

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
OF FLORIDA IN AND FOR
MIAMI-DADE COUNTY,
FLORIDA

CASE NO: 2020-020643-CA-01

GUSTAVO TELLEZ,

Plaintiff,
vs.

VILLAGE OF KEY BISCAYNE,

Defendant.

_____/

PLAINTIFF's MOTION FOR REHEARING

Plaintiff GUSTAVO TELLEZ, by and through undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.530, hereby moves for rehearing of this Court's Opinion rendered on June 29, 2021, and in support thereof states:

SUMMARY

The Florida legislature granted taxpayers the right to test the validity of bond referendums pursuant to Fla. Stat. §100.321 as an important "check and balance" on local government and its power of taxation.

As outlined below, the Court reached a number of factual and legal conclusions that are not supported by the evidence on the record in determining that Defendant met its burden to demonstrate that there is an absence of evidence to support the Plaintiff's case.

APPLICABLE LAW

“The proper function of a [motion] for rehearing is to present to the court in clear and concise terms some point that it overlooked or failed to consider....” *Dep’t of Revenue v. Leadership Hous., Inc.*, 322 So. 2d 7, 9 (Fla. 1975) (quoting *Tex. Co. v. Davidson*, 80 So. 558, 559 (Fla. 1918)). The purpose of a motion for rehearing is to call the Court’s attention “to something...obviously overlooked or misapprehended.” *Goter v. Brown*, 682 So. 2d 155, 158 (Fla. 4th DCA 1996).

SUMMARY JUDGMENT STANDARD

As the Court stated in its Order (p. 2) “the Florida Supreme Court recently amended Rule 1.510 of the Florida Rules of Civil Procedure and “adopted the federal summary judgment standard.” *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, No. SC20-1490, 2021 WL 1684095, at *3 (Fla. Apr. 29, 2021).”

It is well established under the federal summary judgment standard that assessing evidentiary weight is not consistent with a ruling on summary judgment. *Nyari v. Napolitano*, 562 F.3d 916 (8th Cir. 2009). It is likewise not for a trial judge on a pretrial motion to decide whose evidence is more credible and judicial credibility determinations are not proper at the summary judgment stage of the proceedings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).

As the Court correctly pointed out “the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party’s case.” *Opinion p. 2*

In assessing whether the movant has met this burden, the Court views the “evidence and draw[s] reasonable inferences in the light most favorable to the non-movant.” *Maddox v. Townsend and Sons, Inc.*, 639 F.3d 214, 216 (5th Cir. 2011). All reasonable doubts about the facts must be resolved in favor of the non-movant. *Coffin v. Brandau*, 597 F.3d 1205, 1210, 1211 (11th Cir. 2010).

ARGUMENT

A. RECORD EVIDENCE SUPPORTS FACTUAL DISPUTE AS TO INFORMATION AVAILABLE TO VOTERS

1. In its Order, the Court concluded that:

6. *The Village “put online a website at <https://www.vkbresilience.org/>.” Amend. Compl. ¶ The website outlines the projects that would be funded by the bonds, including roadway improvements, renourishment on the beach, undergrounding or elevating utility infrastructure, and hardening of structures that support the electrical components of the grid. Amend. Compl. ¶ 34.*

2. There is no evidence in the record to indicate that the Defendant put the website www.vkbresilience.org online or that the Defendant was involved in writing the content set forth in the website. In fact, the facts in evidence indicate that the website was put up by someone other than the Defendant. The website is not part of the Defendant’s website at <https://keybiscayne.fl.gov/>, but rather on the privately owned www.vkbresilience.org/ website. Publicly available information made available to the Court at the Summary Judgment hearing indicates that the domain is not owned by the Defendant, but by a corporation named CONTACT PRIVACY, INC.

