IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

CITY OF DUNEDIN,
a Florida municipal corporation,

Petitioner,

v. **Case No.: 18-8188-CI**

KRISTI S. HILL n/k/a
KRISTI S. ALLEN,

Respondent.
_____/

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Petitioner, City of Dunedin, by and through its undersigned counsel and, pursuant to Fla. R. Civ. P. 1.510, files its *Motion for Summary Judgment*, and as grounds thereof states as follows:

1. On February 24th 2010, Respondent's mortgage lender filed a *lis pendens* and mortgage foreclosure suit against her. The City of Dunedin was not made a party to this proceeding and received no notice thereof.

2. On January 21st 2014, Code Enforcement Inspector Joseph May, performed an inspection of Respondent's home located at 1658 Douglas Avenue, Dunedin, Florida.

3. That same day, Inspector May mailed a Notice of Violation to Respondent, informing her of the violations observed during the inspection, and informing her that the violations must be corrected by February 16th 2014 or the matter would be brought before the Dunedin Code Enforcement Board.

4. On January 30th 2014, the mailed notice was returned to the City marked "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

5. The Notice of Violation was posted on the Respondent's home on February 3rd 2014.

6. The property was inspected again on February 17th and April 21st 2014.

7. On April 17th 2014, the Pinellas County Property Appraiser's website stated that the owner of 1658 Douglas Avenue, Dunedin, was Kristi S. Hill, and that the owner's mailing address was 1658 Douglas Avenue, Dunedin.

8. The Pinellas County Tax Collector's website also showed the owner of 1658 Douglas Avenue, Dunedin, was Kristi S. Hill, and that taxes for 2012 and 2013 had been paid.

9. On April 21st 2014, Inspector May submitted a Request for Hearing to the Clerk of the Dunedin Code Enforcement Board.

10. On April 22nd 2014, the City sent Respondent by certified mail notice of the Code Enforcement Board's May 6th 2014 meeting at which they were to hear the initial violation citation. The Notice advised Respondent that she was ordered to appear, that she would have the opportunity to present her side of the case, and that should she be found in violation, daily fines may be imposed.

11. The April 22nd Affidavit of Service executed by Inspector May confirms that he also posted the notice of hearing on the property, and at City Hall.

12. On April 28th 2014, the City received the certified mail marked "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

13. On May 14th 2014, the Code Enforcement Board entered an order finding the Respondent in violation, giving Respondent until June 15th 2014 to achieve compliance, and imposing a daily fine of $250 should the property not be brought into compliance.

14. On May 15th 2014, the City mailed Respondent the CEB's initial order of May 14th requiring compliance by June 15th 2014.

15. On June 16th 2014, the City mailed Respondent notice of the CEB's July 1st 2014 meeting at which they would consider whether Respondent had complied with its initial order.

16. On July 11th 2014, the Code Enforcement Board entered an order finding Respondent still out of compliance, imposing a $100 per day fine beginning June 15th 2014 and running until compliance was achieved, imposing a $50 administrative fee, and creating a lien "on any real or personal property that is owned by you."

17. Pursuant to Florida Statutes § 162.07(4), such orders, once recorded, "shall constitute notice to any subsequent purchasers, successors in interest, or assigns if the violation concerns real property, and the findings therein shall be binding upon the violator and, if the violation concerns real property, any subsequent purchasers, successors in interest, or assigns.

18. Florida Statutes § 162.07(2) provides that in addition to recovery of the daily fines provided for in such orders, the City is entitled to recover all costs incurred in prosecuting the case before the CEB.

19. The City mailed Respondent a copy of the executed CEB order that same day. On July 16th 2014, the mailed order was returned to the City marked "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

20. On July 17th 2014, the City recorded the code enforcement lien with the Pinellas County Clerk of Court.

21. On October 27th 2014, Respondent's mortgage lender obtains a Final Judgment finding its lien superior to other interests and claims.

22. On December 27th 2016, Code Enforcement Inspector Michael Kepto inspected the property and found that the violations had been corrected.

23. On April 3rd 2018, the Dunedin Code Enforcement Board entered an order finding that the property was in compliance effective December 27th 2016.

24. A copy of this order was recorded in the County's Official Records on April 17th 2018.

25. Since compliance was accomplished, the City sent a letter to Respondent on April 3rd 2018 requesting payment of the then-outstanding fines due of $99,211.58. Respondent did not respond to the letter.

