

IN THE CIRCUIT COURT OF THE 16th JUDICIAL CIRCUIT OF
THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY,

APPELLATE DIVISION

Case No.: 22-AP-0008-P

L.T. Case No. CE20110034

ELIZABETH DIAZ-VELIZ and
VICTOR DIAZ (A.K.A. VICTOR VELIZ),

Appellants,

v.

MONROE COUNTY, FLORIDA,

Appellee.

OPINION

(Through inadvertence and technical issues with the automated filing system, two prior opinions may have been signed and emailed to counsel and parties but were not filed in the case. This Opinion is the only valid, authorized Opinion and is the only Opinion filed in the case)

THIS CAUSE comes before the Court upon Elizabeth Diaz-Veliz's and Victor Diaz's (hereinafter "Appellants"), Notice of Appeal of Special Magistrate's Code Enforcement Order Imposing Fine rendered on November 8, 2022. The Court, having considered the Appellants' Initial Brief, the Answer Brief of Monroe County, Appellants' Reply Brief, pertinent legal authority, and having heard from the parties at oral argument held on

April 10, 2024, and being otherwise fully advised in the premises, finds and orders as follows:

BACKGROUND

Appellants are the owners of property located at 373 Bahia Avenue, Key Largo, Florida 33037 (the "Property"). On March 25, 2021, Monroe County Code Compliance issued a Notice of Violation/Notice of Hearing to Appellants for conducting unpermitted work on the Property. In lieu of contesting the allegations at a hearing, the Appellants signed and entered a Stipulation to Code Violation and for Time to Comply for First Time Offenses (the "Stipulation") wherein the Appellants admitted to the violations of the Monroe County Code. The Appellants agreed to obtain an after-the-fact building permit for the installation of concrete slabs and a demolition permit to clear the paved right-of-way. Per the Stipulation, if compliance were not timely achieved, a daily fine of \$100.00 per count would start running and would accrue until the date of compliance. In the Stipulation, Appellants agreed to waive the right to appeal any finding of violation.

Compliance was not achieved by the date in the Stipulation and fines started to accrue. A Code Compliance Hearing was held on April 29, 2021, and a Final Order was issued by the Special Magistrate on April 30, 2021. The Final Order found violations of sections 110-140(a) and 19-33 of the Monroe County Code based on the Stipulation which was incorporated into and attached to the Final Order. Appellants did not appeal the Final Order.

Appellants requested and were granted a Mitigation Hearing which was held on October 17, 2022, before the Special Magistrate. Appellant Elizabeth Diaz-Veliz was present and was given the opportunity to be heard. Monroe County Code Inspector Chris Grant presented the County's evidence at the hearing. On November 8, 2022, the Special Magistrate entered an Order Imposing Fine. In the Order Imposing Fine, the Special Magistrate evaluated the testimony and evidence presented at the Mitigation Hearing and considered the factors enumerated in Florida Statute section 162.09(2)(b) and Monroe County Code section 8-31. The Special Magistrate ordered a reduced fine in the amount of \$61,000.00 for the violations stipulated to on the Property along with \$1,029.71 in costs. If the fine was not paid within 30 days of the Order, the fine would be restored to the unmitigated total fine of \$63,500.00 plus costs.

This appeal of the Special Magistrate's Order Imposing Fine followed.

STANDARD OF REVIEW

Pursuant to section 162.11, Florida Statutes, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Cent. Fla. Invest., Inc. v. Orange Cty.*, 295 So. 3d 292, 294 (Fla. 5th DCA 2019). "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." § 162.11, Fla. Stat. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Cent.*

Fla. Invest., at 294. “[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Id.* at 295 (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995)). The Circuit Court also has jurisdiction to consider and resolve constitutional issues as part of a code enforcement appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).