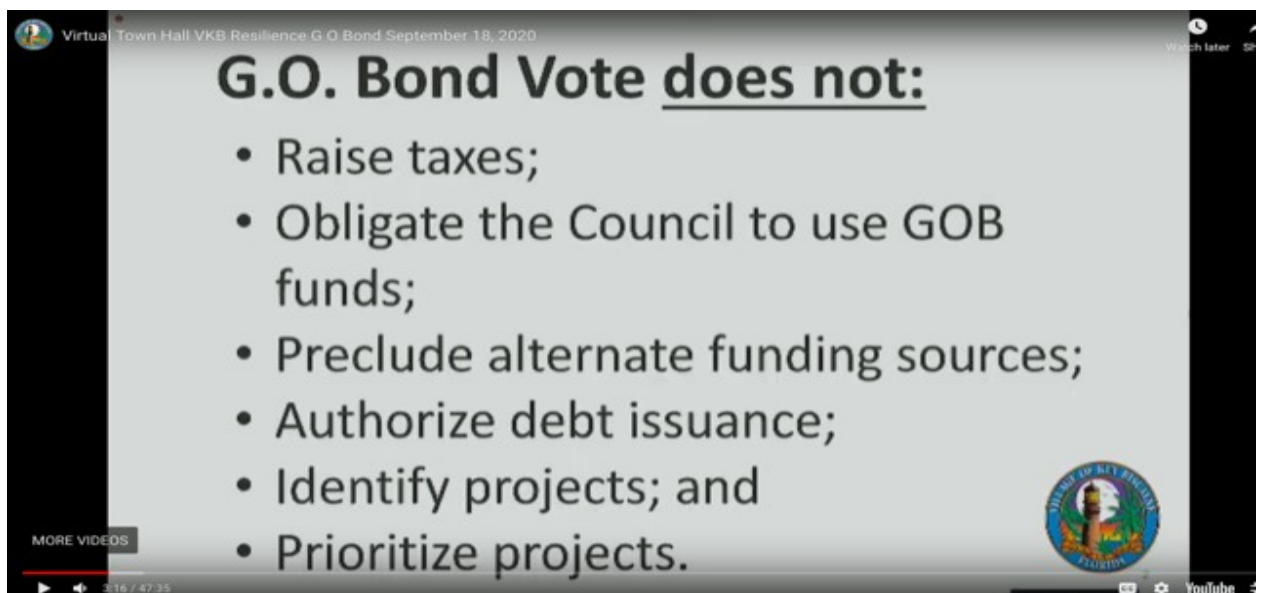
3. In an Affidavit filed on June 2, 2021 in opposition to Defendant's Motion for Summary Judgment, Plaintiff Gustavo Tellez stated:

3. *I was not provided with sufficient information to enable me to intelligently cast my ballot.*

4. *Based upon my knowledge and belief, the projects identified to be funded by the GO BOND changed over time.*

5. *Further, different elected officials, city employees and members of the community made differing and contradictory statements about the projects that would be funded by the GO BOND.*

6. *For example, at a Virtual Town Hall VKB meeting on September 18, 2020, representatives of the Village, including Village Manager Andrea Agha, showed this power point slide:*



and stated at the 3 minute 13 second mark that projects to be funded by the GO BOND have not been identified.

4. None of this evidence, not even Village Manager Andrea Agha expressly stating that no projects have been identified, is addressed by the Court when it concludes:

7. In addition to the website, the record reflects extensive public notice and information as to how the money would be used, including comments by the Village Manager at the June 30, 2020 Council meeting, newspaper articles discussing the Referendum and its purpose, and virtual town hall meetings, all prior to the November 3, 2020 vote.