26. As of December 6th 2018, the total fine due, with principal and interest, was $103,559.31.

27. Florida Statutes § 162.09(3) authorizes a local government, upon petition to the circuit court, to sue to recover a money judgment for the amount of a code enforcement lien plus accrued interest.

28. Petitioner filed this action seeking to obtain a money judgment against Respondent on December 14th 2018.

29. On February 18th 2019, Respondent filed a *Motion to Strike Sham Pleading* and a *Motion to Dismiss*. These motions essentially argued that a cause of action did not exist, that the bank's foreclosure judgment erased the City's ability to obtain a money judgment based on the code lien, that the City did not perfect its lien under the Uniform Commercial Code procedures, and that the City failed to provide notice to Respondent in a manner which would satisfy due process.

30. On April 2nd 2019, following a hearing on the motions, the court entered an order denying same.

31. On April 12th 2019, Respondent filed her Answer and Affirmative Defenses. Respondent's Affirmative Defenses appear to be re-arguments of the same arguments made in her earlier, denied motions.

32. Pursuant to Florida Statutes § 162.10, in an action for a money judgment based on a code enforcement lien, if the City prevails, it is entitled to recover all costs, including a reasonable attorney's fee, that it incurs.

33. The City has incurred reasonable attorney fees and costs of action as outlined in the affidavit of Petitioner's fee expert.

34. The City's responses to Respondent's production request, as well as its answers to interrogatories attested to by *Joan McHale*, the Code Enforcement Board Clerk, have been filed in support of this Motion.

35. These materials verify that the City complied with all of its statutory procedural requirements, and that the Respondent was provided lawful notice of the relevant CEB proceedings and orders.

36. Fla.R.Civ.Pro. 1.510(c) provides that "the judgment sought shall be

rendered forthwith if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

37. The pleadings, affidavits and other exhibits filed in support of this *Motion for Summary Judgment* establish that there are no genuine issues of material fact, and that Petitioner is entitled to summary judgment as a matter of law.

38. Pursuant to Sixth Circuit Administrative Order No.: 2015-056 PA/PI-CIR, Plaintiff shall have ten days after being served with this Motion to file her argument and legal memorandum with citations of authority in opposition to the relief herein requested.

MEMORANDUM OF LAW

SUMMARY JUDGMENT STANDARD:

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Estate of Githens ex rel. Seaman v. Bon Secours–Maria Manor Nursing Care Ctr.*, 928 So.2d 1272, 1274 (Fla. 2nd DCA 2006)**.

Once the movant has come forward with evidence of no genuine issue of material fact, the non-moving party must produce counter evidence sufficient to reveal a genuine issue. ***Landers v. Milton*, 370 So.2d 368 (Fla. 1979)**; ***Roberts v. Stokley*, 388 So.2d 1267 (Fla. 2d DCA 1980)**. While "summary judgments should be cautiously entered, where the material facts are not in dispute and the moving party is entitled to a summary

judgment as a matter of law, it is the court's duty to enter summary judgment." ***Castellano v. Raynor*, 725 So.2d 1197, 1199 (Fla. 2d DCA 1999)**.

Based upon the factual record as reviewed in detail above, and upon the provisions of law set forth herein, and in light of the fact that the Respondent has failed to establish the validity of any of his affirmative defenses, there is no genuine issue of material fact in this case, and the Petitioner is entitled to judgment as a matter of law. The Code Enforcement Board Order was properly recorded and constitutes a lien against the real and personal property of Respondent. The Respondent has not satisfied the lien against the property, and it remains a valid lien. Therefore, the City is entitled to the entry of a money judgment for the full amount claimed and respectfully requests that the Court grant this motion, and enter a money judgment in favor of the City.

RESPONDENT'S ARGUMENTS:

Respondent's *Answer* admits several allegations in the *Petition*, claims she is "without knowledge" as to most others, and for those she denies, she denies based on her steadfast legal position that the City is not applying the statute correctly. Respondent spends the majority of space in her *Answer* setting forth her Affirmative Defenses.

However, the parties had ample opportunity to argue Respondent's theories at the hearing on her motions to dismiss and to strike. The Court denied those motions. Respondent's Affirmative Defenses are merely cut and paste efforts to yet again argue that the statutes do not allow the City to bring this action, that the mortgage foreclosure forecloses this action, and that the City's notice efforts failed to satisfy due process. However, these arguments are just as without merit as they were the first time the Court heard them.

Is There a Valid Cause of Action?

