

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 09-10196 CA 09

HALSEY MINOR, and
SAVE HIALEAH RACING, INC.,
a Florida Not-For-Profit Corporation,

Plaintiffs,

vs.

JOHN BRUNETTI, HIALEAH, INC.,
BAL BAY REALTY, LTD.
and THE CITY OF HIALEAH,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS BRUNETTI, HIALEAH, INC., AND
BAL BAY REALTY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Plaintiffs Halsey Minor and Save Hialeah Racing, Inc. filed this action seeking a declaratory judgment regarding ownership of Hialeah Park Racetrack. They now respectfully request that the Court deny the baseless Motion to Dismiss First Amended Complaint ("Motion to Dismiss") filed by Defendants John Brunetti, Hialeah, Inc., and Bal Bay Realty, Ltd ("Brunetti Defendants") who claim ownership of the Racetrack. Alternatively, if the Court believes any of the arguments in the Motion to Dismiss have some merit (they do not), the Court should, at a minimum, provide Plaintiffs with leave to amend, as none of the arguments advanced in the Brunetti Defendants' Motion to Dismiss warrant a dismissal with prejudice at this early juncture.

FACTUAL BACKGROUND

This is a declaratory judgment action. Plaintiffs seek a declaration that certain deeds transferring legal title to the property commonly known as Hialeah Park Racetrack are null and

LAW OFFICES

SHOOK, HARDY & BACON LLP

MIAMI CENTER, SUITE 2400, 201 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-4332 • TELEPHONE (305) 358-5171

604832v1

void because the initial transfer of the property occurred in flagrant violation of the City Charter of the City of Hialeah. More specifically, the Hialeah City Charter requires a referendum before the City can lawfully transfer title to City-owned property. In spite of the provision, the City purportedly deeded its legal title to Hialeah Park Racetrack to Defendant Hialeah, Inc. without holding a referendum, much less a referendum approving the transfer.

Plaintiffs accordingly seek a declaration in Count I of the First Amended Complaint that the City's attempted transfer of Hialeah Park Racetrack to Hialeah, Inc. was improper and the deed null and void. Plaintiffs further seek a declaration in Count II that the subsequent deed attempting to transfer the property from Hialeah, Inc. to Defendant Bal Bay Realty was likewise improper and that deed null and void. Plaintiffs also seek a constructive trust over the subject property in Count III in favor of the City as the lawful owner of the property, as Bal Bay Realty and Defendant John Brunetti wrongly maintain possession and control over the property and wrongly hold themselves out as owners of the property.

Plaintiffs are an individual and not-for-profit corporation who believe that restoration of Hialeah Park Racetrack, a nationally recognized historic site, is in the public interest. Both the Attorney General of Florida and the City's Historic Preservation Board have recognized the public interest in preserving Hialeah Park Racetrack, which was once one of the nation's most prestigious and well-recognized thoroughbred horse racetracks but which was closed to the public in 2001. Indeed, the sole and paramount goal of Plaintiff Save Hialeah Racing, Inc. is the historic preservation of Hialeah Park Racetrack and the restoration of thoroughbred horse racing at the property for the benefit of the citizens of Hialeah and the public at large. Plaintiff Halsey Minor is a member of Save Hialeah Racing, who seeks to purchase the property and invest more than one hundred million dollars in support of that mission but who cannot determine the

Racetrack's lawful owner. The members of Save Hialeah Racing also include citizens of the City of Hialeah, who were unlawfully denied their rights guaranteed under the City Charter to vote at a referendum concerning the transfer of the City-owned property to a private entity.

BRUNETTI DEFENDANTS' BASELESS MOTION TO DISMISS

“When determining the merits of a motion to dismiss, the trial court’s consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.” *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204, 206 (Fla. 3d DCA 2003) (quoting *Bell v. Indian River Mem’l Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001)). “Consideration of potential affirmative defenses or speculation about the sufficiency of evidence which plaintiff will likely produce on the merits is wholly irrelevant and immaterial to deciding such a motion.” *Id.* Moreover, “[a] motion to dismiss is not a substitute for a summary judgment.” *Combs v. City of Naples*, 834 So. 2d 194 (Fla. 2d DCA 2002) (also noting that “[t]he test for sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining the decree he seeks favoring his position, but whether he is entitled to a declaration of rights at all”).

Here, Defendants Brunetti, Hialeah, Inc., and Bal Bay Realty make three arguments in their Motion to Dismiss: (1) Plaintiffs allegedly did not comply with Florida Rule of Civil Procedure 1.130 because Plaintiffs did not attach a document to the First Amended Complaint which Defendants plan to rely upon for their defense; (2) Plaintiffs allegedly lack standing; and (3) Plaintiffs have purportedly not alleged viable claims against Brunetti. Each of these arguments is baseless and does not justify dismissing the First Amended Complaint.