DISCUSSION

Generally, an appellate court is called upon to determine: (1) whether due process was accorded; (2) whether the correct law was applied; and (3) whether the decision is supported by “competent substantial evidence.” *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1274 (Fla. 2001). In this case, these requirements are not directly challenged. Rather, Appellants make the following arguments: (1) the Stipulation is fundamentally flawed and unconstitutional because the County did not give a reasonable time to correct the violation before issuing a notice of violation/hearing; (2) the Stipulation is fundamentally flawed and unconstitutional because it waives the right to appeal; (3) the Final Order fails to include findings of fact; (4) the Final Order is not final because the County did not conduct a *Massey* hearing; (5) the daily fine cannot run past the date the order is recorded in public records; and (6) the fine imposed is unconstitutionally excessive.

As a preliminary matter, the County argues that any challenge to the Stipulation or to the Final Order is not properly before the Court because they were not timely appealed and because the Appellants waived their right to contest the violations by accepting the benefits of the Stipulation. The Court agrees that it does not have jurisdiction over the Final Order or the original findings of violation pursuant to the Stipulation, and the only order before the Court on appeal is the Order Imposing Fine.

Section 162.11, Florida Statutes provides that an appeal from the final order of a code enforcement board shall be filed within 30 days of the execution of the order to be appealed. If an appeal is not filed within thirty days of the execution of the order to be appealed, an enforcement order is outside the scope of the circuit court's review. *City of Miami v. Cortes*, 995 So. 2d 604, 606 (Fla. 3d DCA 2008). In this case, neither the Stipulation nor the Final Order were appealed within 30 days of execution, and therefore they are outside the scope of the Court's review.

Further, Appellants invited any alleged error by requesting and accepting the benefits of the Stipulation and they are estopped from arguing deficiencies in the Final Order because they expressly waived their right to appeal any finding of violation. "Where a party accepts the benefits of a settlement agreement or a compromise of his case and knows, or in the exercise of due diligence should have known, of the facts concerning that settlement, the party ratifies the settlement by accepting the benefits [...] and he is thereafter estopped to attack the settlement." *Kisz v. Massry*, 426

So. 2d 1009, 1011 (Fla. 2d DCA 1983) (citing *Nagymihaly v. Zipes*, 353 So. 2d 943, 944 (Fla. 3d DCA 1978)).

With these limitations to the Court's jurisdiction in mind, the Court will address each of the Appellants' arguments.

A. Stipulation flawed because not a reasonable time to comply

Appellants argue that the County failed to comply with Florida Statute section 162.06 which requires the inspector to give the violator a reasonable time to correct the violation before issuing a notice of violation/hearing. Appellants argue that as a result, the Stipulation is fundamentally flawed and unconstitutionally misleading. The Appellants are estopped from making this challenge because it was waived when Appellants knowingly entered into the Stipulation and accepted its benefits.

B. Stipulation flawed because it waives the right to appeal

Appellants argue that the Stipulation is fundamentally flawed, unconstitutional and contrary to public policy for including a condition that the Appellants waive the right to appeal any finding of violation or order that they would otherwise have under Section 162.11. However, a party may waive any right to which he is legally entitled under the Constitution, a statute, or a contract. *Dep't of Health & Rehab. Servs. v. E.D.S. Fed. Corp.*, 631 So. 2d 353, 355 (Fla. 1st DCA 1994). Here, the Appellants entered the Stipulation to resolve their code violations outside of the statutory code enforcement process. This was not an "invalid confession of judgment" as Appellants now contend. The caselaw on which Appellants rely is not

applicable to this case. Having accepted the benefit of the Stipulation, Appellants are now estopped from challenging the terms they agreed to within.

C. Final Order insufficient findings of fact

Appellants argue that the Final Order fails to include legally sufficient findings of fact. As explained above, the Court does not have jurisdiction to review the Final Order because the Appellants did not file a notice of appeal within thirty days of its rendition. The only order under appellate review is the Order Imposing Fine which includes legally sufficient findings of fact and conclusions of law.

D. The County did not conduct a Massey hearing

Appellants argue the Final Order and the Order Imposing Fine are null and void because the County failed to schedule a *Massey* hearing to determine the amount of the fine. Again, the Court does not have jurisdiction over the Final Order because it was not timely appealed. However, a *Massey* hearing was held in this case prior to the Order Imposing Fine.

