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

VILLAGE OF KEY BISCAYNE, a Florida municipal corporation,

Plaintiff,

v.

NATIONAL MARINE MANUFACTURERS ASSOCIATION, a Delaware nonprofit corporation,

Defendant.

_____/

CIVIL DIVISION
CASE NO.: 15-9160 CA 11

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE

This Cause came before the Court on the above motion, and the Court, having reviewed the motion and response, considered the arguments of counsel, and being otherwise fully advised in the premises, hereby finds as follows:

FACTS & PROCEDURAL HISTORY

In 2010, the City of Miami ["City"] adopted a plan to turn Virginia Key, an island owned by the City, into a park and restore the Marine Stadium. After entertaining various proposals, the City directed its manager on November 20, 2014, to negotiate a license with the National Marine Manufacturers Association ["NMMA"]—a non-profit entity that operates boat and sport shows across North America—that would let NMMA use the area around Marine Stadium ["Property"] for a five-day boat show in early 2016. On January 8, 2015, the City heard its manager's recommendations and approved a license ["License"/"Agreement"]. This License, in pertinent part, committed 16 million dollars of public money to installing the boat show's supporting infrastructure on the Property such as pavement, electricity, broadband internet, etc. The License also obligated the City to secure the "necessary upland permits" for the event and established a 50-50 profit-sharing agreement between the parties on concession and parking sales.

The City, however, did not execute this Agreement until June 4, 2015, and in the interim, the License was amended twice. The first amendment is unrelated to this case as it only involved electric utility work on the Property.[1] The second revision, though, occurred on May 28, 2015, and modified section thirty-five of the License as follows:

[1] More specifically, the April 2015, Memorandum of Understanding ["MOU"] states that NMMA would pay approximately 2.5 million to install the utilities, and the City would pay the maintenance and repair

> Licensee understand that the public shall have access~~, at all reasonable times,~~ to City contracts and all documents, records and reports maintained by the City which are ~~and~~ generated pursuant to this License, ~~pursuant to~~ in accordance with the provisions of Chapter 119, Florida Statutes, as amended.~~, including compliance with the provisions of Section 119.0701, Florida Statutes, entitled "Contracts; public records" and agrees to allow access by the City and the public to all documents subject to disclosure under applicable law.~~[2]

This change arose because on April 10, 2015, the Village of Key Biscayne ["Village"] cited this clause and demanded that NMMA produce all of its records related to this License as required by Florida's Public Records Act ["FPRA"]. NMMA, though, rejected this request seven days later on the basis that it is not subject to FPRA. The Village sued to compel disclosure on April 22, 2015, and amended its complaint on November 5, 2015. That same day, NMMA moved to dismiss the case. This motion was heard on November 16, 2015, and since the Village does not show that NMMA is the City's agent and thus subject to FPRA, the motion is *GRANTED*.

DISCUSSION

When filing a complaint, a plaintiff must, amongst other things, "state a cause of action and [include] a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b)(2). This rule "forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." Cont'l Baking Co. v. Vincent, 634 So. 2d 242, 244 (Fla. 5th DCA 1994). A defendant can thus test "the legal sufficiency of the complaint" by filing a motion to dismiss, but in assessing whether a complaint states a cause of action, a court must 1) confine its review "to the four corners of the complaint" plus any attached or incorporated materials; 2) draw all reasonable inferences in favor of the pleader; and 3) accept all well-pled allegations as true. Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014). Internally inconsistent factual claims, conclusory allegations, or mere legal conclusions do not state a cause of action, and if an attached exhibit facially negates an asserted cause of action, the document controls. Fladell v. Palm Beach Cnty. Canvassing Bd., 772 So. 2d 1240, 1242 (Fla. 2000); W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So. 2d 297, 300 (Fla. 1st DCA

---

costs. While the MOU, per its own terms, was not formally binding until its July 6, 2015, execution date, NMMA expressly agreed to be bound by the MOU as of May 14, 2015, the day it signed the document.

[2] Words ~~stricken~~ are deletions; words underlined are additions.

1999) (internal citation omitted); Clark v. Boeing Co., 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) ("Pleadings must contain ultimate facts *supporting each element of the cause of action*. *Mere conclusions are insufficient*.") (Emphasis added).

