

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.

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**PLAINTIFFS' RESPONSE TO THE BRUNETTI DEFENDANTS' VERIFIED MOTION  
TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT AS SHAM**

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 Verified Motion to Strike First Amended Complaint as a Sham (“Motion to Strike”) filed by Defendants John Brunetti, Hialeah, Inc., and Bal Bay Realty, Ltd. (“the Brunetti Defendants”) who claim ownership of the Racetrack. The Court should reject the Brunetti Defendants’ blatantly improper effort to short-circuit the judicial process and enter what is, in effect, a summary judgment on Plaintiffs’ claims before the discovery process has even commenced. Simply because the Brunetti Defendants and Defendant City of Hialeah’s attorney disagree with the claims alleged in Plaintiffs’ First Amended Complaint (“Complaint”) does not render that Complaint a purported “sham.” Rather, their denials serve only to reinforce

LAW OFFICES

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the patent need for the declaratory relief requested by Plaintiffs to resolve what is plainly a *bona fide* dispute between the parties.

### **PLAINTIFFS' COMPLAINT**

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 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 City-owned property to a private entity. In spite of that requirement, the City purportedly deeded its legal title to Hialeah Park Racetrack to a private entity without holding a referendum, much less a referendum approving the transfer.

Plaintiffs accordingly seek a declaration in Count I of the Complaint that the City's attempted transfer of legal title to Hialeah Park Racetrack to Defendant Hialeah, Inc. was improper, and the deed null and void, because no referendum approving that transfer occurred. 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 was null and void. In Count III, Plaintiffs seek a constructive trust over the subject property in favor of the City as the lawful owner of the property, as Bal Bay Realty and its general partner, Defendant John Brunetti, wrongly maintain possession and control over the property and wrongly hold themselves out as owners of the property.

### **THE BRUNETTI DEFENDANTS' BASELESS MOTION TO STRIKE**

The Brunetti Defendants make a number of arguments in their Motion to Strike, none of which meet the exceedingly high standard necessary to strike a complaint as a purported "sham."

First, the Brunetti Defendants argue that the Complaint should be stricken because Defendant City of Hialeah's attorney, William W. Grodnick, informed Plaintiffs of his

unremarkable belief that the 2004 property transfer *he authorized* was proper. According to Grodnick and the Brunetti Defendants, compliance with the City Charter referendum requirement was supposedly unnecessary because the property transfer was allegedly pursuant to an option contained in a 1978 Lease Purchase Agreement between the City and Hialeah, Inc. Grodnick and the Brunetti Defendants further believe that, even if a referendum was required, a 1977 voter approval of the City's acquisition of the property – which vote had nothing to do with, much less approved, the 2004 transfer of the property 27 years later – somehow satisfied that referendum requirement.

Unfortunately for the Brunetti Defendants, neither Plaintiffs nor more importantly this Court are bound by Grodnick's unilateral, self-serving, and unsupported view of the law. The view of the law developed by Grodnick and supported by the Brunetti Defendants, with which Plaintiffs obviously disagree, merely frames the issue for this Court to adjudicate in this declaratory judgment action. The views of a defendant's attorney do not render Plaintiffs' Complaint a purported "sham" and do not support the Brunetti Defendants' effort to shut down this lawsuit and escape what will likely be very revealing discovery as this matter goes forward.<sup>1</sup>

Second, the Brunetti Defendants argue that the Complaint seeking a determination of the proper *legal owner* of Hialeah Park Racetrack should be stricken as a purported "sham" on the basis of *stare decisis*. The Brunetti Defendants point to a two-decade old Third District opinion decided in an entirely distinguishable context, which held Hialeah, Inc. was the *equitable owner* of the property *for ad valorem taxation purposes*. As the Brunetti Defendants well know, legal and equitable ownership are not the same, and even equitable ownership for tax purposes is

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<sup>1</sup> Making their effort transparent, Defendants have already filed a Motion to Stay Discovery and for Protective Order Pending the Court's Ruling on Defendant's [sic] Motion to Dismiss and Motion to Strike as a Sham Pleading.

different than equitable ownership for all purposes. The Brunetti Defendants obviously felt further action to solidify their legal ownership was needed, as evidenced by the 2004 deed. In short, the Third District's opinion in no way renders the Complaint a purported "sham."

