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HARVEY RUVIN, CLERK OF COURT, MIA-DADE CTY

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 2017-013687-CA-01
SECTION: CA 44

Francine Liebman, et al.,
Plaintiff,
vs.

City of Miami (The)
Defendant.
_____/

ORDER ON THE CITY OF MIAMI AND INTERVENOR FLAGSTONE ISLAND GARDENS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

THIS MATTER came before the Court on Defendant, The City of Miami ("City"), and Defendant/Intervernor, Flagstone Island Gardens, LLC's ("Flagstone"), Motion to Dismiss Plaintiffs' Second Amended Complaint and the Court having reviewed the file, the motions memoranda, having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED and **ADJUDGED** as follows:

The Plaintiffs, Francine Liebman ("Liebman"), Jorge Mursuli ("Mursuli"), Daniel Suarez ("Suarez"), and Willy A. Bermello ("Bermello"), filed this action seeking declaratory and injunctive relief challenging Intervenor Flagstone's mixed-use development on City-owned property, based on allegations that the lease agreements violate sections 29-A, 29-B, 29-C, and 3(f)(iii)(B) of the City Charter.

In February 2001, the City issued a request for proposals ("RFP") for a mixed-use development on property owned by the City on Watson Island. Flagstone submitted a proposal and was selected as

instructing Flagstone to vacate the property and relinquish all of its rights and interests in the property.[1]

On June 8, 2017, Plaintiffs, Liebman, Mursuli, and Suarez filed the instant lawsuit. On January 31, 2018, the original complaint was amended with leave of Court and Plaintiff Bermello was added as a party to the case. The operative pleading is the Second Amended Complaint. The Complaint only asserts one count for declaratory judgment (Count I). Plaintiffs seek a declaration that the agreements are illegal, ultra vires, and void as a matter of law as they violate sections 29-A, 29-B, 29-C, and 3(f)(iii)(B) of the City Charter.

Liebman, Mursuli, and Suarez, who are residents of the City of Miami, assert that they have standing to bring the instant lawsuit based on section 52(C) of the City of Miami's Citizen's Bill of Rights ("Bill of Rights"). Section 52(C), confers standing to City of Miami citizens to bring legal actions to enforce the City Charter.[2] Bermello, who is not a resident of the City of Miami, asserts that he has standing as he has suffered a special injury.

Flagstone and the City each moved to dismiss the Second Amended Complaint ("Complaint"). Although Flagstone and the City have raised several grounds for dismissal, the Court finds that the standing issue is dispositive. Upon careful consideration, the motions to dismiss on the ground of lack of standing are GRANTED for the following reasons:

I. Standing[3]

It is well settled that citizens and taxpayers lack standing to challenge governmental action unless they have suffered a special injury. *See Herbits v. City of Miami*, 207 So. 3d 274 (Fla. 3d

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[1] As a result of the termination of the agreements, Flagstone filed a separate lawsuit on June 9, 2017.
[2] In 2016, the Commission voted to place a charter amendment on the ballot, which included a revision of the relief provision in the Citizens' Bill of Rights, Section 52(c). Voters approved the charter amendment in a November 2016 special election.
[3] The City adopted an incorporated in its motion to dismiss, Flagstone's argument as to the lack of standing issue.

DCA 2016). Special injury has been defined as "an injury that is different from that of the general public." *McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016).

A. Bermello

Bermello, a non-resident of the City of Miami, asserts that he has standing to bring the instant lawsuit as he has suffered a special injury. Pursuant to the allegations in the Complaint, Bermello was a principal of an entity that was an equity participant in Watson Island Partners, LLC, one of the groups that unsuccessfully bid in response to the City's RFP for the development of Watson Island back in 2001. Bermello alleges that he would consider submitting a bid if the City issues a new request for proposals for the Watson Island site. Based on this, Bermello alleges that he has a special injury different in kind than other City residents, caused by the City's violations of its Charter.

The Court finds that the allegation of special injury asserted by Bermello is conclusory and insufficient to state that he has suffered an injury different in kind from that of the general public. Bermello filed this suit in his individual capacity. He was not a bidder when the City issued the RFP back in 2001, and the fact that he would consider submitting a bid if the City issues a new RFP is speculative at best.

