

5F, LLC v. Hawthorne

Decided Feb 26, 2021

Case No. 2D19-2574

02-26-2021

5F, LLC, Appellant, v. BRUCE N.
HAWTHORNE and CATHLEEN A.
HAWTHORNE, Appellees.

David M. Levin and Jason A. Lessinger of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellant. Bruce N. Hawthorne and Cathleen A. Hawthorne, pro se.

SLEET, Judge.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED Appeal from the Circuit Court for Lee County; Keith R. Kyle, Judge. David M. Levin and Jason A. Lessinger of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellant. Bruce N. Hawthorne and Cathleen A. Hawthorne, pro se. SLEET, Judge.

5F, LLC, appeals the trial court's final summary judgment in favor of Bruce and Cathleen Hawthorne in 5F's action for trespass. Because the Hawthornes have a common law right under Florida law to wharf out and construct a dock out to navigable waters without 5F's consent, we affirm. *2

In 2011, 5F acquired a substantial portion of State-owned submerged lands around Boca Grande Island, including submerged land adjacent to the Hawthornes' upland waterfront property. Thereafter, 5F served notices upon upland property owners living on Boca Grande warning them that if they attempted to construct docks over

and beyond 5F's submerged lands, the owners would be subject to an action for injunctive relief and trespass by 5F. 5F demanded money from upland owners in exchange for 5F's waiver of its purported right to file an action for trespass and injunctive relief to prevent the construction of the docks over its submerged land. Some owners settled, but others did not. 5F demanded \$100,000 from the Hawthornes in exchange for 5F's permission to allow the Hawthornes the right to build their boat dock beyond 5F's submerged land. Thereafter, 5F demanded the Hawthornes pay \$162,000 to purchase 5F's submerged land underneath their dock. The Hawthornes rejected both demands.

On June 1, 2017, the Florida Department of Environmental Protection (FDEP) granted a general permit to the Hawthornes to construct a dock extending over 5F's submerged land to the point of navigability. FDEP required the Hawthornes to comply with all State guidelines, including but not limited to size and length of the dock, minimum water level depths, and environmental and navigational provisions.

On September 27, 2017, Lee County permitted the construction of the Hawthornes' dock and required the Hawthornes to construct the dock in accordance with the plans submitted, which provided the dock would extend over 5F's submerged land to the point of navigability. On October 17, 2017, the Hawthornes received a Receipt of Submission from FDEP for a FDEP Self Certification Permit. The permit and *3 state

regulations allowed the Hawthornes to construct their dock beyond the mean low water mark over 5F's submerged land.

When the Hawthornes commenced construction of their dock, 5F filed an action for trespass and permanent injunctive relief. The Hawthornes answered the complaint and filed a counterclaim against 5F for slander of title. On October 4, 2018, the trial court granted final summary judgment in favor of the Hawthornes on 5F's action for trespass and injunctive relief. Both parties relied upon our decision in 5F, LLC v. Dresing, 142 So. 3d 936 (Fla. 2d DCA 2014). 5F argued that Dresing limited the Hawthornes' right to construct the dock only to the low water line. The Hawthornes countered that Dresing created no such limitation and that they had a right to construct their dock beyond the low water line and over 5F's submerged land up to the point of navigability. The trial court ruled that the Hawthornes, as riparian owners,¹ have a common law right to construct a dock over privately owned submerged land adjacent to their upland property and out to navigable water without the consent of the owner of the submerged land. 5F stipulated to the entry of a final judgment in favor of the Hawthornes on the slander of title with prejudice and stipulated to entry of a final judgment in favor of the Hawthornes on 5F's claim for trespass. 5F reserved its right to appeal the trial court's final summary judgment on its trespass action. This appeal ensued. *4

¹ The word "riparian" technically refers "to land abutting non-tidal [sic] or navigable river waters whereas 'littoral' refers to the land abutting navigable ocean, sea, or lake waters." Brannon v. Boldt, 958 So. 2d 367, 372 n.3 (Fla. 2d DCA 2007) (quoting Kester v. Tewksbury, 701 So. 2d 443, 444 n. 2 (Fla. 4th DCA 1997)). However, in keeping with common practice in Florida, we will use the term "riparian." See id. ("Although the use of 'riparian' in this case

is technically incorrect, it is consistent with the accepted usage in Florida cases."). ----

The material facts are undisputed, and the standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo. See Gibson v. Wells Fargo Bank, N.A., 255 So. 3d 944, 946 (Fla. 2d DCA 2018).

On appeal, 5F contends that our Dresing holding limits a riparian owner's right to construct a dock on his or her upland property to only the low water line, rather than to the point of navigability. 5F relies upon seven words found in the following paragraph in Dresing:

We conclude there is a common law qualified riparian right or privilege to construct piers or wharves from the riparian owner's land onto submerged land to the point of navigability **but not beyond the low water line**, subject to the superior and concurrent rights of the public and to applicable regulations. This is true regardless of whether the submerged lands are held in trust by the State or privately held.

Dresing, 142 So. 3d at 947 (emphasis added).