B. COURT’S CONCLUSION THAT “NO MONEY HAS BEEN BORROWED” IS NOT RELEVANT TO WHETHER RESOLUTION “AUTHORIZES THE BORROWING OF MONEY” IN VIOLATION OF VILLAGE CHARTER

3. Plaintiff alleges in Count 1 that Resolution 2020-45 “authorizes the borrowing of money,” which is an action that can only be done pursuant to an “ordinance” under the Village Charter. In making this argument, Plaintiff points to the language in Resolution 2020-45 that expressly “authorizes the borrowing of money” “by subsequent ordinance or resolution,” despite the fact that this action can only be done pursuant to an “ordinance” under the Village Charter, not by “resolution.”
4. The Village Charter sets forth the powers and functions of elected officials as well as the organization and procedures of the Village and expressly requires that certain actions must be “effected or authorized” by “ordinance.”
5. One of the enumerated actions that require an ordinance is any action to “Authorize the borrowing of money”:

Section 4.03. - Action requiring an ordinance.

In addition to other acts required by law or by specific provision of this Charter to be effected or authorized by ordinance, those acts of the Village Council shall be by ordinance which:

- 1. Adopt or amend an administrative regulation or establish, alter or abolish any Village office, department, board or agency;*
- 2. Establish a rule or regulation the violation of which carries a penalty;*
- 3. Levy taxes or appropriate funds;*
- 4. Grant, renew or extend a franchise;*
- 4. Set service or user charges for municipal services or grant administrative authority to set such charges;*
- 5. Authorize the borrowing of money;*
- 6. Convey or lease or authorize by administrative action the conveyance or lease of any lands of the Village;*
- 7. Amend or repeal any ordinance previously adopted, except as otherwise provided in this Charter; or*
- 8. Approve a Capital Project in excess of \$500,000. When an ordinance authorizing a Capital Project in excess of \$500,000 has been approved upon first reading, notice of the date and time of the second reading shall be provided ("Second Reading Notice"). The Second Reading Notice shall include a brief description of the Capital Project and its cost and shall be published in addition to and contemporaneously with notices regularly published for second readings. Each Village elector shall be sent a Second Reading Notice by postcard. Action taken by the Council on a Capital Project shall not be voided by the failure of an individual Village elector to receive a Second Reading Notice postcard.*

6. Resolution 2020-45 provides at Section 8:

If a majority of the votes cast by qualified electors of the Village at the Referendum approves the ballot question concerning the Project, the Village shall be authorized to issue the Bonds in the manner provided herein. The Bonds may be issued all at one time or in part from time to time as the Village may in its discretion thereafter determine by subsequent ordinance or resolution. (emphasis added).

7. The Court granted summary judgment as to Count 1 by concluding that:

If the Village in the future does attempt to borrow money without the passage of an ordinance, that would be in violation of section 4.03(b) and can be challenged at that time. However, since there is no evidence presented that any money has been borrowed or can be borrowed without an ordinance, the Court hereby enters final summary judgment in favor of the Village as to Count I of the Amended Complaint. (emphasis added)

8. The plain language of Resolution 2020-45 contradicts the Court's factual finding that "there is no evidence presented that any money...can be borrowed without an ordinance." Section 8 of the resolution expressly authorizes the borrowing of money through a resolution, something that is specifically prohibited by the Village Charter.
9. In addition, whether or not the Defendant has actually borrowed any money pursuant to Resolution 2020-45 is not the issue; rather, the issue is whether the Resolution "authorizes the borrowing of money." The plain language of Resolution 2020-45 "authorizes the borrowing of money" "by subsequent ordinance or resolution," despite the fact that this action can only be done pursuant to an "ordinance" under the Village Charter, not by "resolution."
10. The Court invites Plaintiff to sue in the future:

If the Village in the future does attempt to borrow money without the passage of an ordinance, that would be in violation of section 4.03(b) and can be challenged at that time.

11. This invitation to sue in the future misses the point because the violation of the Charter has already taken place. Resolution 2020-45 "authorizes the borrowing of money" "by subsequent ordinance or resolution," despite the fact that this action can

only be done pursuant to an “ordinance” under the Village Charter, not by “resolution.”

12. Plaintiff seeks, and is entitled to, a declaratory judgment as to whether Resolution 2020-45 “authorizes the borrowing of money” in contravention of Section 4.03 of the Village Charter.