A. The First Amended Complaint Complies with Rule 1.130

Florida Rule of Civil Procedure 1.130(a) provides that “[a]ll bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense

made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading.” Rule 1.130(a) contains an additional and important provision, which Brunetti Defendants notably do not cite in their Motion to Dismiss, which provides that “[n]o papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.”

Here, the Brunetti Defendants argue that the First Amended Complaint “is subject to dismissal for failure to state a cause of action” because it does not attach the 1978 Lease Purchase Agreement, which purportedly authorized the City of Hialeah to transfer the Hialeah Park Racetrack property to Hialeah, Inc. (Motion at 1-2.) In other words, the Brunetti Defendants believe that Rule 1.130(a) requires that Plaintiffs attach a document to the First Amended Complaint which the Brunetti Defendants believe supports their defense. There is, of course, no such requirement in that Rule. The Rule actually provides to the contrary, namely that it is the Brunetti Defendants’ obligation to attach to their pleading (*i.e.*, their answer to the complaint) the documents they believe support their defenses. Moreover, and as noted above, Rule 1.130(a) actually cautions Plaintiffs not to “unnecessarily annex[] exhibits” to their complaint, including “unnecessary recitals of deeds, documents, contracts, or other instruments.” It thus appears that, in truth, Plaintiffs have complied with (not violated) Rule 1.130(a).

Fundamentally, in the end, the 1978 Lease Purchase Agreement is not the “document[] upon which [this] action [is] brought.” Fla. R. Civ. P. 1.130(a). Plaintiffs have not brought a claim for breach of contract based on that Agreement and thus had no obligation to attach it. *See, e.g., Marine Env'tl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 n.2 (Fla. 4th DCA 2003) (“MEP had no obligation to attach the Licensing Agreement to any version of the complaint, since it never sued on that agreement.”). A review of the operative allegations in Counts I, II,

and III of the First Amended Complaint fails to reveal any reference to or reliance upon that Agreement. Instead, those Counts are based upon the City's execution of an unlawful deed in violation of its own City Charter that plainly required a referendum, but none was had. That the Brunetti Defendants believe the 1978 Lease Purchase Agreement somehow provides them a defense by purportedly exempting the subject deed from the referendum requirement does not mean that defensive document becomes an essential part of Plaintiffs' claims. *Rolling Oaks Homeowners Ass'n v. Dade County*, 492 So. 2d 686, 690 (Fla. 3d DCA 1986) (the plaintiff's failure to attach a deed to its complaint did not justify dismissal because issues related to that conveyance were matters for the defense to raise).

Accordingly, the Court should deny the Brunetti Defendants' request to dismiss the First Amended Complaint for not attaching what is merely evidence upon which the Brunetti Defendants plan to rely. *See Railey v. Skaggs*, 220 So. 2d 689, 690 (Fla. 3d DCA 1969) ("Rule 1.130(a) does not relate to the proposed agreement because that rule of pleading, by its very words, is meant to include those documents upon which an action is being brought. Here, the proposed agreement is material as evidence . . . Thus, the Second Amended Petition was not defective with regard to F.R.C.P. 1.130(a)."). At worst, the Court should simply provide leave to file an amended complaint that attaches the subject document, but even that is unnecessary here.

B. Plaintiffs Plainly Have Standing to Bring This Declaratory Judgment Action

The Brunetti Defendants' argument that Plaintiffs lack standing to bring this action is predicated on their belief that Plaintiffs must allege a "special injury" in order to have standing. Although Defendants recognize that the special injury rule is not absolute, the Brunetti Defendants contend that this case does not fall within any of the exceptions thereto. Thus, the Brunetti Defendants contend that Plaintiffs cannot demonstrate a special injury, and that, as a result, Plaintiffs' Complaint should be dismissed.

The Brunetti Defendants' argument notwithstanding, it is unnecessary for this Court to determine whether Plaintiffs have alleged a special injury.¹ Plaintiffs have brought this action as a declaratory judgment action under chapter 86, Florida Statutes. (First Am. Compl. ¶ 22.)

Under chapter 86,

[a]ny person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

§ 86.021, Fla. Stat. As evidenced by its plain language and as recognized by Florida courts, section 86.021, Florida Statutes, "contains no requirement that a special injury be established" to confer "standing to seek a declaratory judgment." *Combs v. City of Naples*, 834 So. 2d 194, 197 (Fla. 2d DCA 2002).

