

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

APPELLATE DIVISION (CIVIL)  
CASE NO: 502007AP000131XXXXMB  
L.T.: 502003CC029408XXXXMB  
DIVISION: "AY"

BRADFORD ELECTRICAL  
SERVICES, INC.,

Appellants,

CITY OF LAKE WORTH,

Appellee.

Opinion filed: FEB 22 2008

Appeal from the County Court in and for Palm Beach County, Florida,  
Judge Frank Castor.

For Appellant: Larry R. Leiby, Esq., 1000 Sawgrass Corp. Pkwy., Suite 552, Fort  
Lauderdale, FL 33323.

For Appellee: Elaine Johnson James, Esq., One North Clematis Street, Suite 400, West  
Palm Beach, FL 33401.

AFFIRMED.

(ROSENBERG and WINIKOFF, JJ., concur.)(MCCARTHY, J. dissents with opinion.)

I, respectfully, dissent, in part.

**FACTS**

At issue here is the trial Court's granting of the CITY's MOTION FOR SUMMARY JUDGMENT, the inherent denial of BRADFORD ELECTRICAL's MOTION FOR SUMMARY JUDGMENT, and the denial of BRADFORD ELECTRICAL's MOTION TO CERTIFY CLASS.

BRADFORD ELECTRICAL SERVICES, INC. filed this case in November of 2003. The Complaint alleged unlawful extraction of registration fees and requested declaratory relief as to the legality of Section 14-2 of the CITY OF LAKE WORTH's ordinances which states as follows:

"Any person who engages in any business, occupation or profession within the City, not required to be licensed, thereunder, shall be registered with the licensing officer by executing an information form provided by the City. The purpose of such registration is to provide the City with information concerning those who are doing business within the City and, where appropriate, to assure the City that such persons are licensed countywide by the county of Palm Beach, Florida. The registration shall be fifteen dollars (\$15.00) except in the case of contractors who possess a countywide municipal license, shall be required to pay a registration fee of two dollars (\$2.00)."

At the time the lawsuit was filed, the CITY would not issue a building permit unless the state-certified contractor paid the additional registration fee. BRADFORD ELECTRICAL sought to be the class representative in a class action suit.

#### **MOTIONS AT ISSUE**

Almost two (2) years later, in October of 2005, the trial Court denied BRADFORD ELECTRICAL's MOTION TO CERTIFY CLASS. The Court found that BRADFORD ELECTRICAL could not show that it suffered damages and, therefore, had no standing to be the class representative.

In August 2005, the CITY filed its MOTION FOR SUMMARY JUDGMENT and alleged that it was entitled to summary judgment because:

1. On April 22, 2005, it had tendered a check in the amount of \$25.50 to the Plaintiff as a "full refund to the Plaintiff" (the check was not cashed by BRADFORD) and,
2. On July 5, 2005, the CITY passed an ordinance eliminating the disputed fees.

On December 11, 2006, BRADFORD ELECTRICAL filed its own MOTION FOR SUMMARY JUDGMENT and alleged that it was entitled to summary judgment because:

- (1) The CITY had violated Florida Statutes 205.065 and 489.113 by extracting prohibited fees from BRADFORD ELECTRICAL and,
- (2) By sending the CITY a check for \$25.50 and revoking the ordinance on April 22, 2005, the CITY had confessed liability.

The material facts here are not in issue. The lower Court granted the CITY's MOTION FOR SUMMARY JUDGMENT. The majority here affirmed the lower Court's rulings. I agree in part and disagree in part.

I agree with the lower Court's ruling as to denial of BRADFORD ELECTRICAL's MOTION TO CERTIFY CLASS but would reverse as to the lower Court's granting CITY's further MOTION FOR SUMMARY JUDGMENT. I would instruct the lower Court to enter summary judgment for BRADFORD ELECTRICAL as to the declaratory relief it seeks.