C. PLAINTIFF IS ENTITLED TO A DECLARATORY STATEMENT AS TO WHETHER THE REFERENDUM COMPLIES WITH SECTION 5.03 OF THE VILLAGE CHARTER

13. In Count 2, Plaintiff seeks a declaratory judgment that the Referendum does not contain language expressly required by the Village Charter.
14. The Village Charter provides express language that must be included in any “ordinance or other ballot issue to be voted on by the electors”:

Section 5.03. - Form of ballots.

A charter amendment, ordinance or other ballot issue to be voted on by the electors shall be presented for voting by ballot title. The ballot title of a measure may differ from its legal title and shall be a clear, concise statement describing the substance of the measure without argument or prejudice. Below the ballot title shall appear the following question: "Shall the above described [amendment/ordinance/proposal] be adopted?" **Immediately below such question shall appear, in the following order, the word "YES" and also the word "NO."** (emphasis added)

15. Fla. Stat. § 100.341 provides the Florida statutory requirements for a bond referendum:

100.341 Bond referendum ballot provides.—The ballots used in bond referenda shall include a printed description of the issuance of bonds to be voted on as prescribed by the authority calling the referendum. A separate statement of each issue of bonds to be approved, giving the amount of the bonds and interest rate thereon, together with other details necessary to inform the electors, shall be printed on the ballots in connection with the question “For Bonds” and “Against Bonds.”

16. Fla. Stat. § 100.311 makes clear that the law of the municipality governs bond referendums and that § 100.341 is “**additional and supplementary to any such local law**”:

100.311 Local law governs bond election held by municipalities.—No section of this code controlling or regulating bond referenda shall be deemed to repeal or modify any provision contained in any local law relating to bond referenda held by any municipality, but ss. 100.201-100.351 shall be deemed additional and supplementary to any such local law. (emphasis added).

17. As such, Fla. Stat. § 100.311 expressly requires that any bond referendum by the Village of Key Biscayne needs to conform with the requirements of the Village Charter.

18. The Court concludes:

The Village argues that Charter section 5.03 does not apply. However, the Court need not reach this issue because, even if section 5.03 were to apply, binding case law establishes that such “highly technical” arguments are insufficient to invalidate ballot language. See Metropolitan Dade County v. Shiver, 365 So. 2d

210, 213 (Fla. 3d DCA 1978) (finding that “ballot language is in compliance with the” statutory requirements, notwithstanding “slight variation in ballot language”). In fact, when confronted with this issue, the Florida Supreme Court has held that voters are “afforded an opportunity to express themselves fairly,” regardless of whether they are asked to select “Yes” and “No” or “For Bonds” and “Against Bonds.” *State v. Special Tax Sch. Dist. No. 1 of Dade Cty.*, 86 So. 2d 419, 419 (Fla. 1956). In this case, it is clear that “the voters were afforded an opportunity to express themselves fairly and did in fact exercise that privilege.” *Id.* (emphasis added).

19. Plaintiff’s argument is not a “technical argument.” Section 5.03 of the Charter says what it means and means what it says and the Florida legislature made clear in Fla. Stat. § 100.311 that municipal governments must comply with their charters in conducting bond referendums.
20. There is no case law to support the conclusion that compliance with the ballot language requirements of Fla. Stat. § 100.311 nullifies the need to comply with the express requirement in the very same statute that local law must be complied with.
21. From a jurisprudential perspective it is not surprising that there is no case law standing for the proposition that an express requirement in a state election statute is not enforceable.
22. Plaintiff seeks, and is entitled to, a declaratory judgment as to whether the referendum complies with Section 5.03 of the Village Charter.