In *Combs*, the court was faced with exactly the same situation as here. Plaintiffs, both individuals and a not-for-profit corporation, brought suit challenging a local government action. Count II of their complaint sought a declaratory judgment declaring the action invalid. *Id.* at 196. Defendants moved to dismiss the complaint, including count II, alleging that the Plaintiffs lacked standing. *Id.* On appeal, the Second District noted that count II was a declaratory judgment action, governed by the provisions of chapter 86, Florida Statutes, and concluded that

¹ In the unlikely event that this Court determines a special injury is required for Plaintiffs to have standing to maintain this action, Plaintiffs expressly reserve their right to argue that they have a special injury. Plaintiffs contend that the allegations in their First Amended Complaint demonstrates how they are specially injured by the Defendants' actions. Moreover, if necessary, Plaintiffs will argue that because their First Amended Complaint sufficiently alleges a special injury, any further analysis of Plaintiffs' standing should be undertaken at the summary judgment phase.

chapter 86 did not contain any requirement of a special injury. *Id.* at 197. In so holding, the Second District also noted that the declaratory judgment statute must be liberally construed. *Id.* (citing *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002)); *see also Ready v. Safeway Rock Co.*, 24 So. 2d 808 (Fla. 1946) (explaining the legislative intent underlying the declaratory judgment statute and noting that “[t]here is no reason whatever why the highway to justice should be strewn with hurdles and pitfalls that make one who secures it wonder if the ‘game is worth the candle’”). Thus, the court only analyzed whether the plaintiffs had a sufficient interest to confer standing, not whether the plaintiffs had a special injury. *Id.* In doing so, the court found the interests of two of the individuals and the not-for-profit corporation sufficient to confer standing to bring the declaratory judgment count. *Id.* As to the third individual, however, the court found that because he was simply asserting an interest as a taxpayer, he did not have standing under chapter 86.² *Id.*

The *Combs* opinion is not the first to exclude the special injury requirement from an analysis of whether a plaintiff has standing to pursue a declaratory judgment action, though it may be the first to do so explicitly. Years earlier, the Second District decided that a seller had standing to seek a declaration that a third-party’s easement was invalid by finding that the seller had a “sufficient stake and interest in the controversy to bring this suit.” *Nordvind Two Inc. v. Treasure Shores Beach Club Condo. Ass’n.*, 573 So. 2d 1028 (Fla. 2d DCA 1991). Nowhere does this opinion mention the special injury requirement. *Id.* Moreover, in *City of Homestead v.*

² Notably, however, the Second District found that this individual plaintiff had standing as a taxpayer to bring a constitutional challenge to the city’s exercise of its taxing and spending authority. As the Brunetti Defendants note, an exception to the special injury requirement exists for taxpayer challenges based on the constitutionality of a city’s action. Thus, Plaintiffs standing to bring this action on the ground that the City of Hialeah violated due process, and thus the constitution, by conveying Hialeah Park Racetrack without first holding the required referendum election is exempt from the special injury requirement for this independent reason.

Dade County, the Third District concluded that the City of Homestead had standing to seek a declaration of the County's obligations under various legal documents by finding that the City had "a sufficient interest in and doubts about its rights under those documents." *City of Homestead v. Dade County*, 425 So. 2d 592 (Fla. 3d DCA 1982). Likewise, the Fifth District's recent decision in *Orange County v. Expedia, Inc.*, finds that the plaintiffs have standing to pursue a declaratory judgment action but makes no mention of whether the plaintiffs in that case had a special injury. *Orange County v. Expedia, Inc.*, 985 So. 2d 622, 626-27 (Fla. 5th DCA 2008). Even the Florida Supreme Court's opinion in *Olive v. Maas* excludes any mention of the special injury requirement when concluding that a plaintiff had standing to bring a declaratory judgment action. *Olive*, 811 So. 2d 644 (Fla. 2002).

A review of Plaintiffs' complaint, taking the allegations in the light most favorable to Plaintiffs, as is required, reveals that Plaintiffs have an interest in this case beyond that of a taxpayer seeking to challenge a governmental act. In fact, Plaintiffs do not purport to bring their action solely as taxpayers. Instead, Plaintiffs bring this action as historic preservationists with an interest in the protection and preservation of Hialeah Park Racetrack as a nationally significant historic landmark. (First Am. Compl. ¶¶ 8-9.) Plaintiffs also bring this action as thoroughbred horse racing fans who routinely attended races at Hialeah Park Racetrack and who are no longer able to do so. (First Am. Compl. ¶¶ 10-11.) Plaintiffs likewise bring this action as residents of Hialeah who were denied the right to vote on the conveyance of Hialeah Park Racetrack from the City of Hialeah to Hialeah, Inc. (First Am. Compl. ¶¶ 12-13.) Finally, Plaintiff Minor brings this action as someone who seeks to purchase Hialeah Park Racetrack in order to preserve its historic nature and resume thoroughbred racing on its track, but who is unable to do so because

he cannot determine the rightful owner of Hialeah Park Racetrack. (Compl. ¶¶ 14-15.) These interests are sufficient to confer standing to Plaintiffs under section 86.021.³

