

RAYMOND A. DELLASELVA, et al.,

CASE NO. 03-1947 CA WCM

Plaintiffs,

vs.

FLORIDA DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES, et al.,

Defendants.

**ORDER DENYING DEPARTMENT'S MOTION TO DISMISS
COUNTS II AND III OF FIRST AMENDED CLASS ACTION COMPLAINT**

THIS CAUSE came before the Court on September 5, 2006 on the motion of defendants Florida Department of Agriculture and Consumer Services and its Commissioner (the "Department") to dismiss Counts II and III of the First Amended Class Action Complaint. The Court has reviewed the motion and opposing memorandum, heard argument of counsel, and is otherwise fully advised in the premises.

Applicable Legal Standard

The purpose of a motion to dismiss is to determine whether a complaint properly states a cause of action upon which relief can be granted. A court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The sole question is whether,

assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested. *Huet v. Mike Shad Ford, Inc.*, 915 So. 2d 724 (Fla. 5th DCA 2005); *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001). These legal standards guide this Court's analysis and determination of the pending motion.

Plaintiffs' First Amended Class Action Complaint

On October 21, 2005, plaintiffs/class representatives Raymond A. Dellaselva, Mary E. Dellaselva, Joseph B. Dolliver, Nancy C.M. Dolliver, John W. Klockow, Deanna Klockow, Marianne J. Sanson, Charles K. Stroh and Lois A. Stroh filed their First Amended Class Action Complaint (the "Complaint") seeking relief for themselves and the certified class (collectively, the "Class").¹ In relevant part, the Complaint alleges that beginning January 1, 2000, the Department implemented a new, widely expanded citrus canker eradication program involving the destruction of all otherwise healthy, uninfected citrus trees located within 1900 feet of each tree determined through laboratory analysis to be infected with citrus canker. (Complaint, ¶¶ 15-17). The Department adopted the new policy for the stated public purpose of eradicating citrus canker in Florida and protecting the State's valuable commercial citrus industry. (Id.). Since January 1, 2000, the Department has destroyed thousands of otherwise healthy, uninfected citrus trees owned by the Class under

¹ The Class is defined as follows:

All owners of citrus trees within Lee County, incorporated or otherwise, not used for commercial purposes, which were not determined by the Department to be infected with citrus canker and which were destroyed under the CCEP from January 1, 2000 to the present.

the expanded eradication program. (Id., ¶ 4-10). The Class has not received full or adequate compensation for the destruction of their otherwise healthy, uninfected residential citrus trees. (Id.).

Count I of the Complaint asserts a common law claim for inverse condemnation, alleging the Department's physical destruction of the Class' otherwise healthy, uninfected citrus trees constituted a *per se* taking, requiring payment of full and just compensation as required under Article X, § 6(a) of the Florida Constitution. (Complaint, ¶¶ 20-25). Count II is a claim for declaratory judgment seeking, *inter alia*, a declaration that § 581.1845, Fla. Stat., and the Supreme Court's recent decisions in *Haire v. Florida Department of Agriculture*, 870 So. 2d 774 (Fla. 2004) and *Patchen v. Dep't of Agriculture*, 906 So. 2d 1005 (Fla. 2005), do not abrogate the Class' common law inverse condemnation remedy or deprive its members of their constitutional rights to full compensation for the destruction of their property. (Id., ¶¶ 27-36). Count III asserts an alternative claim to recover additional compensation under § 581.1845, Fla. Stat. (Id., ¶¶ 38-39).

The Department's Motion to Dismiss

The Department does not seek dismissal of the common law claim for inverse condemnation (Count I). Moreover, the Department does not challenge the sufficiency of the factual allegations supporting the causes of action pleaded in the Complaint. Instead, the Department seeks dismissal of Counts II and III of the Complaint. The Department argues the claim for declaratory judgment (Count II) is unnecessary and duplicative of Counts I and III, and the alternative claim for additional compensation under § 581.1845 (Count III) fails

because the statute does not create a private cause of action. The Court addresses these arguments below.

Analysis of *Haire and Patchen*

Because the thrust of the Department's motion is based on two recent Supreme Court decisions, the Court begins by briefly analysing these decisions.

Haire v. Florida Department of Agriculture, 870 So. 2d 774 (Fla. 2004) involved a challenge to the constitutionality of the new canker eradication laws authorizing the Department to destroy all otherwise healthy, uninfected citrus trees located within 1900 feet of a citrus tree positively determined to be infected with canker. The Florida Supreme Court upheld the constitutionality of the new eradication laws based largely on the inclusion of a mandatory compensation component:

In this case, we conclude that under the statutory scheme the State is obligated to provide more than token compensation if the State has destroyed a healthy, albeit exposed tree. [footnote omitted] Section 581.1845 expressly states that the specified per-tree amount "does not limit the amount of any other compensation that may be paid ... *pursuant to court order* for the removal of citrus trees as part of a citrus canker eradication program." § 581.1845(4) (emphasis supplied). Thus, the Citrus Canker Law sets a compensation floor that is consistent with the established principle that "the determination of what is just compensation ... is a judicial function that cannot be performed by the Legislature." *Smith*, 110 So. 2d at 407 (quoting *Stafford v. Brevard County*, 92 Fla. 617, 100 So. 451, 454 (1926)).