As the City has noted before, it filed its *Petition* based upon the following provision of law:

> A certified copy of an ***order imposing a fine***, or a fine plus repair costs, ***may be recorded in the public records and thereafter shall constitute a lien*** against the land on which the violation exists and ***upon any*** other real or ***personal property owned by the violator***. ***Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment*** by the sheriffs of this state, including execution and levy against the personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes.

Florida Statutes § 162.09(3). Emphasis added.

In ***City of Boynton Beach v. Janots*, 101 So.3d 864 (Fla. 4th DCA 2012)**, the court considered a case wherein Jantos had code violations on his homestead property (parcel 1). The city eventually issued orders of violation which assessed fines. These orders were eventually recorded and in subsequent years, the enforcement of the orders as against the personal and non-homestead real property (including a vacant lot the court called parcel 2) came at issue in relation to an eminent domain proceeding. In discussing the effect of the recorded orders, the *Jantos* court stated as follows:

> The City recorded the orders in the public record pursuant to section 162.09(3), Florida Statutes, which states:
>
> > A certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator. Upon petition to the circuit court, such order may be enforced in the same manner as a court judgment by the sheriffs of this state, including levy against the personal property, but such order shall not be deemed to be a court judgment except for enforcement purposes.
>
> § 162.09(3), Fla. Stat. (1998). Accordingly, the code enforcement liens attached to all real and personal property owned by Ryan, including Parcel 2.

***Jantos*, at 865**. Emphasis added.

While the *Petition* is not a lien foreclosure action seeking to have real estate sold (Respondent correctly notes she no longer owns the home which created the violation), it is an action seeking to enforce a lien, and that enforcement may result in the execution and levy of the order on not only personal property of the Respondent, but on any non-homestead real property the City may discover she has ownership of.

As the Second District Court of Appeals ruled, the statute allowing local government code enforcement boards to impose fines for code violations and file liens does not confer upon boards right to collect, by action at law, money judgment for failure to pay the fine. Rather, the language providing that the fine continues "to accrue until the violator comes into compliance or until judgment is rendered in a suit to foreclose on a lien" merely authorized an "equitable action to enforce lien." ***City of Tampa for Use and Benefit of City of Tampa Code Enforcement Bd. v. Braxton*, 616 So.2d 554 (Fla. 2d DCA 1993)**. Based on the foregoing authorities, Florida Statutes § 162.09(3) and the judicial opinions interpreting that statute clearly demonstrate that the Legislature has created a cause of action by which a local government may enforce its code lien via petition. And, since the statute expressly vests jurisdiction over such actions in the circuit courts, this case is properly before the Court.

Failure to Provide Notice

Respondent also argues in her Affirmative Defenses, as she did in her motion to dismiss and motion to strike, that she never actually received notice of the code enforcement proceedings, and thus was denied due process. However, Respondent's contention that she has no evidence of having been provided with notice of the Code

Enforcement proceedings and resulting lien is without merit. As the Court can ascertain from an examination of the City's *Answers to Interrogatories* and *Response to Request for Production* on file with this Court in support of this *Motion for Summary Judgment*, a Notice of Violation was mailed to Respondent at 1658 Douglas Avenue, Dunedin, on January 22nd 2014 but returned to sender with no forwarding address, in spite of the fact that the Pinellas County Property Appraiser and Pinellas County Tax Collector data both reflected that the owner of 1658 Douglas Avenue, Dunedin, was Ms. Kristi Hill, and that her mailing address was 1658 Douglas Avenue, Dunedin.

The record also reflects that:

- On April 22nd 2014, the City mailed Respondent notice of the Code Enforcement Board's May 6th 2014 meeting at which they were to hear the initial violation citation;
- On May 15th 2014, the City mailed Respondent the CEB's initial order of May 14th requiring compliance by June 15th 2014;
- On June 16th 2014, the City mailed Respondent notice of the CEB's July 1st 2014 meeting at which they would consider whether Respondent had complied with its initial order; and
- On July 11th 2014, the City mailed Respondent a copy of the executed CEB order finding her still out of compliance, imposing a $100 per day fine until compliance was achieved, and creating a lien "on any real or personal property that is owned by you."

It is of no legal moment that Respondent failed to provide a forwarding address, and/or otherwise declined to sign for the certified mail attempted to be provided to her.