Appellants argue that Section 162.09 requires the Code Enforcement Board or Special Magistrate to conduct two hearings: a hearing to consider evidence of a violation and a separate hearing (a *Massey* hearing) to impose an appropriate fine. Appellants contend the failure to comply with this two-step process violates due process. In support, Appellant relies on *Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003), but that case is

distinguishable. In *Massey*, a lien order was entered based solely upon a code inspector's affidavit, that was not served on the Masseys, and that did not give the Masseys an opportunity to challenge the facts upon which the lien order was based. *Id.* at 146. In other words, it was the process whereby the property owner was denied the opportunity to contest the assertion of non-compliance that was found to violate due process. *Id.* *Massey* requires the County to give a property owner the opportunity to contest the code officer's affidavit of non-compliance when there is a claim by the property owner that they complied.

In this case, the Appellants admitted and waived their right to contest the violations in the Stipulation. Appellants agreed that fines would be imposed if compliance was not achieved by the date agreed upon in the Stipulation. Appellants have never alleged that they achieved compliance by the date agreed upon in the Stipulation. Section 162.09 states that when a finding of violation has already been made, "a hearing shall not be necessary for issuance of the order imposing fine." § 162.09(1), Fla. Stat.

However, in this case, a *Massey* hearing to determine the amount of fine was held on October 17, 2022. Appellants were given notice of the hearing and were given an opportunity to be heard. At this hearing, the Appellants had an opportunity to explain why they were unable to achieve compliance by the date agreed to in the Stipulation, and the Special Magistrate took their explanation into account in imposing the fine. Due process was afforded to the Appellants in this case.

E. Fine stops when Final Order is recorded

Appellants argue that the continued running of a fine against a property owner for noncompliance with city codes must stop when a lien has been recorded against such property. Appellants contend that the maximum fine that can be imposed in this case is \$3,600.00, which represents the amount the fine had accrued at the time the Final Order was recorded.

Appellants rely on an Attorney General's Advisory Opinion from 1986 to support this argument. "Opinions of the Attorney General are considered persuasive, but do not constitute binding authority on the courts of Florida." *Willens v. Garcia*, 53 So. 3d 1113, 1117 n.4 (Fla. 3d DCA 2011) (citing *Palm Beach County v. Hudspeth*, 540 So. 2d 147 (Fla. 4th DCA 1989)).

Additionally, Florida Statute section 162.09 has been amended since the Advisory Opinion relied upon by Appellants was issued, and now it plainly states that "[a] fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to this section, whichever occurs first." § 162.09(3), Fla. Stat.

F. Fine unconstitutionally excessive

Contrary to the Appellants' claim, the fines imposed for the violations in this case are not excessive. The fine imposed is well within constitutional and statutorily-established boundaries. Section 162.09 provides that "a fine imposed pursuant to this section shall not exceed \$250 per day for a first

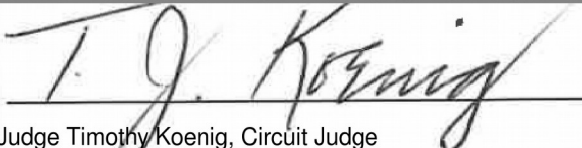
violation and shall not exceed \$500 per day for a repeat violation.” § 162.09(2)(a), Fla. Stat. Here, there were two separate violations of the County code, each in the amount of \$100 per day. Appellants agreed to the amount of the daily fine in the Stipulation.

The Special Magistrate evaluated the testimony and evidence presented at the Mitigation Hearing and considered the factors enumerated in Florida Statute section 162.09(2)(b) and in Monroe County Code section 8-31 in imposing the fine. The fine imposed is not excessive and it is supported by competent substantial evidence.

CONCLUSION

For the foregoing reasons, the Special Magistrate’s Order Imposing Fine is **AFFIRMED**.

DONE AND ORDERED at Key West, Monroe County, Florida this Monday, April 29, 2024

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Judge Timothy Koenig, Circuit Judge
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