In accord with our precedent, we conclude that the schedule established by the Legislature sets a floor but does not determine the amount of compensation. When the State destroys private property, the State is obligated to pay just and fair compensation as determined in a court of law. We emphasize the fact that the

Legislature has determined that all citrus trees within 1900 feet of an infected tree must be destroyed does not necessarily support a finding that healthy, but exposed, residential citrus trees have no value. [FN 11]

FN 11. A related issue regarding the payment of compensation is currently before the Court in *Patchen v. State Department of Agriculture & Consumer Services*, 817 So. 2d 854 (Fla. 3d DCA), *review granted*, 829 So. 2d 919 (Fla. 2002). In *Patchen*, the Third District certified the following question of great public importance: [certified question omitted]

Id. at 785.

Patchen v. Dep't of Agriculture, 906 So. 2d 1005 (Fla. 2005) involved review of a narrow question certified by the Third District Court of Appeal to be of great public importance:

Does the Florida Supreme Court's decision in *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990), which held that the Department's destruction of healthy *commercial* citrus nursery stock within 125 feet of trees infected with citrus canker did not compel state reimbursement, also apply to the Department's destruction of uninfected, healthy *noncommercial, residential* citrus trees within 1900 feet of trees infected with citrus canker?

The Florida Supreme Court answered the certified question in the negative, quoting extensively from its decision in *Haire*, thus enabling homeowners to pursue legal claims to recover additional compensation (above the "compensation floor" approved in *Haire*) resulting from the Department's destruction of their otherwise healthy, uninfected residential citrus trees under the canker eradication program.

Legal Analysis

As an initial matter, this Court notes that all other courts which have considered the issues described below have denied identical motions to dismiss filed by the Department.²

Count II - Declaratory Judgment. The Department argues Count II fails to state a cause of action because it is completely dependent on Count III. Thus, the Department argues that if Count III is dismissed, so should Count II. This Court concludes otherwise.

Courts have repeatedly recognized the propriety of determining legal rights or status under statutes through a declaratory judgment action. *See, e.g., Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991). Moreover, numerous decisions acknowledge the propriety of challenging statutes through a declaratory judgment action. *See Wilson v. County of Orange*, 881 So. 2d 625 (Fla. 5th DCA 2004) (reversing dismissal of declaratory relief counts challenging facial constitutionality of statutes and ordinances); *Royal Selections, Inc. v. Florida Department of Revenue*, 687 So. 2d 893 (Fla. 4th DCA 1997) (reversing dismissal of declaratory judgment count, holding that trial court's decision on motion to dismiss

² *In Re: Citrus Canker Litigation*, Miami-Dade County Circuit Court Case No. 03-8255 CA 13, Order Denying Defendants' Motion to Dismiss Second Amended Class Action Complaint entered on December 8, 2005; *Ayers, et al. v. Florida Department of Agriculture and Consumer Services*, Orange County Circuit Court Case No. 05-CA-4120, Order Denying Defendants' Motion to Dismiss First Amended Class Action Complaint entered on February 1, 2006; *Mendez v. Florida Department of Agriculture and Consumer Services*, Palm Beach County Circuit Court Case No. 02-13717 AJ, Order Denying Defendants' Motion to Dismiss Second Amended Class Action Complaint entered on February 24, 2006; and *In Re: Citrus Canker Litigation*, Broward County Circuit Court Case No. 00-18394, Order on the Department's Motion to Dismiss the Third Amended Class Action Complaint, etc. entered on March 8, 2006.

declaratory judgment claim is limited to testing whether plaintiff is entitled to declaration of his rights, not whether it is entitled to declaration in its favor); *X Corp. v. Y Person*, 622 So. 2d 1098 (Fla. 2d DCA 1993); *Adams Packing Association, Inc. v. Florida Department of Citrus*, 352 So. 2d 569 (Fla. 2d DCA 1977).

Count II alleges facts clearly demonstrating an “immediate substantial and actual justiciable controversy concerning future proceedings under the common law remedy of inverse condemnation and the application of § 581.1845 in light of the Supreme Court’s decision in *Patchen*. Count II alleges a present state of facts (Complaint, ¶¶ 27-30); some right of the complaining party (the Lee County certified class) dependent upon the facts or the law applicable to the facts (*Id.*, ¶¶ 32 and 36); some person or persons (the Department) who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or in law (*Id.*, ¶ 33); and a bona fide, actual, present practical need for the declaration concerning the disputed issues (*Id.*, ¶¶ 31, 34 and 35). These allegations suffice to show a “bona fide, actual, present and practical need” for a declaration of the parties’ respective rights vis-a-vis the statute.