**A. Standard of Review for Motions to Strike as a "Sham"**

Florida Rule of Civil Procedure 1.150(a) provides that, "[i]f a party deems any pleading or part thereof filed by another party to be a sham, that party may move to strike the pleading or part thereof." Rule 1.150(b) provides that "[t]he motion to strike shall be verified and shall set forth fully the facts on which the movant relies and may be supported by affidavit."

"Because striking a pleading is an extreme measure, it is disfavored in the law." *Upland Dev. of Cent. Fla., Inc. v. Bridge*, 910 So. 2d 942, 944 (Fla. 5th DCA 2005). It is reversible error for the Court to "make a determination about the truth or falsity of the complaint's allegations" or "to consider extrinsic evidence to reach its decision." *Id.* at 945. Hence, the Court "must resolve all doubts in favor of a pleading when ruling on a motion to strike." *Sunex Int'l, Inc. v. Colson*, 964 So. 2d 780, 782 (Fla. 4th DCA 2007).

According to the Third District, "in order to justify the striking of a pleading for being sham or false, it must be *so undoubtedly false as not to be subject to a genuine issue of fact.*" *Slatko v. Virgin*, 328 So. 2d 499, 500 (Fla. 3d DCA 1976) (emphasis added). "In other words, a pleading may be stricken as a sham only where it is shown to be *palpably or inherently false.*" *Id.* (emphasis added). Moreover, it must be "clearly known to be false at the time the pleading was made." *Cromer v. Mullally*, 861 So. 2d 523, 525 (Fla. 3d DCA 2003).

"The fact that a court may perceive little prospect in the success of an alleged sham proceeding is not a sufficient ground to grant a motion to strike the pleading." *Id.* Indeed, even "the frivolous nature of a pleading" does not warrant striking it. *Upland Dev.*, 910 So. 2d at 955 (quoting *Decker v. County of Volusia*, 698 So. 2d 650, 651 (Fla. 5th DCA 1997)).

If there is any possibility a pleading may be stricken, a special-set evidentiary hearing is required on the matters raised in the verified motion to strike. *See* Fla. R. Civ. P. 1.150(a); *Herranz v. Siam*, 34 Fla. L. Weekly D400 (Fla. 3d DCA Feb. 18, 2009) (reversing because hearing on motion to strike not properly noticed as evidentiary hearing). That hearing should not, however, be a “a mini-trial on the merits of the case.” *Scarfone v. Silverman*, 408 So. 2d 778, 781 (Fla. 2d DCA 1982). “A hearing on a motion to strike is not a hearing to try the issues but to determine whether there are any genuine issues to be tried.” *Slatko*, 328 So. 2d at 500.

The Brunetti Defendants have not proven that the Complaint in this case, viewed in a light most favorable to Plaintiffs, is “so undoubtedly false as not to be subject to a genuine issue of fact.” *Slatko*, 328 So. 2d at 500. To the contrary, and as explained in detail below, there exists a *bona fide* dispute between the parties that requires a declaration with respect to the legal ownership of Hialeah Park Racetrack. The Brunetti Defendants’ baseless Motion to Strike must therefore be summarily denied. If the Court has even the slightest doubt, however, it should receive evidence to confirm that genuine issues of fact indeed exist.

**B. The Unsupported and Self-Serving Affidavit of Defendant City of Hialeah’s Attorney Does Not Prove that the Complaint is a Purported “Sham”**

The Brunetti Defendants’ reliance on the opinion developed by the attorney for Co-Defendant City of Hialeah as supposed authority for finding the Complaint a purported “sham” is misplaced. As will be shown below, Plaintiffs have solid factual and legal bases for their claims. Simply because the Brunetti Defendants and the attorney for Defendant City of Hialeah happen to believe otherwise does not render Plaintiffs’ claims false. It simply frames the issues to be adjudicated in this case.

**1. The Referendum Requirement in the 1999 City Charter Applies to, and was Violated in Connection with, the 2004 Sale of the City-Owned Hialeah Park Racetrack to Private Entity Hialeah, Inc.**

The Brunetti Defendants argue that the 1999 Hialeah City Charter and its requirement that transfer of City-owned property be approved by a referendum were allegedly “inapplicable” to the 2004 transfer of Hialeah Park Racetrack from the City to Hialeah, Inc., even though the 1999 Charter undisputedly was in effect in 2004. (*See* Motion to Strike at 5-6.) They argue that the transfer was “excepted” from the referendum requirement because (i) a different provision in 1999 Charter provides that it will not impair obligations existing at the time of the adoption of the 1999 Charter and (ii) the transfer at issue was purportedly pursuant to a preexisting option to purchase contained in a 1978 Lease Purchase Agreement. (*See id.*) There are a host of problems with this argument.