Here, whether the complaint states a cause of action is essentially a legal inquiry since the crux of the Village's claim is that section thirty-five of the License, both the original and revised versions, entitles it to NMMA's records. See § 119.0701, Fla. Stat. (2015).[3] Contract and statutory interpretation, after all, is a matter of law that can generally be decided by a court, see Bradley v. Sanchez, 943 So. 2d 218, 222 (Fla. 3d DCA 2006); and when interpreting a contract or a law, courts must give meaning to the plain and unambiguous language so long as it does not lead to an absurd result. Castillo v. Vlaminck de Castillo, 771 So. 2d 609, 610-11 (Fla. 3d DCA 2000). The Village's argument, however, misconstrues the License and FPRA.

Added to FPRA in 2013, section 119.0701(2) mandates "each public agency contract for services [to] include a provision that requires the contractor to comply with public records laws." This addition is why the License includes section thirty-five, but it does not automatically subject every private contractor to FPRA. Fla. Att'y Gen. Op. 2014-06 (2014). FPRA, after all, only applies to contractors that "[enter] into a contract for services with a public agency ***and*** [are] acting on behalf of the public agency as provided under s. 119.011(2)[4]." § 119.0701(1)(a), Fla. Stat. (emphasis added). Moreover, a private entity does not act "on behalf of" a public agency by merely entering into a government contract. News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029, 1031 (Fla. 1992); Parsons & Whittemore, Inc. v. Metro. Dade Cnty., 429 So. 2d 343, 346 (Fla. 3d DCA 1983). A contractor instead acts "on behalf of an agency" based on "the nature and scope of the services provided." Fla. Att'y Gen. Op. 2014-06 (2014); see also Econ. Dev. Comm'n v. Ellis, 2015 WL 6554566 (Fla. 5th DCA 2015) ("A private entity acting on behalf of a public entity is subject to the Act; however, a private entity that is merely providing goods or services to a public agency pursuant to contract is not required to comply with chapter 119.").

The License's plain language similarly indicates that section thirty-five does not mandate total disclosure. For instance, the original section thirty-five, which both parties agree contained broader language, only allowed access to records that are "***subject to*** disclosure under applicable

[3] Unless stated otherwise, all statutory references are to the 2015 version of the Florida Statutes.

[4] Section 119.011(2) defines "agency."

law." Based on the above analysis, NMMA must be acting "on behalf of" the City for its records to be subject to disclosure under section 119.0701. The original section thirty-five, though, was never enacted, and the revised version clearly contains more narrowly tailored language that authorizes no greater disclosure than what is required by law. Both versions thus say the same thing. See Martin Daytona Corp. v. Strickland Const. Servs., 941 So. 2d 1220, 1224 & n.7 (Fla. 5th DCA 2006) ("Generally, courts are permitted to consider subsequently enacted legislation in determining the meaning of a statute.").

The courts have established "two general sets of circumstances in which documents in the possession of private entities must be produced as public records." Weekly Planet, Inc. v. Hillsborough Cnty. Aviation Auth., 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

> First, when a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records. Second, when a public entity contracts with a private entity for the provision of certain goods or services to facilitate the public agency's performance of its duties, the private entity's records in that regard may be public if the 'totality of the factors' indicates a significant level of involvement by the public agency.

Id. (internal citations omitted). The instant complaint, though, contains no facts suggesting that either scenario is applicable. For instance, the Village does not allege that NMMA has assumed the City's "statutorily authorized" duty to host boat shows for its citizens as no such obligation exists, and holding boat shows is not a task the City would undertake. Compare Stanfield v. Salvation Army, 695 So. 2d 501, 502-03 (Fla. 5th DCA 1997) (noting that the law required counties to provide probation services but also permitted private entities to perform said services on a county's behalf) and Fox v. News-Press Pub. Co., Inc., 545 So. 2d 941, 943 (Fla. 2d DCA 1989) (same, city legally obligated to remove abandoned or wrecked vehicles from roads).

