

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Original

In re: Application for amendment of Certificates Nos. 570-W and 496-S to add territory in Charlotte County by Florida Water Services Corporation.

DOCKET NO. 980261-WS

In re: Application for certificates to operate a water and wastewater utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc.

DOCKET NO. 970657-WS
ORDER NO. PSC-98-1538-PCO-WS
ISSUED: November 20, 1998

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING MOTION FOR PARTIAL SUMMARY DISPOSITION

BY THE COMMISSION:

BACKGROUND

On March 4, 1998, Florida Water Services Corporation (FWSC) filed an Objection to Application(s) for Territory Amendment & Original Certificates by Lake Suzy Utilities, Inc. and Petition for Leave to Intervene in this docket. On March 20, 1998, Lake Suzy Utilities, Inc. (Lake Suzy) filed a Response to Objection of Florida Water Services Corporation and Florida Water Services Corporation's Petition to Intervene. On April 13, 1998, FWSC filed a Motion to Consolidate Dockets Nos. 970657-WS and 980261-WS (Application for amendment of Certificates Nos. 570-W and 396-S in Charlotte County by FWSC). On April 20 and 28, 1998, Lake Suzy and Haus Development, Inc. (Haus Development) respectively filed responses to FWSC's Motion to Consolidate.

By Order No. PSC-98-1089-PCO-WS, issued August 11, 1998, we consolidated Dockets Nos. 970657-WS and 980261-WS and set the

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matter for hearing. In light of this decision, we also granted intervention to both Charlotte and DeSoto Counties upon oral motion at the July 21, 1998 Agenda Conference. Subsequently, on August 17, 1998, DeSoto County filed notice of its withdrawal of its objection to the application of Lake Suzy and notice of voluntary dismissal of its petition.

On August 13, 1998, Lake Suzy filed a Motion for Partial Summary Disposition, and on August 25, 1998, FWSC filed its Response in Opposition to Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition. Finally, on August 21, 1998, the Division of Legal Services received a copy of a Memorandum and Response to Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition by Charlotte County. The County's response subsequently was filed with the Division of Records and Reporting on August 31, 1998. At the October 6, 1998 Agenda Conference, we denied Lake Suzy's motion.

RECONSIDERATION

At the October 6, 1998 Agenda Conference, after hearing from the parties, we decided, among other things, that FWSC had demonstrated a disputed issue of material fact regarding its ability to provide service by utilizing other possible sources other than the Agreement with Charlotte County which precluded summary judgment. Accordingly, we denied Lake Suzy's motion. However, that decision was based only on allegations contained in FWSC's response to Lake Suzy's motion.

At the Agenda Conference, counsel for Lake Suzy argued that the only things which could be relied upon in ruling on a motion for summary judgment were pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any. Lake Suzy further argued that a motion is not a pleading and hence a response to a motion is not a pleading. Therefore, Lake Suzy argued that it would be inappropriate to consider the allegations by FWSC in its response which were wholly unsupported by any of the documents in the docket files and were not supported by any accompanying affidavits. However, we disagreed with Lake Suzy and relied upon FWSC's response as the basis for denying Lake Suzy's motion.

Subsequently, after the Agenda Conference, Lake Suzy forwarded to our staff documentation which supports its arguments regarding the inappropriateness of basing a decision on a motion for summary

judgment on the allegations contained solely in a response to such a motion. See H. Trawick, Florida Practice and Procedure Sec. 6-1 at 81 (1997 ed.) (stating that motions are not pleadings). As a result, further research has been conducted and it now appears that it was inappropriate, absent other appropriate supporting documentation, for us to base our decision solely upon the allegations contained in FWSC's response because it does not constitute a pleading. See White v. Fletcher, 90 So.2d 129 (Fla. 1956); Harris v. Lewis State Bank, 436 So.2d 338 (Fla. 1st DCA 1983) (stating that motions are not pleadings and citing Hart Properties, Inc. v. Slack, 159 So.2d 236, 239 (Fla. 1963) and H. Trawick, Florida Practice and Procedure Sec. 6-1 at 60 (1979 ed.)). Accordingly, we find that the basis for our prior decision is in error and that it is appropriate for us to reconsider our decision on our own motion.

Lake Suzy's Motion for Partial Summary Disposition

Lake Suzy asserts in its motion that as a matter of law, and with no factual dispute, FWSC cannot legally provide water service to the Links subdivision. In support of this assertion, Lake Suzy alleges that the water and wastewater systems operated by Charlotte County and FWSC in Charlotte County were previously owned by General Development Utilities, Inc. and Deep Creek Utilities, Inc., respectively. As such FWSC and Charlotte County are assignees of the rights of Deep Creek Utilities, Inc. and General Development Utilities, Inc. as set forth in the Substitute Water and Sewer Agreement, dated October 7, 1988 (Agreement), and as subsequently amended by an Addendum Agreement, dated April 5, 1990 (Addendum).