The motions are GRANTED as Bermello lacks standing to sue in the instant matter.

B. Plaintiff's Liebman, Mursuli, and Suarez

Plaintiffs Liebman, Mursuli, and Suarez allege that they have standing to sue to enforce the provisions of the City of Miami Charter as standing was expressly conferred them by the Charter Citizens' Bill of Rights.

In November 2016, by a majority of votes from the residents of the City of Miami, section 52(C) of the Citizens' Bill of Rights was amended to confer standing to the residents of the City.

The specific language in section 52(C) reads as follows: "[r]esidents of the City shall have standing to bring legal actions to enforce the City Charter, the Citizen's Bill of Rights, and the Miami-Dade County Citizens' Bill of Rights as applied to the City."[4] Based on this provision, Liebman, Mursuli, and Suarez, who are residents of the City, contend that they have standing to sue for the alleged violations of the City Charter that occurred: in 2010-2014, when the City amended and re-enacted amendments to the Flagstone Project; and in May 2014 and August 2016, when the City entered into the Marina Ground Lease and the Retail/Parking Ground Lease, respectively. They argue they have standing to sue for events that pre-dated the amendment to section 52(C) as the amendment applies retroactively because it is a remedial and procedural change in the law.

Two inquiries arise when determining if a statute should be retroactively applied. *See Metropolitan Dade Cnty. v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). "The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively." *Id.* at 499. "If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible." *Id.* at 499. It is well settled that a law which affects substantive rights, liabilities and duties is presumed to apply prospectively. *See id.* at 499. Thus, even if the statute is clearly intended to apply retroactively, the Court will reject such application if doing so impairs vested rights, creates new obligations, or imposes a new penalty. *See Menendez v. Progressive Exp., Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

In this matter, the Court finds that section 52(C) does not expressly state that it is to be applied retroactively. Furthermore, a review of Resolution-R-16-0352, which is part of the

[4] *See* Exhibits 1 attached to Plaintiff Opposition to Flagstone's Motion to Dismiss the Second Amended Complaint. Exhibit 1 is a copy of section 52, in its entirety. Although not attached to the Complaint, section 52(C) is the legislative basis asserted for standing. *See Veal v. Voyager Prop. And Casualty, Ins. Co.*, 51 So. 3d 1246 (Fla. 2d DCA 2011).

legislative history of this provision, does not support a finding that it was intended to apply retroactively.[5] Additionally, such intent cannot be unequivocally implied. *See Keystone Water Co., Inc. v. Bevis*, 278 So. 2d 606, 608-09 (Fla. 1973).

Even if this Court were to find that the provision was intended to apply retroactively, such application would not be constitutionally permissible in this case because it would impair vested rights that Flagstone and the City acquired by the execution of the Marina Ground Lease and the Retail/Parking Ground Lease. All of the events Liebman, Mursuli, and Suarez complained of occurred *before* section 52(C) was amended in November 2016. The execution of the Amended ATE, the Marina Ground Lease, and Retail/Parking Ground Lease and the process leading to those agreements all occurred *prior* to the amendment. The Marina Ground Lease and the Retail/Parking Ground Lease provided Flagstone with vested contractual development rights on Watson Island and the City with vested rights to collect rents *before* any standing to sue seeking to enforce compliance with Charter provisions was conferred to the City's residents. If this provision were to be applied retroactively it would attach new legal consequences to events completed before its enactment. *See Metropolitan Dade Cnty.*, 737 So. 2d at 499. As such, retroactive application is rejected by this Court. The court finds that section 52(C) is applies prospectively.

The Court further finds that the amendment to section 52(C) is substantive rather than remedial. "[S]ubstantive law prescribes duties and rights." *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 425 (Fla. 4th DCA 2014). Whereas, remedial statutes do not create new or take

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[5] *See* Exhibit 2 attached to Plaintiffs' Opposition to Flagstone's Motion to Dismiss the Second Amended Complaint. Resolution R-16-0352 is part of the legislative history proposing the amendment to the Charter to confer standing to its citizens. Although not attached to the Complaint, the Court considers it as part of its analysis of whether the City intended that the amendment applied retroactively. *See Metropolitan Dade Cnty. v. Chase Federal Housing Corp.*, 737 So. 2d 494, 500 (Fla. 1999) ("[T]he presumption against retroactivity is only a default rule of statutory construction. The essential purpose of statutory construction is to determine legislative intent."). *See also Veal*, 51 So. 3d at 1246.

away vested rights, as they operate in furtherance of a remedy or confirmation of rights already in existence. *See City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961).