The complaint also fails to state what good or service NMMA is providing that facilitates the City's performance of its duties, and thus, it cannot be said that the License "significantly involved" NMMA with the City. Moreover, there are nine "totality of the circumstance" factors that assess involvement level, and the complaint only pleads one of them—"whether the activity was conducted on publicly owned property." Schwab, 596 So. 2d at 1031 ("The factors considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5)

whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning.").[5] As such, the record, at most, suggests the City is just spending money to develop a public park, and NMMA is participating in this effort so that it can use the land for a boat show.

For instance, the complaint notes that the City will spend 16 million dollars to develop the Property, and the development appears tailored towards preparing the area for the 2016 boat show. However, there is no claim that the City's funds are commingled with NMMA's, and "merely providing money to a corporation, especially in consideration for goods and services, is not an important factor in this analysis." Sarasota Herald-Tribune Co. v. Cmty. Health Corp., Inc., 582 So. 2d 730, 734 (Fla. 2d DCA 1991). The government, moreover, can lease its lands to private developers on a long-term basis for commercial development. Weekly Planet, 829 So. 2d at 974. There is also no assertion that the License is "an integral part" of the City's "decision-making processes." Compare Schwab, 596 So. 2d at 1032 (finding architectural service contract non-integral) (citing Byron, Harless, Schaffer, Reid & Assocs., Inc. v. State *ex rel*. Schellenberg, 360 So. 2d 83 (Fla. 1st DCA 1978)[6] (finding consultants hired to recommend agency's managing director integral)). Relatedly, the Village does not contend that NMMA is performing a government function. Instead, it only states that NMMA's development services further "the City's interest in transforming the Property into a commercial event and exhibition venue to support the Boat Show and future commercial events." This claim, though, does not establish that NMMA is performing a government service; if anything, it shows that NMMA is merely

[5] The Court is aware that applying the "totality of the circumstance" test involves "mixed questions of law and fact," Ellis, 2015 WL 6554566; and that claims involving fact-intensive analysis are "better addressed on a summary judgment motion, or at trial, but certainly not on a motion to dismiss." Chodorow v. Porto Vita, Ltd., 954 So. 2d 1240, 1242 (Fla. 3d DCA 2007). However, the instant complaint contains little to no facts regarding these factors and thus fails to state a claim. See Kreizinger v. Schlesinger, 925 So. 2d 431, 432 (Fla. 4th DCA 2006) (affirming dismissal of complaint for failure to "allege sufficient ultimate facts" supporting the claim); see also Morris Pub. Group, LLC v. Fla. Dep't. of Educ., 133 So. 3d 957, 959 (Fla. 1st DCA 2013) ("The determination of what constitutes a public record is a question of law.") (internal citation and quotation omitted).

[6] Quashed on other grounds by Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633 (Fla. 1980).

working with the City to advance its goal of having a place to hold the 2016 boat show, which then leaves the City with a developed property to use as it sees fit. There is also no claim that the City regulates NMMA, and NMMA was plainly not created by the City to host the boat show. Compare Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302, 304 (Fla. 3d DCA 2001) ("The joint venture was created 'for the purpose of performing the Contract [with the County].' DAC performs no other business or function."). The Village, furthermore, does not contend that the City has a "substantial financial interest" in NMMA. In summary, the current complaint puts NMMA on notice that it is being sued under FPRA, but it fails to state a cause of action because it does not establish that NMMA is subject to FPRA.

CONCLUSION

Accordingly, for the reasons stated above, it is hereby **ADJUDGED** that:

1) NMMA's Motion to Dismiss is **GRANTED**, and this case is therefore **DISMISSED WITHOUT PREJUDICE**. See Fla. Nat. Org. for Women, Inc. v. State, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) ("Leave to amend a complaint 'shall be given freely when justice so requires.' Fla. R. Civ. P. 1.190(a). Thus, a trial court should grant leave to amend, rather than dismiss a complaint with prejudice, unless a party has abused the privilege to amend, an amendment would prejudice the opposing party, or the complaint is clearly not amendable.").

2) The Village has twenty days from the date of this Order to file a second amended complaint that should also clarify its standing to sue because suing to enforce the law generally does not confer standing. Am. Compl. ¶ 1; Holiday Pines Prop. Owners Ass'n, Inc. v. Rowen, 679 So. 2d 824 (Fla. 4th DCA 1996).

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 12/02/15.

ANTONIO MARIN
CIRCUIT COURT JUDGE

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

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.