IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA.

CASE NO: 502019CA008660XXXXMB AI

B. & B. PROPERTIES, INC., a Florida
Corporation, and on behalf of all others
similarly situated,
Plaintiff,

v.

PALM BEACH COUNTY,
Defendant.
_______________________________________/

ORDER DENYING MOTION TO DISMISS PORTIONS OF THE THIRD AMENDED COMPLAINT

THIS matter came before the Court for hearing on November 4, 2021, on the Motion of the Defendant, Palm Beach County (the "County"), to Dismiss Portions of the Third Amended Complaint ("TAC"). After reviewing the parties' submissions, and hearing argument of counsel, the Court rules as follows:

In reviewing a motion to dismiss, a trial court is limited to the four corners of the complaint and must accept the allegations as true with all reasonable inferences construed in the plaintiff's favor. *See Rhiner v. Takashi Koyama, DMD.*, 2021 WL 4073396, at *2 (Fla. 4th DCA Sept. 8, 2021). A review of the four corners of the TAC indicates that Plaintiff ("B&B") is challenging the County's custom and policy of charging interest as part of a code enforcement lien, when there has been no lawsuit to foreclose the lien or a suit for a money judgment to recover the amount of the lien, in violation of Fla. Stat. § 162.09, and charging collection agency fees that are not court-related financial obligations, in violation of Fla. Stat. §§ 938.31 and 938.35. TAC ¶¶ 17, 20, 23-27. Additionally, TAC ¶¶18-19 alleges that the County's code enforcement Ordinance, Article 10 ULDC only allows interest when the County forecloses on the lien. TAC ¶¶21-22 and 25 also allege that the County has a custom and

policy of improperly compounding interest, and charging collection agency fees in excess of what the County paid the collection agent in violation of Fla. Stat. §938.35. These allegations set forth the basis for B&B's claims for declaratory and injunctive relief, and federal claims for procedural due process and excessive fines.

Stratton v. Sarasota County, 983 So. 2d 51, 55 (Fla. 2d DCA 2008), holds that the County's penalties for a code enforcement violation are limited to a daily fine and repair costs, and it has no authority to seek any further charges not authorized by the Fla. Stat. §162.09. B&B relies on *Stratton* to support its allegations that the County is not authorized to charge collection agency fees or interest, except in conjunction with a lawsuit. Additionally, TAC ¶¶26-27 plead that Fla. Stat. §938.35, when read in conjunction with Fla. Stat. §938.31, applies only to court proceedings and court-related financial obligations, and only allows collection agency fees that are actually paid to the collection agent. Code enforcement proceedings are administrative and not court proceedings, and the penalties at issue are administrative and not court-related financial obligations. *Saratoga County v. Nat'l City Bank of Cleveland*, 902 So. 2d 233, 235 (Fla. 2d DCA 2005); Fla. Stat. §162.09.

STATUTE OF LIMITATIONS

The County seeks dismissal based on the statute of limitations. To obtain dismissal based on this ground, the facts constituting this defense must "affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Rhiner, 2021* WL 4073396 at *2.

The limitations period for both declaratory judgment and 42 U.S.C. § 1983 claims is four years. *See* Fla. Stat. §95.11(3)(p); *Burton v. City of Belle Glade,* 178 F. 3d 1175, 1188 (11th Cir. 1999). For § 1983 actions, the statute of limitations begins to run when "the facts which would support a cause of action are apparent or should be apparent to a person with reasonable prudent regard for his rights." *Foudy*

v. Indian River Cty. Sheriff's Office, 845 F.3d 1117, 1122-1123 (11th Cir. 2017). These claims accrue "when the Plaintiff has 'a complete and present cause of action.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

The County asserts that the Plaintiff was put on notice that it had a cause of action to challenge collection agency fees when it received the March 7, 2007, Order Imposing Fine/Line which contained a "NOTE" that stated the following:

> "If this lien is not satisfied within ninety (90) days of the date the lien is recorded, it will be referred to the Office of Financial Management [OFMB] for referral to a collection agency. No modification requests will be accepted, and **you will be responsible for any collection fees incurred by the County**."

(Emphasis supplied.)

