BOARD OF TRUSTEES OF THE CITY OF DELRAY BEACH POLICE AND FIREFIGHTERS RETIREMENT SYSTEM v. CITIGROUP GLOBAL MARKETS: LIMITING THE ENFORCEMENT OF THE FLORIDA SUNSHINE LAW*

Jerome M. Congress**
Stephen H. Cypen***
Todd Kammerman****

I. INTRODUCTION

In *Board of Trustees of the City of Delray Beach Police and Firefighters Retirement System v. Citigroup Global Markets, Inc.*,[1] the Eleventh Circuit Court of Appeals opined on whether a contract made by a governmental entity in private, contrary to the Florida Sunshine Law (the "Sunshine Law"),[2] can be enforced against that government entity by a contracting party that relied on the contract. As discussed in more detail below, the Eleventh Circuit Court of Appeals' pronouncement on this issue conflicts with the pertinent Florida Supreme Court jurisprudence.

II. BACKGROUND

The issue in *Board of Trustees* was whether the lower court had properly denied the defendant's motion to compel arbitration.[3] Defendant Citigroup Global Markets[4] ("Citigroup") was

 Mssrs. Congress and Kammerman are partners at Milberg LLP, and Mr. Cypen is a partner at Cypen & Cypen.

** LL.B., Harvard Law School, 1965; B.A, Cornell University, 1960.

*** J.D., University of Miami, 1968; B.A., University of Florida, 1965.

**** J.D., Benjamin N. Cardozo School of Law, 2002; B.A., Brandeis University, 1999.

1. 622 F.3d 1335 (11th Cir. 2010).

2. Fla. Stat. §§ 286.001–286.29 (2011).

3. 622 F.3d at 1337.

4. Citigroup Global Markets was known as Salomon Smith Barney when it was hired as the Board's pension consultant in October 1995. *Id.*

plaintiff Board of Trustees of the City of Delray Beach Police and Firefighters' Retirement System's (the "Board") pension consultant pursuant to Florida Statute[5] and the Delray Beach City Ordinance.[6]

The Board brought suit against Citigroup in Florida state court alleging claims for breach of contract, fraud, breach of fiduciary duty, and negligent misrepresentation in connection with Citigroup's performance of its duties as the Board's pension consultant.[7] Citigroup removed the case to the United States District Court for the Southern District of Florida[8] and subsequently filed a motion to compel arbitration.[9]

Citigroup's motion was based on arbitration clauses contained in account applications signed by the Board's chairman. These arbitration clauses were extremely broad and purported to encompass any claim asserted by the Board against Citigroup regardless of whether such claim had any relationship to those account agreements.[10]

The district court denied Citigroup's motion to compel arbitration on the basis that the Board's chairman did not have actual or apparent authority to amend the pension-consultant contracts.[11] Citigroup subsequently appealed the decision to the Eleventh Circuit pursuant to 9 U.S.C. § 16(a)(1)(B).[12]

Before the Eleventh Circuit, the Board defended its position that its chairman had neither actual nor apparent authority to amend the pension-consultant contracts by agreeing to arbitrate any dispute that arose out of those contracts. Specifically, the Board argued that its chairman had no actual authority because: (1) the Board did not expressly delegate such authority to its chairman; (2) the Board did not impliedly delegate such authority to its chairman; (3) the Board's chairman believed that he lacked the authority to amend the pension-consultant contracts; (4) the

5. Fla. Stat. §§ 175.071(6)(a), 185.06(5)(a) (2011).

6. City of Delray Beach Code (Fla.) § 33.66(G) (current through June 21, 2011).

7. *Bd. of Trustees of the City of Delray Beach Police & Firefighters' Ret. Sys. v. Citigroup Global Mkts., Inc.*, 2009 U.S. Dist. LEXIS 57476 at *5 (S.D. Fla. June 23, 2009).

8. *Id.* at *2.

9. *Id.* at *5.