Lake Suzy continues by stating that FWSC obtains all of its water for its system in Charlotte County pursuant to the Agreement and Addendum. Lake Suzy argues that FWSC's reservations of capacity in the Agreement are only to serve the property described in Exhibits "A" and "C" of the Agreement, which does not include the Links subdivision.

The Addendum extends the property to which FWSC may provide wastewater service pursuant to the Agreement. Lake Suzy argues that the necessity for the Addendum makes it clear that FWSC may not provide water service to the Links subdivision without a further addendum to the Agreement. Since Charlotte County has already entered into an agreement with Lake Suzy to provide service to the Links subdivision, it cannot amend the Agreement to allow FWSC to serve the Links subdivision. Thus, Lake Suzy argues that

FWSC cannot obtain the water necessary to serve the Links subdivision and will not have the ability to serve. As such, its application to provide service to this subdivision must be denied, and it is without standing to object to Lake Suzy providing service to the area.

Finally Lake Suzy alleges that "FWSC with its tens of millions of dollars in revenue and a team of in-house attorneys has been able to invoke a proceeding - the unprecedented consolidation of a late-filed application with an earlier filed application - which will require Lake Suzy to either give in to FWSC's bullying or expend over 20% of its gross revenue in asserting its legal rights." Lake Suzy argues that in light of the clear contractual prohibition against FWSC serving the Links subdivision, sanctions should be imposed against FWSC for its frivolous actions in the nature of the reimbursement of Lake Suzy's legal fees.

FWSC's Response

FWSC argues in its response that Lake Suzy's motion is based on several flawed premises and fails to meet the applicable legal standards to warrant the relief requested. FWSC argues that it is not clear from the Agreement that FWSC may only serve the property identified therein. In addition, the Agreement contains no such express restriction. Instead, FWSC alleges that the agreement is a reservation of capacity for a minimum number of connections. FWSC alleges that it has not yet utilized all of the connections and, therefore, can provide water service to the Links subdivision and other properties.

In addition, FWSC asserts that it is engaged in efforts to obtain water supply from sources other than Charlotte County pursuant to the Agreement, such as from DeSoto County, which may be used to provide service to the Links subdivision. FWSC argues that the foregoing establishes that there are indeed disputed issues of material fact as to FWSC's ability to provide service to the disputed area.

Finally, FWSC states that because denial of Lake Suzy's motion is required as discussed above, there is no basis for an award of costs. Even if Lake Suzy's motion is granted, FWSC alleges that Lake Suzy fails to establish FWSC's application was made for an improper purpose as defined by Section 120.595(1)(e)1., Florida Statutes. FWSC alleges that it had a reasonably clear legal

justification for its filing, as established by the facts set forth above.

Charlotte County's Response

Pursuant to Rule 28-106.204, Florida Administrative Code, "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact . . . All other parties may, within seven days of service, file a response in opposition . . ."

As stated earlier, Charlotte County's Memorandum and Response to Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition was received by the Division of Legal Services on August 21, 1998. However, the County's response was not filed with the Division of Records and Reporting until August 31, 1998. Pursuant to Rule 28-106.104(1), Florida Administrative Code, "filing shall mean received by the office of the agency clerk during normal business hours" Since Charlotte County's pleading was filed with the Division of Records and Reporting eighteen days after service of Lake Suzy's motion, at the October 6, 1998 Agenda Conference, we found that Charlotte County's pleading was untimely. In addition, we also found that the pleading was not responsive to Lake Suzy's motion.

Summary Disposition

Pursuant to Rule 28-106.204, Florida Administrative Code, "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact." A summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. Section 120.57(1)(h), Florida Statutes (1998).

Under Florida law "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought. Green v. CSX Transportation, Inc., 626 So.2d 974 (Fla. 1st DCA 1993). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So.2d 666 (Fla. 1985).

Lake Suzy has challenged FWSC's ability to service the disputed area. In order to determine whether any genuine issue of material fact exists with regards to FWSC's ability to serve, we have reviewed the documents contained in the docket files in order to determine which documents may be appropriately relied upon in disposing of Lake Suzy's motion. FWSC's application, which we believe is appropriately viewed as a pleading, contains statements in Exhibits D, G, and H that FWSC obtains bulk water and wastewater service from Charlotte County pursuant to the agreement and that it is relying on bulk service from the County to provide service to the disputed territory. No mention is made of any other source from which FWSC could obtain bulk service.

Lake Suzy attached a copy of the contract for bulk service executed by FWSC and the County to its motion in support of its allegations that FWSC cannot serve the Links subdivision absent an addendum to the contract. However, that copy is unauthenticated. A copy of the contract is already in the docket file because Charlotte County also attached a copy of the contract to its objection to FWSC's application. However, that copy has not been authenticated either.

Merely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla.R.Civ.P. 1.510(e). Moreover, rule 1.510(e) by its very language excludes from consideration . . . any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit.