A procedural-due-process claim "requires proof of three elements: a deprivation of a constitutionally-protected liberty or property interest; state action; and constitutionally inadequate process." ***Doe v. Florida Bar*, 630 F.3d 1336, 1342 (11th Cir.**

2011) (internal quotation marks omitted). As relevant here, "individuals whose property interests are at stake due to government actions are entitled to notice of the proceedings and an opportunity to be heard." ***Mesa Valderrama v. United States*, 417 F.3d 1189, 1196 (11th Cir. 2005)**. To satisfy due process, interested persons must be given " 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " **Id. at 1196–97** (quoting ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)**). "Reasonable notice, however, requires only that the government attempt to provide actual notice; it does not require that the government demonstrate that it was successful in providing actual notice." **Id. at 1197**.

Initially, Petitioner notes that Respondent's procedural due process "defense" cannot succeed in this statutory lien enforcement case because she failed to attempt to raise such allegations before the CEB or subsequently in an appeal to the appellate division of the circuit court using the procedure set forth in Florida Statutes § 162.11 (see ***Holiday Isle Resort & Marina Associates v. Monroe County*, 582 So.2d 721 (Fla. 3rd DCA 1991)** (holding that appeal under § 162.11 was the proper forum to raise both facial and as applied constitutional challenges to code enforcement procedures).

But even examining the merits of Respondent's defense, such defense fails. Procedural due process requires both fair notice and a real opportunity to be heard "at a meaningful time and in a meaningful manner." ***Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001)**. The specific parameters of the notice and opportunity to be heard required by procedural due process "are not evaluated by fixed rules of law, but rather by the requirements of the particular

proceeding." **Id**. In the code enforcement context, the City is required to "provide the property owner with notice and an opportunity to be heard concerning any factual determination necessary to impose a fine or create a lien." ***Massey v. Charlotte County*, 842 So.2d 142, 147 (Fla. 2d DCA 2003)**.

The "question ... is not whether the owners actually received notice, which is not demanded by section 162.12, nor always required by law, ... but whether the notice provided ... satisfied the statutory requirements." ***Little v. D'Aloia*, 759 So. 2d 17, 20 (Fla. 2d DCA 2000)**. In ***Levin v. Palm Beach County*, 2017 WL 5132699 (S.D. Fla. November 6, 2017)**, the Southern District dealt with a similar case where an owner denied getting code enforcement notices and claimed a due process violation:

> This is a case about service. One of the Plaintiffs…is the owner of a home…[in] Boca Raton, Florida. In 1998, Defendant Palm Beach County, through its code enforcement office, contends that it mailed a notice of code violation to Plaintiffs. Plaintiffs contend that they never received that notice. As a result of Plaintiffs' alleged failure to receive notice, Plaintiffs maintain that subsequent code enforcement proceedings violated their constitutional rights and caused them damages. *** [T]he operative question for the Court is not whether Plaintiffs *actually* received service of code enforcement violations, but instead whether Defendants' efforts at service complied with Florida law. Florida Statute 162.12(1) governs this question. That statute reads:
>
> > All notices required by this part must be provided to the alleged violator by.... Certified mail, and at the option of the local government return receipt requested, to the address listed in the tax collector's office for tax notices or to the address listed in the county property appraiser's database....
>
> Furthermore, "The question ... is not whether the owners actually received notice, which is not demanded by section 162.12, nor always required by law, ... but whether the notice provided ... satisfied the statutory requirements." *Little v. D'Aloia*, 759 So. 2d 17, 20 (Fla. Dist. Ct. App. 2000). Plaintiffs' constitutional rights are not violated, even in the absence of actual notice, because due process only requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

> opportunity to present their objections." Id. (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).
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> ***
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> The question before the Court is whether Defendants complied with the notice provisions of § 162.12, which in return required Defendants to send notice by certified mail to "the address listed in the tax collector's office for tax notices or to the address listed in the county property appraiser's database." Fla. Stat. § 162.12; see, e.g., *Jacobson v. Attorney's Title Ins. Fund, Inc.*, 685 So. 2d 19, (Fla. Dist. Ct. App. 1996) ("Section 162.12(1) .. requires that the alleged violator be sent notice by certified mail.").