However, this "NOTE" only refers to collection agency fees, *if any*, that B&B "will be responsible for" if there are any collection agency fees incurred in the future. Further it is not apparent from the "NOTE" that the County would impose collection agency fees against B&B without first filing a court action and for an amount more than what it paid to its collection agent. Plaintiff alleges that until there were actual collection agency fees incurred by the County, and B&B was notified that such collection fees are owed, it would not have been apparent to B&B that it had suffered any damages, or that it had incurred a legal injury. Plaintiff argues that until then, any cause of action would only consist of the possibility of a legal injury, that at best would be speculative, uncertain, and contingent on the County incurring collection agency fees in the future and seeking to impose them without filing a court action and for amounts in excess of what the County paid. *See Riverside Avenue Property, LLC v. 1661 Riverside Condominium Association, Inc.*, 2021 WL 3362233 at *2 (Fla. 1st DCA, Aug. 2, 2021). A declaratory judgment is only permissible when a party can show a real, actual, and bona fide injury that needs to be presently resolved between adverse parties. *Id.* The mere possibility of damages or a legal injury is not sufficient for either a declaratory judgment action or a 1983 action. *See Apthorp v. Detzner*, 162 So. 3d 236, 240-241 (Fla. 1st DCA 2015).

Fla. Stat. §95.031(1), which governs when a cause of action begins to run, states: **"[a] cause of action accrues when the last element constituting the cause of action occurs."** (Emphasis supplied). TAC ¶56 alleges that the last element constituting a cause of action for both declaratory judgment and the 1983 claims was, at the earliest, in May of 2018 when the County incurred collection agency fees, or in July of 2018, at the latest, when the County notified B&B that it had paid collection agency fees of $7,146.81 but was charging B&B $22,413.66. Those dates in 2018 were the first times it would have been apparent that the County was imposing collection agency fees without filing a court action. Therefore, on the face of the TAC, the limitations period began to run no earlier than May of 2018, or in July of 2018, when it became apparent to B&B that it had a real and ascertainable legal injury to bring an action for declaratory and injunctive relief and had a "complete and present cause of action" enabling the B&B to assert its 1983 claims. *See Foudy*, supra and *Wallace,* supra.

Regarding interest charges, the County similarly claims that the statement in the March 7, 2007, Order Imposing Fine/Lien that "This amount shall accrue interest at the rate allowed by law" is when the statute begins to run. However, TAC ¶¶52 and 53 plead that it was not until July of 2018, when the County notified B&B through a Statement of Account that the County was charging B&B interest on the daily fine even though it was not complying with the lawsuit requirements of Fla. Stat. § 162.09(3) and County Ordinance Section 3(F) Article 10 ULDC. *See* TAC Exhibit F. TAC ¶¶52 and 53 allege that the July 2018 Statement of Account was the earliest it would have been apparent to B&B that the County improperly compounded interest in calculating the amount owed and was seeking interest not allowed by law.

The County's argument requires B&B to assume that the County would seek to collect accrued interest and ignore, as B&B alleges, the lawsuit requirements mandated by Fla. Stat. §162.09(3) and the code enforcement ordinance, and expect that the County would improperly compound interest. However, as alleged, the statute of limitations may not begin to run until the facts which support a

cause of action are apparent and complete and is not based on what a party should or should not assume. *See Bialek v. Mukasey*, 529 F.3d 1267, 1274 (10th Cir. 2008) ("We expect that …. government officials…[will] follow the law.") Therefore, the TAC allegations on their face do not support dismissal although evidence and proof at trial may show otherwise. This is not an issue appropriate for resolution at a motion to dismiss.

THE FEDERAL PROCEDURAL DUE PROCESS AND EXCESSIVE FINES CLAIMS

TAC ¶40 alleges that the Fourteenth Amendment to the United States Constitution guarantees due process of law. The right to *prior* notice and a hearing is central to due process. *U. S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). TAC ¶42 pleads that the County has acted under color of state law and the County deprived B&B of its property without due process. TAC ¶41 alleges that 42 USC §1983 provides a remedy for denial of due process.

TAC ¶¶36-37 plead that the County has a custom and policy that if a code enforcement lien remains unpaid for 90 days, it refers the lien to OFMB, which then can refer the lien to a collection agency. After the 90-day period, the County refuses to accept any modification requests and denies a hearing before a Special Magistrate or any other hearing officer. By waiting until 90 days before referring the lien to a collection agency, and then prohibiting any opportunity for a hearing or record before an impartial magistrate, TAC ¶¶ 38 and 53 allege, the County violates B&B's due process rights to contest these unauthorized charges, which B&B alleges it was not on notice of until after the 90-day period.