First, Plaintiffs dispute that the “exception” clause the Brunetti Defendants reply upon in the 1999 City Charter applies in this case. Plaintiffs’ claims are founded upon Section 1.04(b)(1) of the City Charter, which provides that:

The city shall not give, donate, sell or otherwise dispose of city real property, parks or recreational areas without approval of the electorate in a referendum held at a general or special municipal election.

The Brunetti Defendants, on the other hand, rely for their defense upon Section 8.06 of the City Charter, which provides that:

No debt, contract obligation, or assessment by the city shall be impaired by adoption of this charter. But all existing debts, obligations and assessments shall remain valid and enforceable, according to their terms, under the charter provisions applicable at the time the debt was incurred, contract signed, or assessment imposed.

Under the circumstances of this case, where there is a purported 1978 contractual obligation to sell City-owned property that purportedly predates the enactment of the 1999 City Charter, there appears to be a *bona fide* dispute as to whether a referendum is required to effectuate the transfer.

Plaintiffs, on the one hand, believe that the referendum required by Section 1.04(b)(1) applies, by its very terms, to any transfer of City-owned property, including the Hialeah Park Racetrack. The City Attorney for Defendant City of Hialeah and the Brunetti Defendants, on the other hand, believe that Section 8.06 somehow nullifies Section 1.04(b)(1) and excepts the transfer from the referendum requirement. The City Charter provides no guidance for this contingency. Hence, Plaintiffs rightly seek a declaration from this Court to resolve what appears to be an ambiguity between two provisions in the City Charter. *See, e.g., State ex rel. Casselberry v. Mager*, 356 So. 2d 267, 268 (Fla. 1978) (resolving issue of “statute which contains an irreconcilable internal conflict”); *see also Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (“It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole. Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.”) (citations omitted). To be sure, Plaintiffs’ efforts to seek a declaration to resolve this issue cannot be found a “sham.”

Second, assuming, *arguendo*, that the Brunetti Defendants are correct and a proper transfer of City-owned property pursuant to a 1978 contract does not require a referendum, Plaintiffs further dispute that the transfer at issue here was proper under the 1978 Lease Purchase Agreement. Specifically, the Brunetti Defendants never refute the allegations in Plaintiffs’ Complaint that Hialeah, Inc. was in default under the 1978 Agreement, thereby negating its ability to exercise its option under that Agreement to purchase the property. *See, e.g., Twelfth*

*Ave. Invs., Inc. v. Smith*, 979 So. 2d 1216, 1219 (Fla. 4th DCA 2008) (holding trial is required where there are disputed issues as to whether party holding option to purchase has breached the contract before exercising option); *Costello v. Curtis Bldg. P'ship*, 864 So. 2d 1241 (Fla. 5th DCA 2004). Indeed, Hialeah, Inc. defaulted under the 1978 Agreement in numerous ways.

The Agreement, for example, required that “during the term of this Lease,” defined as “February 1, 1978 through January 31, 2008,” Hialeah, Inc., shall “be obligated to occupy and use the Leased Premises to conduct thoroughbred racing meetings, and to keep the racing permits and licenses in full force and effect.” (Lease Agreement at §§ 1.01, 2.01, attached as Exhibit 1.)<sup>2</sup> The Agreement also obligated Hialeah, Inc. to maintain the property, buildings, fixtures, and improvements in the same condition as on the day the Agreement was signed, subject to reasonable wear and tear. (*See id.* at §§ 6.01-6.02.)

As alleged in the Complaint, *without dispute from the Brunetti Defendants*, Hialeah, Inc. defaulted on each of the foregoing obligations by failing to maintain a valid pari-mutuel racing license, failing to hold thoroughbred horse racing during the 2002, 2003, and 2004 seasons, and failing to maintain the property in the same condition as it existed on February 1, 1978. (*See* First Am. Compl. at ¶¶ 55-57, attached as Exhibit 2.)