In Dresing, this court meticulously articulated the history and precedent concerning Florida's riparian rights and the well settled proposition that a riparian owner has a common law right to construct a dock out to the point of navigability regardless of whether the submerged land is held in trust by the State or privately held. Id. at 939-46. This court has recognized that "there is extensive supreme court authority establishing the riparian right to 'wharf out,' at least to the low water line, subject only to the public trust." Id. at 943. But to be clear, the issue of a riparian owner's right to construct a dock beyond the low water line to the point of navigability was not addressed by this court in Dresing. There, the riparian owner sought to build a pier upon which he intended to

enjoy his waterfront view. He was not seeking to build a boat dock with access to navigable water. The pier did not extend beyond the low water line or interfere with navigation. But the "issue of wharfing out beyond the low water mark *5 [was] not before this court." Id. at 946. Accordingly, this court in Dresing did not impose a limitation on a riparian owner's right to construct a dock over privately submerged land out to the point of navigability.

As we explained in Dresing, the State of Florida holds title to submerged lands and this title is held in trust for the people for the purposes of navigation, fishing, bathing, and similar uses. See id. at 945; art. X, § 11, Fla. Const. Any private entity that obtains these lands from the State is subject to that trust obligation not to interfere with the riparian rights of upland owners. Dresing, 142 So. 3d at 945. The Florida Supreme Court has specified:

As at common law, this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, [to wit]: the service of the people.

However, consonant with the common law rule, the State may dispose of submerged lands under tidal waters to the extent that such disposition will not interfere with the public's right of navigation, swimming and like uses. Moreover, **any person acquiring any such lands from the State must so use the land as not to interfere with the recognized common law riparian rights of upland owners** (an unobstructed view, ingress and egress over the foreshore from and to the water).

Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957) (emphasis added); see also Williams v. Guthrie, 137 So. 682, 685 (Fla. 1931) ("[I]n this state

riparian owners have the riparian right to construct wharves from the upland to reach the navigable water, when not objected to by the sovereign or specially forbidden by statute."); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491, 501 (Fla. 1917) (addressing the narrow issue of constructing wharves beyond the low water mark to the channel where Theisen owned only to the high water mark). *6

After Hayes, the Florida Supreme Court clarified that riparian rights include "(1) general use of the water adjacent to the property, (2) to wharf out to navigability, (3) to have access to navigable waters and (4) the right to accretions." Belvedere Dev. Corp. v. Dep't of Transp., Div. of Admin., 476 So. 2d 649, 651 (Fla. 1985) (quoting Belvedere Dev. Corp. v. Div. of Admin., State Dep't. of Transp., 413 So. 2d 847, 851 (Fla. 4th DCA 1982)). Thereafter, the district courts followed suit. See Brannon, 958 So. 2d at 372-73; BB Inlet Prop., LLC v. 920 N. Stanley Partners, LLC, 293 So. 3d 538, 543 (Fla. 4th DCA 2020); Shore Vill. Prop. Owners' Ass'n v. State Dep't of Env't. Prot., 824 So. 2d 208, 211 (Fla. 4th DCA 2002).

In Hayes, the Florida Supreme Court was prophetic when it expressed its concern about private entities owning submerged lands in and around areas such as Boca Grande. "Increased interest in this type of land bears forebodings of even more complex problems in the future. These lands constitute tremendously valuable assets. Like any other fiduciary asset, however, they must be administered with due regard to the limitations of the trust with which they are impressed." Hayes, 91 So. 2d at 800.

5F's alleged economic purpose for obtaining the submerged lands is unclear, but its actions are distinct. Since dredging and filling of land is no longer a commonly accepted practice and Boca Grande uplands seem to be substantially developed, the economic goal appears to be that of

extracting money from riparian owners who want to build a dock over the submerged lands out to navigable water.

It is undisputed that the Hawthornes' dock was constructed in accordance with the permits granted by Lee County and the State of Florida. Lee County and FDEP expressed no concerns that the Hawthornes' dock interfered with the public's right to access the water, impaired vessel navigation, or detrimentally affected the environment. *7 And 5F does not contend that the dock extends beyond navigable waters, harms marine life, causes environmental concerns, or contravenes the public trust. This is clear evidence that the Hawthornes' dock did not contravene the public trust or sovereignty for the submerged land.

Finally, 5F's property rights are subordinate to the public trust. See Dresing, 142 So. 3d at 946 (" [T]he rights of the public are superior to those of private landowners."). The State of Florida is still in charge of the supervision and disposition of submerged lands and is presumed to give due regard to private rights as well as the public's rights. Private ownership of submerged land does not confer any right upon the private owner to

require consent to, prevent the exercise of, extract payment in exchange for, or declare a trespass in connection with the exercise of a riparian owner's right to construct a dock from his or her upland property over the submerged land and out to navigable waters in compliance with local and state regulations.

5F's demand to the Hawthornes to avert a lawsuit against them and its subsequent demand that the Hawthornes pay for 5F's submerged land in order to obtain the right to construct their dock contravenes the public trust doctrine and impermissibly interferes with the Hawthornes' riparian rights. 5F may not prevent—or demand monetary compensation in exchange for its consent to—the Hawthornes' exercising their well-established riparian right to construct a dock out to navigable waters. Accordingly, we affirm.

Affirmed. CASANUEVA and ATKINSON, JJ.,
Concur.