### LAW

#### FLORIDA STATUTE 489.113 (4)(a)

Florida Statute 489.113 (4)(a) reads:

When a certificateholder desires to engage in contracting in any area of the state, as a prerequisite, therefore, he or she **shall be required only to exhibit to the local building official**, tax collector, or other person in charge of issuing of licenses and building permits in the area evidence of holding **a current certificate and to pay the fee for the occupational license and building permit required of other persons**. (emphasis added)

Bill Stroop Roofing, Inc. v. Miami Dade County, 788 So.2d 365 (3<sup>rd</sup> DCA 2001) interpreted Florida Statute 489.113 (4)(a) and is binding here:

**"By this section, the Legislature has precluded each county and city from charging state-licensed contractors for any fee beyond its usual occupational license fee and building permit fee as a prerequisite to contracting therein.**

Stroop has alleged that Miami-Dade County has illegally required state-certified contractors to pay a forbidden first registration fee (as well as the allowable fees for an occupational license and building permits) as a prerequisite to engaging in contracting in Miami-Dade. We agree with Stroop that this practice violates the provisions of Sections 489.113 (4)(a). The trial Court should have so declared and enjoined the county from charging a forbidden additional fee. (emphasis added)”

There is no discernible difference between the facts in this case and the facts in Bill Stroop Roofing, Inc., supra.

#### **SECTION 205.065**

Florida Section 205.065 states in pertinent part:

If any person engaging in or maintaining a business, profession, or occupation relegated by the Department of Business and Professional Regulation, has paid a business tax for the current year to the county or municipality in the state where the person's permanent business location or branch office is maintained, **no other local governing authority may levy a business tax, or any registration or regulatory fee equivalent to a business tax,** on the person for performing work or services on a temporary or transitory basis in another municipality or county. (emphasis added)

In this case, at the August 30, 2005 hearing on Plaintiff's MOTION TO CERTIFY CLASS, Genia Baker, the CITY'S zoning administrator, testified to her legal conclusion that the disputed fees were not an occupational license or tax and, therefore, Section 205.065 does not apply. She refers to them as “registration fees.” The witness's legal conclusion upon which the successor judge relied in granting summary judgment demonstrates the danger of allowing witnesses to testify as to their interpretations of legal concepts.

The distinction between taxes and fees was discussed in Jackson Port Authority v. Alamo Rent-A-Car, 600 So.2d 1159 (Fla. App. 1 1992):

“The United States Supreme Court distinguished between a tax and a user fee, defining a tax as providing revenue for the general support of the government, while defining a user fee as imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services. *Commonwealth Edison Co. v.*

*Montana*, 453 U.S. 609, 621-622, 101 S.Ct. 2946, 2955, 69 L.Ed.2d 884, 896-897 (1981).” The Florida Supreme Court has defined it thusly:

“In common parlance, a tax is a forced charge or imposition, it operates whether we like it or not and in no sense depends on the will or contract of the one on whom it is imposed.”

*State ex rel. Gulfstream Park Racing Association v. Florida State Racing Commission*, 70 So.2d 375 (Fla. 1953) [citations omitted].

Contrary to Ms. Baker’s legal conclusion that the “registration fee” is not the equivalent to a business tax, as defined by Florida’s Supreme Court, it is, indeed, a tax. It is a forced imposition and operates whether BRADFORD ELECTRICAL likes it or not and in no sense depends on the will or contract of BRADFORD ELECTRICAL. But whether called a “tax” or a “fee”, it has the same result and violates Florida law. The Third District Court of Appeal opined in Bill Stroop Roofing, Inc., *supra*, at page 367:

“So that there is no misunderstanding of our logic and result, we point out that we recognize the distinction between a “tax” and a “fee” . . . However, we agree with the Fourth District Court that once the illegality of either is established, the prerequisites for recovery are the same . . . The illegal fee here involved was required to be paid along with other, legitimate fees which were necessary to obtain building permits. Like *Ves Carpenter Contractors, Inc.*, return of the illegal exactions is justified.”

#### LAW OF THE CASE

Further, in its ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT’S MOTION FOR FINAL SUMMARY JUDGMENT, the Court below partially upheld its decision by stating:

“D. The law of this case is that registration fees, which the CITY formerly charged are not occupational license taxes or equivalent to occupational license taxes. By charging the fees, the CITY did not violate Section 205.065, Fla. Stat. (emphasis added).”

The “law of the case doctrine” requires that questions of law must first be decided at both the trial level and appeal. Consolidate Insurance Services vs. Freeman, 848 So.2d 444 (Fla. 4<sup>th</sup>

DCA 2003). This is the first time this case has been on appeal, therefore, the "law of the case doctrine," as a matter of law, cannot apply.

### **CONCLUSION**

I would reverse and instruct the trial court to vacate the summary judgment in favor of the CITY and grant BRADFORD ELECTRICAL's MOTION FOR SUMMARY JUDGMENT as to the declaratory relief count, declare the CITY ordinance (14-2) to have been violative of state statutes and release the check in the court file issued by the CITY (or require the CITY to replace the check if stale) and award attorneys fees to the prevailing party.