10. *Id.* at *4.

11. *Id.* at *11.

12. *Bd. of Trustees*, 622 F.3d at 1337; *see* 9 U.S.C. § 16(a)(1)(B) (2006) (permitting the interlocutory appeal of an order denying a motion to compel arbitration under 9 U.S.C. § 4).

Board had no power to delegate such authority; and (5) Florida's Sunshine Law required any decision to amend the pension-consultant contracts to be made at a public meeting.[13] The Board argued that its chairman had no apparent authority because no action by the Board manifested apparent authority for its chairman to amend the pension-consultant contracts.[14]

The Eleventh Circuit, in a two-to-one decision authored by Judge William H. Pryor, reversed the district court's decision and remanded with instructions to grant Citigroup's motion to compel arbitration.[15] The Board filed a motion for rehearing, which the Eleventh Circuit denied without opinion.

This Article will discuss the Eleventh Circuit's holding on the Sunshine Law. Specifically, it will review Florida caselaw and demonstrate why the Eleventh Circuit's holding conflicts with controlling Florida law.

III. FLORIDA'S SUNSHINE LAW

The Eleventh Circuit assumed that the Sunshine Law applied to the contract at issue, but held that it protected only aggrieved private citizens, not the governmental entity itself.[16] It was the Board's position that no decision to amend the pension-consultant contracts ever took place, and that the ability to make such an amendment was never delegated to the Board's chairman.[17] The Board argued, however, that if the court were to find that the Board's chairman did have authority to amend the pension-consultant contracts, such a delegation of authority did not take place in public, as required by the Sunshine Law, and therefore it was not a valid delegation.[18] The Authors believe that, in holding that the Sunshine Law could not be invoked by the Board, the Eleventh Circuit ignored or misconstrued controlling Florida law. This issue is significant because it goes to the heart of the Sunshine Law's enforceability.

The Sunshine Law provides, in pertinent part, that:

13. *Bd. of Trustees*, 622 F.3d at 1340.
14. *Id.*
15. *Id.* at 1344.
16. *Id.* at 1341–1342.
17. *Id.* at 1340.
18. *Id.* at 1341.

> (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, *and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting*. The board or commission must provide reasonable notice of all such meetings.[19]

The statute's plain language makes no distinction as to who is trying to enforce the action or decision that is subject to the Sunshine Law.[20] In *Board of Trustees*, however, the Eleventh Circuit held that an agreement made in violation of the Sunshine Law is binding on the governmental agency at issue, even though it might be open to challenge by a private citizen that was injured by the agreement:

> *Killearn Properties, Inc. v. City of Tallahassee* forecloses the related argument of the Board that its alleged violation of the Florida Sunshine Law could excuse it from complying with the terms of any contracts that it might have given Adams the authority to execute, including the account agreements. That decision makes clear as follows that a government agency cannot benefit from its own violation of the Sunshine Law: "It is one thing for an aggrieved citizen to seek to have set aside an agreement between a government and another party because of Sunshine Law violations; but quite another for the government entity itself to seek to escape its obligation based upon its own alleged wrongdoing."

---

19. Fla. Stat. § 286.011(1) (emphasis added).

20. Moreover, a public meeting is required regardless of whether the Board makes the decision or delegates that decision to someone else:

> A line of Florida cases has expressed the position of the courts that governmental [entities] may not carry out decision-making functions outside the Sunshine Law by delegating such authority. When public officials delegate de facto authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, those delegated that authority stand in the shoes of such public officials insofar as the application of the Government-in-the Sunshine Law is concerned.

Fla. Att'y Gen. Op. INFORMAL (Oct. 21, 1993) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/A3ECB3D542F41C2685256CBF005F2FF1) (citing *News-Press Publ'g Co. v. Carlson*, 410 So. 2d 546, 547–548 (Fla. 2d Dist. App. 1982)) (footnotes omitted).