The County argues that the procedural due process claims should be dismissed because B&B failed to appeal the Order Imposing Fine/Line and the record therein, and that B&B's claims are therefore an impermissible collateral attack that deprives this Court of subject matter jurisdiction. Since B&B is not challenging the record before the Special Magistrate, Plaintiff argues that an appeal under Fla. Stat. §162.11 would not be permitted. The TAC therefore is not a collateral attack on the

order or findings below, and B&B's failure to appeal does not deprive this Court of subject matter jurisdiction to determine if the County unlawfully charged interest and collection agency fees.

The cases relied upon by the County on this issue, relate to challenges to the evidence at the code violation hearing before the Special Magistrate, *see Lindbloom v. Manatee County*, 808 F. App'x 745, 750 (11th Cir. 2020), or to the amount of the daily fine. *See Innova Investment Group, LLC v. Village of Key Biscayne*, 2020 WL 6781821 (S.D. Fla. Nov. 18, 2020). The County cites no cases where the plaintiff was *not* challenging the record below or the amount of the daily fine. Here, B&B alleges and argues that it makes no challenge to the record below or the amount of the fine, and challenges only the imposition of interest charges and collection agency fees not authorized by law.

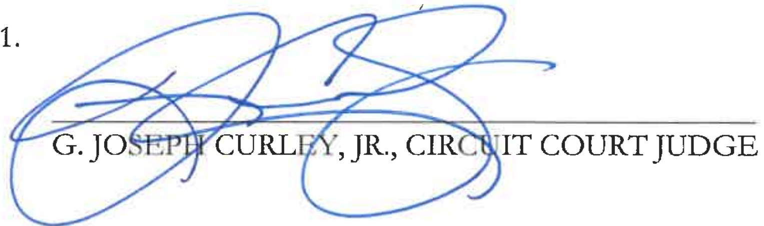
The TAC also pleads a violation of the excessive fines provision of the Eighth Amendment. TAC ¶48 specifically alleges that the unauthorized interest and collection agency fees violate Fla. Stat. §162.09, Article 10 ULDC §3(F), and Fla. Stat. §938.35 and 938.31 and render the amounts charged to B&B excessive. TAC §¶21, 22, 25 and 28 also allege that the County improperly compounds interest and charges collection agency fees in excess of what the County paid to the collection agent in violation of Fla. Stat. §938.35. In *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020), the court remanded the issue of whether a late payment penalty of $63 tethered to a parking fine "is grossly disproportional to the offense of failing to pay the initial fine within 21 days." If a late fee of $63 for a parking fine could be an excessive fine under the Eighth Amendment, then the TAC's allegation in ¶59 that the County is charging unauthorized and compounded interest, and improper collection agency fees totaling $91,248.00 of a $97,152.00 code enforcement lien, would also state an Eighth Amendment claim.[1]

[1] The cases cited by the County in its Motion at pages 10-11, 17-18, 21-24 and 29 all involve property owners who filed separate actions complaining about the code violation or the fines, all of which were within the statutory limits, after they failed to appeal the Special Magistrate's rulings. These cases are inapplicable, because B&B is not challenging the finding of a violation or the amount of the fine.

Finally, the County argues that the availability of a declaratory judgment action under state law bars the federal claims of procedural due process and excessive fines. This argument has been rejected where the federal claims are based, as here, on the County's custom and policy as opposed to a random unauthorized act. *See Monell v. New York City Department of Soc. Ser.*, 436 U.S. 658 (1978) (local governments are liable under §1983 for constitutional wrongs caused by governmental customs and policies). In *Woodward v. Andrews*, 419 F.3d 348, 358 (5th Cir. 2005), the court reaffirmed the principle that a local official acting pursuant to an official policy can be liable for denials of federal procedural due process. In this case, the federal claims are permissible as they are based on the County's custom and policy and not on random unauthorized acts.

The TAC adequately alleges claims for relief and the County's Motion to Dismiss is Denied. The subject claims are not appropriate to resolve on the pleadings.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida on this 13th day of December, 2021.



G. JOSEPH CURLEY, JR., CIRCUIT COURT JUDGE

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