Bifulco v. State Farm Mut. Auto. Inc. Co., 693 So.2d 707, 709 (Fla. 4th DCA 1997). Therefore, if the information is not properly authenticated, the court may not properly consider that information in deciding a motion for summary judgment. Daeda v. Blue Cross & Blue Shield of Florida, Inc., 698 So.2d 617, 618 (Fla. 2nd DCA 1997). See also Tunnel v. Hicks, 574 So.2d 264 (Fla. 1st DCA 1991); Booker v. Sarasota, Inc., 707 So.2d 886, 889 (Fla. 1st DCA 1998) (stating that a court may not consider an unauthenticated document even where it appears that such document, if properly authenticated, may have been dispositive). To consider or rely on an unauthenticated document in ruling on a motion for summary judgment constitutes reversible error. Bifulco at 709.

Pursuant to Section 120.54(5)(a)1., Florida Statutes, the uniform rules, not the Florida Rules of Civil Procedure (except for

discovery), are the rules to be used by administrative agencies. Although the cited cases reference the rule for summary judgment under the Florida Rules of Civil Procedure, we believe the same principles and standards apply to a summary judgment proceeding initiated under the uniform rules since the language which specifies which documents may be considered in such proceeding mirrors the language used in the Florida Rules of Civil Procedure.

Therefore, we find that the bulk service contract is not properly before us and may not be considered or construed in ruling on Lake Suzy's motion. All that remains is FWSC's assertion in its application that it may provide service pursuant to the agreement which Lake Suzy and Charlotte County dispute. Therefore, on this basis alone, we find that Lake Suzy has failed to demonstrate the nonexistence of an issue of material fact in this regard and therefore has failed to meet its burden.

However, assuming *arguendo* that the parties were to stipulate to the authenticity of the document and that Lake Suzy's interpretation of the contract is correct, we still believe summary judgment in favor of Lake Suzy would be inappropriate at this time. On October 5, 1998, FWSC prefiled the direct testimony of Charles L. Sweat, Vice President of Corporate Development for FWSC. In his prefiled direct testimony, Mr. Sweat states on page 5, lines 2-11, that FWSC has been negotiating with DeSoto County to purchase an increased allocation of potable water from the Peace River Authority and this water can be used to serve the Links subdivision. Therefore, there may be another bulk service provider from which FWSC may be able to obtain water to serve the disputed territory.

On October 5, 1998, Lake Suzy also prefiled the direct testimony of Dallas A. Shepard, President of Lake Suzy. Mr. Shepard states on page 1, lines 22-25 and page 2 lines 1-3 that pursuant to an agreement with DeSoto County, Lake Suzy purchases all of DeSoto County's current allocation from the Peace River Manasota Regional Water Supply Authority. Mr. Shepard further states that DeSoto County will not have any additional capacity to sell to FWSC until April, 2001 at the earliest.

While we are cognizant that this prefiled testimony by both parties is not sworn testimony at this time, presumably it will be adopted and sworn to by the witnesses at hearing. However, because it is unsworn, we are reluctant to rely upon this information in determining whether to grant summary judgment to Lake Suzy. In

addition, in order to determine if Lake Suzy's witness is correct regarding the unavailability of water for DeSoto County to sell to FWSC, we would need to examine the bulk service contract between Lake Suzy and DeSoto County. That document is not properly before us at this time either. While a copy of the contract was attached to FWSC's response, it too is an unauthenticated copy not capable of being relied upon.

We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that

[t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So.2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So.2d 129, 132 (Fla. 4th DCA 1969). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Id.

Given the aforementioned considerations, all of which dictate the exercise of caution in granting summary judgment, we believe that while FWSC's ability to serve may in fact be questionable, the proper information and authenticated documentation currently is not before us for our consideration in making that decision. As a point of information, we note that discovery has been served on the parties which addresses the issue of ability to serve by all involved. As a result, we anticipate that the information which may be obtained through the discovery process will shed further light on this issue. Based on the foregoing, we find it

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appropriate to deny Lake Suzy's motion for summary judgment and recognize that Lake Suzy is free to renew its motion if and when it deems appropriate.

With regards to Lake Suzy's request for an award of fees and costs, pursuant to Section 120.595(1)(b), Florida Statutes, the final order in a proceeding pursuant to Section 120.57(1), Florida Statutes, shall award reasonable costs and attorney's fees where the nonprevailing adverse party has been determined to have participated in the proceeding for an improper purpose. Because we are denying Lake Suzy's motion, there is no basis for an award of costs or attorneys fees. Finally, because we are denying Lake Suzy's motion, these dockets shall remain open pending final disposition of the utilities' applications.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Commission on its own motion shall reconsider the decision made on October 6, 1998 as set forth herein. It is further

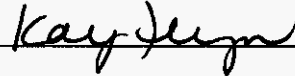
ORDERED that Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition is hereby denied. It is further

ORDERED that Lake Suzy Utilities, Inc.'s request for an award of attorney's fees and costs is hereby denied. It is further

ORDERED that these dockets shall remain open pending final disposition of the utilities' applications.

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By ORDER of the Florida Public Service Commission this 20th
day of November, 1998.



KAY FLYNN, Chief
Bureau of Records

(S E A L)

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Commissioner J. Terry Deason dissented in the Commission's decision to deny the motion for partial summary disposition.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in

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the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.