> The Board does not explain why this decision is mistaken or identify any other Florida precedent that is inconsistent with it.[21]

In so holding, the Eleventh Circuit overlooked the Board's citations to *Frankenmuth Mutual Insurance Co. v. Magaha*[22] and *Broward County v. Conner*.[23] In *Frankenmuth*, the Florida Supreme Court effectively overruled *Killearn* on the issue presented.[24] Moreover, it validated language in *Broward County* that conflicts with the holding in *Killearn*.[25] *Frankenmuth* and *Broward County* both hold that when a contract on behalf of a government entity is subject to the Sunshine Law and is consummated in violation of that law's provisions, that contract cannot be enforced over the objection of that government entity even if the other contracting party has relied to its detriment on that agreement, and even if there is no other basis for challenging the binding nature of the contract.[26]

In *Frankenmuth*, the county commission argued that it was not bound by a computer lease agreement under which the county had used equipment for many years. The Florida Supreme Court held that the county commission could be held to have ratified the lease agreement although it did not originally approve it. It further held that no such ratification would be binding unless it occurred in a public meeting pursuant to the Sunshine Law, and public policy precluded enforcement of contracts that did not comply with that law even if, as occurred in *Frankenmuth*, the party seeking to enforce the contract reasonably relied on the contract purportedly made in the governmental entity's name:

---

21. 622 F.3d at 1341–1342 (quoting *Killearn Props., Inc. v. City of Tallahassee*, 366 So. 2d 172, 181 (Fla. 1st Dist. App. 1979)) (internal citations omitted).

22. 769 So. 2d 1012 (Fla. 2000).

23. 660 So. 2d 288 (Fla. 4th Dist. App. 1995). In *Board of Trustees*, the Board submitted to the court a letter pursuant to Fed. R. App. P. 28(j) informing the court of the decisions in *Frankenmuth* and *Broward County*.

24. *See* 769 So. 2d at 1021 (holding that because an approval of a lease or lease purchase agreement is required to be made in accordance with the Sunshine Law, any subsequent ratification of that agreement must also conform to Sunshine Law requirements).

25. *Id.*

26. *Id.*; 660 So. 2d at 290.

> As stated by the First District in *City of Panama City*, . . . "taxpayers should not be held accountable on a contract unless the contract has been entered into according to the strict letter of the law. Otherwise, corrupt (or merely inept) public officials could subject the public to untold financial liability."[27]

Furthermore, in a ruling that contradicted the approach taken in *Killearn* and was favorably cited in *Frankenmuth*,[28] the court in *Broward County* held that the agreement at issue could not be enforced under the Sunshine Law over the county's objection despite the finding of a lower court that "the agreement had been partly performed" and that the other parties to the contract "had relied to their detriment based on the representation of the county's agents and employees; and, that the county was estopped to deny the settlement."[29] Florida's Fourth District Court of Appeal stated:

> In the present case, the trial court has essentially determined that the county entered into a contract by virtue of the actions of its attorneys, without formal action by the county commission at a meeting as required by the statute. *If the county could not have entered into this contract without action taken at a meeting, it necessarily follows that the actions of the county's attorneys could not bind the county to specific performance of a contract in the absence of proper commission approval*.[30]

IV. CONCLUSION

In light of *Frankenmuth* and its approval of *Broward County*, the Eleventh Circuit's decision on this issue in *Board of Trustees* conflicts with governing Florida law. This decision goes to the heart of whether Florida governmental entities are empowered to invoke the provisions of the Florida Sunshine Law for their own (i.e. the public's) benefit. It remains to be seen whether subse-

27. 769 So. 2d at 1021 (quoting *City of Panama City v. T & A Utils. Contractors*, 606 So. 2d 744, 747 (Fla. 1st Dist. App. 1992)).

28. *Id.*

29. 660 So. 2d at 290.

30. *Id*. (emphasis added).

quent Florida decisions will follow *Board of Trustees* on this issue or adhere to existing Florida Supreme Court precedent.