D. “As a matter of law, the Court finds that the Referendum language is neither confusing nor misleading.”

23. In interpreting the language of a Bond Referendum, the court must look at ballot language "as such language would be construed by a reasonable Voter." *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1375 (Fla. 1991). Under this objective standard, the ballot language is interpreted to mean what the average, reasonable voter in the community understood it to mean when voting.
24. This standard requires the court to presume that voters have familiarized himself with the publicly available materials before voting. *In re Advisory Op. to Att’y Gen. ex rel. Local Trustees*, 819 So. 2d 725,732 (Fla.2002) (citing *In re Advisory Op. to Att’y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So.2d 415 (Fia. 2002)).
25. To determine what the reasonable voter in the community would have known and understood when voting, the court must look to the information that was available before the vote. *Dep’t of Env’tl. Prot. v. Millender*, 666 So. 2d 882, 885-86 (Fla. 1996) (indicating that, in the context of discerning the peoples' intent in enacting a constitutional amendment, the court may "look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent.") (quoting *Plante v. Smathers*, 372 So.2d 933,936 (Fla. 1979)).

26. The evidence on the record shows that:

1. Voters were not provided with sufficient information to enable them to intelligently cast their ballot. *Affidavit of Gustavo Tellez* ¶ 3
2. The projects identified to be funded by the GO BOND changed over time. *Affidavit of Gustavo Tellez* ¶ 4
3. Different elected officials, city employees and members of the community made differing and contradictory statements about the projects that would be funded by the GO BOND. *Affidavit of Gustavo Tellez* ¶5 & 6

27. The question before the Court in this bond validation is whether voters were adequately informed of the issue they were voting on.

28. As such, the Court's conclusion, as a matter of law, that "the record reflects substantial public information informing the citizens of the purpose of the Referendum and use of the funds" is not supported by the facts on record.

E. DISCOVERY PROPOUNDED IS RELEVANT TO ISSUES IN THE AMENDED COMPLAINT

29. The Court characterizes discovery propounded by Plaintiff back in May of 2021 as follows:

Plaintiff has recently propounded discovery that seeks information that is not relevant to the issues in the Amended Complaint or the motion for summary judgment—such as who was involved in creating the website and how it was funded."

30. The record reflects that the interrogatories propounded by Plaintiff include requests regarding information made available to voters prior to the vote, including the following inquiries:

- *Identify all persons who participated in the approval/production of the educational/promotional material for the bond referendum.*
- *Describe the validation criteria for project selection for the Bond website.*
- *Identify all employees of the Village in charge of bond initiative, including public outreach, website, workshops, presentations, tele-canvassing, advertising, telemarketing, and web design and marketing for vkbresilience.org.*
- *Identify the Village's vetting process for all projects mentioned in vkbresilience.org.*

31. Fla. R. Civ. Pro. Rule 1.280(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action.... It is not ground for the objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

32. Plaintiff's discovery is relevant to the issues in the Amended Complaint and Motion for Summary Judgment because it focuses on what information was available to voters prior to the referendum.

CONCLUSION

In assessing whether the Defendant has met its burden to demonstrate that there is an absence of evidence to support the Plaintiff's case in its Motion for Summary Judgment, the Court must view the "evidence and draw reasonable inferences in the light most favorable to the non-movant." *Maddox v. Townsend and Sons, Inc.*, 639 F.3d 214, 216 (5th Cir. 2011). All reasonable doubts about the facts must be resolved in favor of the non-movant. *Coffin v. Brandau*, 597 F.3d 1205, 1210, 1211 (11th Cir. 2010).

The evidence placed on the record by Plaintiff is clear and unrefuted by Defendant:

- Voters were not provided with sufficient information to enable them to intelligently cast my ballot.
- The projects identified to be funded by the GO BOND changed over time.
- Different elected officials, city employees and members of the community made differing and contradictory statements about the projects that would be funded by the GO BOND.

As such, Plaintiff respectfully suggests that Defendant has failed to meet its burden demonstrate that there is an absence of evidence to support the Plaintiff's case.

Respectfully submitted,

/djw/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2021 a true and correct copy of the foregoing has been furnished electronically via the Florida Courts E-filing Portal upon all parties listed on the Service List for this case.

Respectfully submitted,

/djw/

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