Given the foregoing, the Brunetti Defendants' representation that a special injury is required for standing in a declaratory judgment action misrepresents the law and the Brunetti Defendants' argument that Plaintiffs lack a special injury is entirely irrelevant to whether Plaintiffs have standing to pursue their claims. Reviewing Plaintiffs' complaint in the light most favorable to Plaintiffs, Plaintiffs have alleged a sufficient interest to confer standing to bring a declaratory judgment action under chapter 86, Florida Statutes. As such, the Brunetti Defendants' Motion to Dismiss for lack of standing should be summarily denied.

C. Count III Alleges a Viable Cause of Action Against Defendant Brunetti

Without ever mentioning the well-pled allegations in Count III, the Brunetti Defendants argue that the allegations supporting Counts I and II in the First Amended Complaint do not support "a cause of action against Defendant Brunetti individually." (Motion at 5.) The Brunetti Defendants are, of course, correct that the allegations in Counts I and II do not support a cause of action against Brunetti. And that is why he is not a named Defendant in those two Counts.

Rather, Brunetti is named as a Defendant in Count III, which seeks a constructive trust over the subject property. Plaintiffs properly name Brunetti as a Defendant in that Count because, as Plaintiffs alleged, Brunetti "has maintained actual possession of the subject property" since September 29, 2004 and, upon information and belief, "holds himself out as the owner of the subject property." (First Am. Compl. at ¶¶ 93-94.) Based on these allegations, Brunetti is a

³ Of course, because the interests of its members are sufficient to confer standing to its members in their own right, Save Hialeah Racing, Inc. can pursue this action on behalf of its members. *See O'Connell v. Fla. Dep't of Community Affairs*, 874 So. 2d 673 (Fla. 4th DCA 2004); *see also Fla. Society of Ophthalmology v. State of Fla., Dep't of Professional Reg.*, 532 So. 2d 1278 (Fla. 1st DCA 1988) (recognizing that an organization can pursue an action under chapter 86, Florida Statutes, on behalf of its members).

proper Defendant in Plaintiffs' action for a constructive trust because he allegedly possesses and claims to own the subject property. *See Saporta v. Saporta*, 766 So. 2d 379, 382 (Fla. 3d DCA 2000) ("Even when a property has not been acquired by fraud, a constructive trust will be imposed if equity would be offended should the property be retained by the person holding it."); *see also Quinn v. Phipps*, 113 So. 419, 422 (Fla. 1927) ("[A] court of equity will raise a constructive trust and compel restoration where one, through actual fraud, abuse of confidence reposed and accepted, or through other questionable means gains something for himself which in equity and good conscience he should not be permitted to hold.").

In addition, the Brunetti Defendants properly recognize in their Motion to Dismiss that Brunetti is a proper Defendant in any event based on his status as a general partner of Bal Bay Realty under section 620.1404, Florida Statutes. (*See Motion at 5-6.*) Hence, the Brunetti Defendants' Motion to dismiss Brunetti from this action must be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs Halsey Minor and Save Hialeah Racing, Inc. respectfully request that the Court deny the Motion to Dismiss First Amended Complaint filed by Defendants John Brunetti, Hialeah, Inc., and Bal Bay Realty, Ltd. Alternatively, if the Court believes the arguments in the Motion have some merit, the Court should, at a minimum, provide Plaintiffs with leave to amend, as none of the arguments advanced in the Brunetti Defendants' Motion to Dismiss warrant a dismissal with prejudice at this early juncture.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

Counsel for Plaintiffs

Miami Center, Suite 2400

201 South Biscayne Boulevard

Miami, Florida 33131-4332

Telephone: (305) 358-5171

Facsimile: (305) 358-7470

By: _____

STEPHEN J. DARMODY

Fla. Bar No. 469289

DANIEL B. ROGERS

Fla. Bar No. 0195634

JENNIFER A. McLOONE

Fla. Bar No. 0029234

Of counsel:

Martin L. Lieberman, Esq.

Admitted in New York; Not admitted in Florida

11639 North 134th Street

Scottsdale, AZ 85259-3665

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U.S. Mail this ___ day of _____, 2009 to:

Andrew C. Hall, Esq.
Hall, Lamb & Hall, P.A.
2665 South Bayshore Drive, PH-1
Miami, FL 33133 Suite 306

CITY OF HIALEAH, FLORIDA
Mayor Julio Robaina as Mayor
501 Palm Avenue
Hialeah, FL 33010

By: _____

STEPHEN J. DARMODY