Consequently, there is a *bona fide* dispute as to (i) whether Hialeah, Inc. failed to satisfy the terms of its Agreement with the City before exercising its option to purchase, (ii) whether the 2004 transfer was thus proper under the 1978 Agreement, and (iii) whether the 2004 transfer was accordingly “excepted” from the referendum requirement in the 1999 City Charter as pursuant to a preexisting obligation. Plaintiffs rightly brought this declaratory judgment action to resolve

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<sup>2</sup> The Lease Agreement attached as Exhibit 1 is actually attached as Exhibit B to the 1978 Lease Purchase Agreement, and the two agreements were executed simultaneously. The operative provisions at issue in this lawsuit are contained in the Lease Agreement attached hereto as Exhibit 1.

this *bona fide* dispute. Under these circumstances, the Complaint cannot conceivably be found a purported “sham.”

**2. The 1977 Referendum on an Entirely Different Issue was not a Referendum Approving the 2004 Sale of Hialeah Park Racetrack**

Recognizing that the referendum requirement in the 1999 City Charter may, in fact, be applicable, the Brunetti Defendants argue in the alternative that the requirement was met. Their belt-and-suspenders argument is that the requisite *2004 referendum* somehow “occurred” *in 1977*. (See Motion to Strike at 6-7.) That the Brunetti Defendants believe this argument proves the Complaint a “sham” is beyond the pale.

In 1977, the City held a voter referendum *for the limited purpose of approving the City’s purchase of Hialeah Park Racetrack* to support continued thoroughbred racing. (See First Am. Compl. at ¶ 44.) At no time whatsoever did the citizens of Hialeah vote to approve the 2004 sale of Hialeah Park Racetrack to Hialeah, Inc. Indeed, Hialeah voters approved of the City taking title to the property for the specific purpose of the property continuing to be operated as a thoroughbred horse racetrack. (See *id.* at ¶ 45.) Considering that Hialeah, Inc. had ceased all such racing activities on the property (thereby defaulting under its Agreement with the City), it is inconceivable that, given the purpose of the 1977 referendum, it could in any way be considered an approval of the 2004 sale to Hialeah, Inc. This Court must reject the Brunetti Defendants’ efforts to bootstrap the 1977 referendum as somehow fulfilling the requirement for a referendum in 2004.

If the Court has any doubt as to whether the 1977 referendum in any way approved the 2004 sale, the Court need look only at the actual language of the 1977 ballot, which plainly reflects that the voters were merely asked to approve the City’s acquisition of the property:

Shall the City of Hialeah be authorized, without pledging any of its general credit or taxing power or other property, to borrow the sum

of \$9,000,000 pursuant to the terms of an Indenture between the City of Hialeah and the Southeast First National Bank of Miami (as Indenture trustee) for the purchase of the Land portion of the Premises commonly known as Hialeah Race Track, which Loan shall be evidenced by a Promissory Note or Notes bearing interest at the rate of 6% per annum, payable in 360 equal monthly installments, said Note or Notes to be secured by a Mortgage on the Land portion of Hialeah Race Track; and payable only from revenues derived from the Hialeah Race Track Land.

(City of Hialeah Ordinance No. 77-55, attached as Exhibit 3.) Nowhere in the foregoing ballot question were the voters of Hialeah asked to approve a sale of the property 27 years later to a private company that had unilaterally shut down racing on the property.

Furthermore, accepting the construction of the foregoing ballot measure advanced by the Brunetti Defendants – that the block-quoted language approved the 2004 sale of Hialeah Park Racetrack pursuant to the 1978 Lease Purchase Agreement – would render that ballot measure “affirmatively misleading” and, hence, improper. *See Falk v. City of Miami Beach*, 538 So. 2d 956, 957 (Fla. 3d DCA 1989) (quoting section 101.161(1), Florida Statutes, and section 701(4)(b) of the Metropolitan Dade County Home Rule Charter); *see also Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976) (stating voters “must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be”); *Volusia Citizens’ Alliance v. Volusia Home Builders Ass’n*, 887 So. 2d 430, 439 (Fla. 5th DCA 2004). Florida law is clear that a ballot measure must be clear and unambiguous and “must give the voter fair notice of the decision he must make.” *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) (stating all ballots must not mislead the voter and provide notice of the proposition voted on). The Brunetti Defendants’ position obviously conflicts with clear Florida law and must be rejected.

**C. The Third District Did Not Hold in *Hialeah, Inc. v. Dade County* that Hialeah, Inc. Became the *Legal* Owner of the Property in 1978**

In their last attempt to twist the truth and paint Plaintiffs' claims as a purported "sham," the Brunetti Defendants wrongly argue that, since Hialeah, Inc. has been found the *equitable* owner of the property *for real estate tax purposes*, Plaintiffs' request for a declaration of true *legal* ownership is a purported "sham." Like the preceding arguments, this argument likewise provides no basis for finding the Complaint is a purported "sham."

