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MEMORANDUM

Attorney-Client Privileged **Work Product Privileged**

To: Board of County Commissioners
From: Paul R. Berg, WhiteBird, PLLC
Date: February 23, 2024
Re: Robert M. Jaffe Trust v. Indian River County
Indian River County Case #: 312018CA000881

Summary

The County filed suit to affirm the public's right to use of the beach in Summerplace for customary recreational uses as required by section 16.035, Florida Statutes. This was a case of first impression for this new statute. The Court ruled against the County finding it did not follow the statutory procedures the way the Court interpreted the statute. One of the homeowners in Summerplace filed a counterclaim alleging that the filing of the lawsuit breached the terms of a 2009 Temporary Beach Renourishment Easement. The Court agreed and awarded the homeowner one dollar (\$1.00).

The homeowner is entitled to his costs. Those were previously reported at about \$31,000.00. The statute nor the Temporary Easement provide for attorney's fees. However, the homeowner may claim fees based upon several motions filed during the litigation claiming the County's case was frivolous. We believe these motions should be denied.

Background

Indian River County filed a lawsuit in 2018 to affirm the public's right to customary recreational use of the beach in the Summerplace subdivision. Jaffe filed a counterclaim alleging that the filing of the lawsuit breached a 2009 Temporary Beach Easement that his predecessor in title gave to the County for beach renourishment. That Temporary Easement reserved to the property owner the continued free use of the Easement Premises and promised that the County would not "unreasonably interfere" with the owner's use of his property.

The County's lawsuit to affirm the public's right to customary use of the beach was defeated on procedural grounds. Jaffe filed a Motion for Summary Judgment alleging that the County intended to use evidence in the lawsuit that was not presented to the Board of County Commissioners at a required public hearing before the lawsuit was filed. The Court granted Jaffe's Motion for Summary Judgment. The Order Granting Summary Judgment does not prohibit the County from curing the procedural defect if it wants to go back and affirm the public's rights to customary use of the beach in front of Jaffe's house.

Jaffe's counterclaim is based upon a 2009 Temporary Easement that expires on May 1, 2025. The County raised numerous defenses to the counterclaim. These included legal arguments going to the enforceability of the contract and factual arguments including that Jaffe doesn't own the property where the easement was given and that he suffered no damages.

Court's Ruling

The Court ruled in favor of Jaffe on his counterclaim. The Court ruled that he owned approximately nine (9) feet of beach east of the seawall in Summerplace and that the County's pursuit of the lawsuit to affirm the public's right of customary use of the beach constituted a breach of the 2009 Temporary Easement for beach renourishment.

Jaffe was awarded only one dollar (\$1.00). The Court found that Jaffe had provided no evidence of any actual diminution in value to his property. However, because the Court found a breach of contract occurred, Jaffe was awarded nominal damages. As a result, he is the prevailing party in the case.

Costs

As the prevailing party, Jaffe is entitled to recover his costs as allowed by Chapter 57, Florida Statutes. Those costs were approximately \$31,000.00 back in February 2023. Jaffe may have incurred additional recoverable costs since then for court reporter and expert testing fees. The exact amount of these additional costs is unknown at this moment. However, "costs" does not include attorney's fees.

Attorney's Fees

There is no basis for attorney's fees in Jaffe's Breach of Contract counterclaim. In Florida, a party is entitled to their attorney's fees only if provided for in a contract or statute. The 2009 Temporary Easement does not provide for attorney's fees in the event of litigation. Likewise, section 163.035 regarding establishment of recreational customary use does not provide for attorney's fees in the event of litigation. The only possible basis for attorney's fees is a series of Motions filed by Jaffe claiming the County's lawsuit was frivolous.

Jaffe's first Motion for Attorney's Fees was filed on January 21, 2020 claiming that the lawsuit was unsupported by the facts necessary for the County to bring its lawsuit. The Court never made a ruling on whether the facts were sufficient. The Court decided the case on procedure. As a result, the Motion should be denied.

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The second Motion for Attorney's Fees was filed on May 12, 2020 claiming that the County's claims were (1) not supported by the necessary facts, (2) that the County did not attach its Notice of Intent in order to delay the case, and (3) the County improperly added a new party to the lawsuit. As stated above, the Court made no ruling on the sufficiency of the facts. The other two allegations are procedural in nature and Jaffe would have to show how failure to attach the Notice of Intent delayed anything or how adding a new name to the list of potentially affected parties was done for delay or was unsupported by fact.

The third Motion for Attorney's Fees was served on August 21, 2021 alleging that the County's claim that Jaffe's property ends at the seawall constructed on the eastern edge of his property had no factual basis. While the Court adopted Jaffe's arguments that his property extends about nine (9) feet beyond the seawall, that determination was based upon the fact that his property was listed in the lawsuit. The Court declined to hear evidence at the hearing and made a ruling based solely upon the listing of his property.

Jaffe fourth Motion for Attorney's Fees was filed on August 30, 2023. That Motion seeks for fees under section 57.105, Florida Statutes, claiming that the County knew its evidence used to obtain the Notice of Intent from the Board of County Commissioners was false and that its claims in this lawsuit under section 163.035 were unsupported by the necessary facts. That Motion was filed after Summary Judgment had been entered and therefore is untimely.

Jaffe's last Motion for Attorney's Fees was filed on September 11, 2023 claiming that a delay in giving a copy of the 2009 Temporary Easement caused unreasonable delay and would disprove the County's claims of customary use. The Court would have to hold a hearing and render a determination on this Motion if it is called up.

Appeal

The County could take an appeal. There were several rulings by the Judge that we believe were made in error. These errors occurred in both the main claim and the counterclaim. The County must file its Notice of Appeal no later than March 13, 2024.