The Department also urges dismissal of Count II claiming *Patchen* resolved the disputed issues, thereby rendering futile the claim for declaratory relief. Once again, this Court disagrees. Although the Department will have an opportunity to argue its interpretation of *Patchen* during a hearing on the merits, the test for the sufficiency of the claim for declaratory judgment is not whether the Class will succeed in obtaining the decree

it seeks, but whether it is entitled to a declaration of rights at all. *See Platt v. General Dev. Corp.*, 122 So. 2d 48 (Fla. 2d DCA 1961).

Based on the foregoing, the Court denies the motion to dismiss Count II.

Count III - Statutory Compensation. The Department argues Count III, which asserts an alternative claim to recover additional compensation under § 581.1845, fails to state a cause of action because there is no express cause of action created by § 581.1845 and the Legislature did not intend to imply any such cause of action. This Court disagrees.

In 2002, the Florida Legislature enacted § 581.1845, Fla. Stat., which, in relevant part, provides as follows:

581.1845 Citrus canker eradication; compensation to homeowners whose trees have been removed.--

(1) *The Department of Agriculture and Consumer Services shall provide compensation to eligible homeowners whose citrus trees have been removed under a citrus canker eradication program. Funds to pay this compensation may be derived from both state and federal matching sources and shall be specifically appropriated by law. Eligible homeowners shall be compensated subject to the availability of appropriated funds.*

(2) To be eligible to receive compensation under the program, a homeowner must:

- (a) Be the homeowner of record on the date the trees were removed from the residential property as part of a citrus canker eradication program;
- (b) Have had one or more citrus trees removed from the property by a tree-cutting contractor as part of a citrus canker eradication program on or after January 1, 1995; and

...

(3) The amount of compensation for each tree removed from residential property by the citrus canker eradication program shall be \$55 per tree. If the homeowner's property is eligible for a Shade Dade or a Shade Florida Card, the homeowner may not receive compensation under this section for the first citrus tree removed from the property as part of a citrus canker eradication program.

(4) *The specification of a per-tree amount paid for the residential citrus canker compensation program does not limit the amount of any other compensation that may be paid by another entity or pursuant to court order for the removal of citrus trees as part of a citrus canker eradication program.*

(emphasis added).

Whether a statute serves as the basis for a private cause of action is a question of legislative intent. *See Baumstein v. Sunrise Cmty., Inc.*, 738 So. 2d 420, 421 (Fla. 3d DCA 1999); *see also Nettles v. State*, 850 So. 2d 487, 493 (Fla. 2003) (legislative intent is the “polestar that guides the court’s inquiry”). Courts must determine legislative intent from the plain meaning of the statute. *State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996).

This issue was recently addressed in *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So. 2d 20 (Fla. 2005), a case which is instructive here. While the Department argues § 581.1845 completely eliminated the common law remedy of inverse condemnation, it also argues § 581.1845 does not create a new simplified cause of action entitling homeowners to seek additional compensation under the new statute.

A statute creates a new cause of action if it provides a remedy unavailable under the common law. *See Fla. E. Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631, 632 (Fla. 1933); *see also Gunpowder Horse Stables, Inc. v. State Farm Auto Ins. Co.*, 108 Md. App. 612, 673 A.2d 721, 728 (Spec. App. 1996) (holding statute created a new cause of action

because the burden of proof needed under the statute was less rigorous than the common law burden).

This Court concludes the Complaint properly states a cause of action, in the alternative, to recover additional compensation under § 581.1845 resulting from the Department's destruction of the Class' citrus trees. The plain language of § 581.1845(4) reflects the Legislature's intent that homeowners be afforded the opportunity to seek additional compensation from the Department (or any other entity) above the "compensation floor" provided under the statute. Such an interpretation is also consistent with Chief Justice Pariente's concurring opinion in *Patchen*, which stated that § 581.1845 enhances the homeowners' protection by obviating the need "to pursue an inverse condemnation proceeding. Holding that the statute applies under the circumstances of this case relieves the homeowners of the burden of proving that a taking occurred . . ."

Based on the foregoing, the motion to dismiss Count III is denied.

Conclusion

Based on the foregoing, the Department's Motion to Dismiss Counts II and III of First Amended Class Action Complaint is **DENIED**. The Department shall file its answer to Plaintiffs' First Amended Class Action Complaint within ten (10) days of this order.

12-26-06

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this _____
day of September, 2006. document was signed

DEC 13 2006

by William C. McIver

William C. McIver
Circuit Judge

Copies furnished to:

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