***Levin*, at *1**. In granting summary judgment for the County, the Levin court explained:

> This case is not like cases such as *Ciollo v. City of Palm Bay*, 59 So. 3d 295 (Fla. Dist. Ct. App. 2011)—upon which Plaintiffs rely—where a defendant governmental entity relied upon nothing more than an unauthenticated return receipt to establish statutory compliance; the Defendants in this case have documented a large amount of detailed evidence tracking the path of the notices of violation through the delivery process. Ultimately, however, the Court's decision is narrow. The Court need not decide whether Plaintiffs received actual notice. Instead, the Court need only consider whether a reasonable jury could find that Defendants did not comply with § 162.12, which only requires that Defendants, through certified mail, sent their notices to "the address listed in the tax collector's office for tax notices or to the address listed in the county property appraiser's database." The Court concludes that no reasonable juror could find that Defendants did not comply with the notice requirements of § 162.12. Accordingly, Defendants' claims, all of which are premised on improper service, cannot stand.

***Levin*, at *4**. At the hearing on Respondent's motions to dismiss and strike, Respondent argued that the case of ***Little v. D'Aloia*, 759 So.2d 17 (Fla. 2nd DCA 2000)** should provide her relief. However, Little merely stood for the proposition that where the local government actually knew of a good mailing address for the property owner, but knowingly persisted in sending mail to an invalid address, its also posting of the notice on the property itself was not sufficient notice so as to satisfy due process. As the *Little* court explained:

> When the City received notice of the correct post office box number, it did not avail itself of this correct box number to mail the next notice, the notice of hearing. *Because the City had actual notice of the corrected post office box*, in addition to the knowledge of the abortive first mailing to the residence address, *it would have been reasonable under these circumstances to use the corrected box number* in light of the deprivation of property the Littles were potentially facing. As the City had done for the notice of violation, *it also would have been reasonable to send the second notice*, the notice of hearing, *to the current residence address*, which the City had, return receipt requested, *even if it were again returned unclaimed and unsigned*. The City's argument that it fulfilled all the requirements of the statute does not persuade us because either alternative would have sufficed, but the City failed to do either.

***Little*, at 20**. Emphasis added. Since, in this case, Respondent did not provide the United States Postal Service, Property Appraiser, Tax Collector, or City with any forwarding address, the City's sending its various notices to Respondent's last known address satisfied due process. Citizens should not be allowed to use due process as a sword by intentionally going off the grid, then claiming a regulatory agency didn't give them notice while exercising a police power.

Finally, the City would note that the actual dollar amount of the fine does not create a constitutional question. See, ***Town of Lake Park v. Grimes*, 963 So.2d 940 Fla. 4th DCA 2007)** (per diem fines from the Town totaling $464,914.19 due to continuing code violations, where the total amount of the fines was in excess of three times the value of the property at issue, was not an excessive fine); ***Moustakis v. City of Fort Lauderdale*, 2008 WL 2222101, at *2 (S.D. Fla. May 27, 2008)** (dismissing Eighth Amendment claim where building code fine was initially assessed at $150 per day but had accumulated over a period of fourteen years to more than $700,000 since "it would be contrary to reason and public policy to allow plaintiffs to evade responsibility simply by neglecting to (or deciding not to) pay fines for so long a period of time that the

cumulative amount owed becomes large enough for such plaintiffs to argue unconstitutionally excessive punishment."); ***Marfut v. City of North Port*, 2009 WL 790111 (M.D. Fla. March 25, 2009)** ($25 a day fine which had accumulated to $37,502.20 was not an excessive fine); and ***Conley v. City of Dunedin*, 2010 WL 146861 (M.D. Fla. January 11, 2010)** (fines of $50 a day for an oversized truck violation and $100 a day for an illegal shed violation were not excessive where defendants failed to pay the fines or comply with the ordinances for over three years, allowing the total amount of the fines to accrue to over $198,000, since refusal to comply with the city ordinances for several years did not transform the daily fines into excessive fines).

Conclusion

In light of the foregoing, Petitioner has established its entitlement to judgment and that Respondent's various defenses are without merit. It therefore requests that the Court enter an order granting this motion, that it grant a money judgment against the Respondent which includes the principle and interest of the code enforcement fine, the statutory costs, and a reasonable attorney fee, and that it grant such other relief as may be just and proper.

Respectfully submitted,

/s/ ***Robert Michael Eschenfelder***
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in compliance with Fla. R. Jud. Admin. 2.516, on **May 13th 2019**, the foregoing was filed with the Circuit Court using the EFC system which will provide an electronic copy to: **Benjamin Hillard**, Esq., 13143 66th Street, North, Largo, FL 33773, who is attorney for the Respondent, at: hcaeservice@gmail.com.

/s/ ***Robert Michael Eschenfelder***
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