In *Hialeah, Inc. v. Dade County*, 490 So. 2d 998 (Fla. 3d DCA 1986), Hialeah, Inc. tried to avoid paying real estate tax on Hialeah Park Racetrack, even though the 1978 Lease Purchase Agreement upon which they so heavily rely obligated them to pay such taxes. (See Lease Agreement at § 3.02(A).) In that case, Hialeah, Inc. argued that it did not own Hialeah Park Racetrack but had a "leasehold" interest that "was subject to taxation only as intangible personal property." *Hialeah, Inc.*, 490 So. 2d at 999. The Third District rejected Hialeah, Inc.'s effort to avoid paying real estate tax for the property. See *id.* at 999-1001. The Third District held that, *for purposes of real estate taxes*, Hialeah, Inc. had almost all of the "burdens and obligations of ownership" and was thus "the *equitable* owner of the property" and not exempt from paying real estate taxes merely "because the city holds *legal* title." *Id.* at 1001 (emphasis added).

That the Third District's holding in *Hialeah, Inc.* was strictly limited to its circumstances of equitable ownership for purposes of ad valorem taxation is evidenced by a subsequent Florida Supreme Court opinion with analogous facts that, after citing *Hialeah, Inc.*, stated:

***Our holding in this case should not be construed to mean that one who leases property from another becomes the equitable owner of the property if the lease contains an option to purchase.*** To the contrary, this Court has long held that the status of parties to the ordinary lease with an option to purchase remains that of landlord and tenant until the option is exercised and that the lessee has no equitable interest in the property. *Gautier v. Lapof*, 91 So. 2d 324 (Fla. 1956). ***We hold only that under the stipulated facts***

*of this case, the project is not subject to ad valorem taxation because the Authority holds virtually all the benefits and burdens of ownership.*

*Leon County Educ. Facilities Auth. v. Hartsfield*, 698 So. 2d 526, 530 (Fla. 1997) (emphasis added).

Despite the clear limitations of the Third District's opinion in *Hialeah, Inc.*, the Brunetti Defendants argue here that Plaintiffs' action seeking a declaration of the propriety of the 2004 transfer of **legal** ownership of Hialeah Park Racetrack was somehow already decided in the *Hialeah, Inc.* ad valorem taxation opinion. (See Motion to Strike at 7-9.) The Brunetti Defendants are clearly wrong. That 1986 tax opinion did not already decide Plaintiffs' claim that the 2004 sale failed to comply with the referendum requirement in Section 1.04(b)(1) of the 1999 City Charter. That tax opinion also did not already decide the Brunetti Defendants' claim that the 2004 sale was excepted from the referendum requirement because of Section 8.06 of the 1999 City Charter. At most, that opinion proves only that under one particular provision of Florida's statutes, Hialeah, Inc. was the **equitable** owner of the property **for purposes of real property taxes**. But as Hialeah, Inc. itself recognized by requesting and accepting the 2004 deed transferring legal ownership of the property, Hialeah, Inc. was never the **legal** owner of Hialeah Park Racetrack until that 2004 deed and ownership transfer occurred.

This lawsuit rightfully seeks a declaration regarding whether the 2004 transfer of legal ownership from the City to Hialeah, Inc. was, in fact, proper under the 1999 City Charter. The Third District's ad valorem taxation opinion from over two decades ago in no way proves this declaratory judgment lawsuit is a purported "sham." All that opinion proves is that Hialeah, Inc. will either claim or disclaim ownership of the property whenever it suits its interest.

**CONCLUSION**

For the foregoing reasons, Plaintiffs Halsey Minor and Save Hialeah Racing, Inc. respectfully request that the Court summarily deny the Verified Motion to Strike First Amended Complaint as a Sham filed by Defendants John Brunetti, Hialeah, Inc., and Bal Bay Realty, Ltd. If the Court believes the arguments in the Motion to Strike have some merit (they do not), Plaintiffs respectfully request the Court hear evidence to determine if a genuine issue of fact exists.

Respectfully submitted,

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- Exhibits: (1) Lease Agreement  
(2) First Amended Complaint  
(3) City of Hialeah Ordinance No. 77-55

**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