Before section 52(C) was amended, the City of Miami residents did not have the right to sue to enforce compliance with the City's Charter. A review of Resolution R-16-0352 reveals that the amendment to section 52(C) conferred standing to sue to enforce compliance with the Charter provisions because the City of Miami's Citizen's Bill of Rights was also amended to guarantee a *new right* to its Citizens: *the right to be governed by the rule of law*.[6] The amendment recognized that the City of Miami Charter is the Constitution of the City of Miami and specifically provided that the City shall abide by all of its express provisions. Thus, section 52(C) expressly prescribed duties not in existence before its amendment and granted a new right to its citizens that they did not have before.

Plaintiffs, however, assert that the standing provision in section 52(C) is remedial and procedural as it is contained in the "Remedies for Violations" section. However, just because section 52(C) is labeled as remedial, that does not make it so. *See American Optical Corp. v. Spiewak*, 73 So. 3d 120, 131 (Fla. 2011) (" '[j]ust because the Legislature labels something as being remedial .... does not make it so.'")

Based on the foregoing, the Court finds that section 52(C) applies prospectively. As such, Plaintiffs, Liebman, Mursuli, and Suarez lack standing to enforce the Charter provisions for alleged violations that predate the amendment.

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[6] *See* Exhibit 2 to Plaintiffs' Opposition to Flagstone's Motion to Dismiss the Second Amended Complaint at page 2, § 52(A)(1).

The Court does not address whether Liebman, Mursuli, and Suarez have standing under the well settled law requiring special injury. The only basis for standing alleged by these Plaintiffs is section 52(C) and the Complaint is devoid of any allegations that they suffered a special injury.[7]

The motions to dismiss for lack of standing are GRANTED and this cause is dismissed with prejudice.

DONE AND ORDERED in chambers, at Miami-Dade County, Florida, this _____ day of March, 2018.

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WILLIAM THOMAS
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION
NUMBER 12
THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.
Judge's Initials

[7] As to Liebman, Mursuli, and Suarez, it is important to note that in *Herbits v. City of Miami*, 207 So. 3d 274 (Fla. 3d DCA 2016) an exception to the special injury requirement was recognized. There the court found that legislation providing a cause of action and standing to private citizens is an exception to the special injury requirement. *See id.* at 281. The *Herbits* court found that the exception applied to the "unique rights conferred through the Miami-Dade County Home Rule Charter and its Citizen's Bill of Rights." *See id.* As such, the court concluded that the appellants, in *Herbits,* had standing to sue for violations to the Miami-Dade County Citizen's Bill of Rights for truth in government violations. *See id. Herbits*, however, did not overturn *Solares v. City of Miami*, 166 So. 3d 887 (Fla. 3d DCA 2015) which specifically stated that "a city charter does not rise to the level of the Florida Constitution for purposes of creating an exception to standing." *Solares*, 166 So. 3d at 888. Furthermore, *Solares* stated that a city charter cannot expand or contract the principle of standing. Although the *Herbits* court stated that "the Citizen's Bill of Rights was neither raised nor considered in the taxpayer decisions ... in *Solares* and *Kneapler v. City of Miami*, 173 So. 3d 1002 (Fla. 3D DCA 2015), *Herbits* addressed the exception to the special injury requirement as to the Citizen's Bill of Rights of the Miami-Dade County Home Rule Charter. *Herbits* did not address the City of Miami's Citizen's Bill of Rights which is the relevant Bill of Rights in this case. Whether the exception recognized in *Herbits* would extend to amendments to the City Charter conferring standing to its citizens is unsettled based on the law as it currently stands.

No Further Judicial Action Required on THIS MOTION. CLERK TO RECLOSE CASE IF POST JUDGMENT.

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