

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 2009-CA-1008-K

CITY OF KEY WEST, FLORIDA
CITIZEN REVIEW BOARD,

Plaintiff,

v.

PABLO RODRIGUEZ,

Defendants.

MOTION FOR FINAL SUMMARY JUDGMENT IN FAVOR
OF PABLO RODRIGUEZ
And incorporated Memorandum of Law

PABLO RODRIGUEZ, the Defendant herein, through undersigned counsel and pursuant to *Florida Rule of Civil Procedure 1.510(b)*, moves for the entry of a judgment in his favor, as to the Complaint filed by the Plaintiff, **CITY OF KEY WEST, FLORIDA; CITIZEN REVIEW BOARD**, and as grounds thereof, the Defendant would show that there is no genuine issue as to any material fact and the Defendant is entitled to a judgment as to the Complaint as a matter of law.

I. BACKGROUND:

The following facts are on the face of the complaint and attached exhibits to the complaint.^{1/}

Defendant, **SERGEANT PABLO RODRIGUEZ**, at all times, was and is a sworn law enforcement officer employed by the City of Key West.

The Citizens Review Board began an investigation relative to a search warrant affidavit executed by Sergeant Pablo Rodriguez during the arrest of Omar “Brown, while Sgt. Rodriguez was acting in his official capacity as a sworn police officer.

On February 9, 2009, the Citizens Review Board issued a subpoena to Sergeant Pablo Rodriguez, returnable April 27, 2009, to testify before the Board’s members.

Sgt. Rodriguez did not appear before the Board on April 27, 2009.

On June 17, the Citizens Review Board filed the present suit to enforce its subpoena.

^{1/} *Rule 1.130, Florida Rules of Civil Procedure* provides that “[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes.” *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *A.S.J. Drugs, Inc. v. Berkowitz*, 459 So.2d 348 (Fla, 4th DCA 1984).

II. THE PLEADINGS:

- 6-15-09 Plaintiff filed a complaint to enforce the subpoena;
- 6-24-09 The court entered a scheduling order and noticed a status conference;
- 7-15-09 Defendant filed a motion to dismiss the complaint;
- 10-1-09 A hearing was held on the motion to dismiss;
- 10-6-09 The Court entered a written order denying the motion to dismiss;
- 10-5-09 Defendant filed his answer and affirmative defenses;

This litigation is at issue.

THE LAW:

A summary judgment is a pretrial mechanism, the principal function of which is to avoid the time and expense of a useless trial if it clearly appears from the pleadings, affidavits, depositions and other evidence in the record that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *Fish Carburetor Corp. v. Great American Insurance Co.*, 125 So.2d 889, 891 (Fla. 1st DCA 1961); *Suggs v. Allen*, 563 So.2d 1132 (1st DCA 1990); *see also Busbee-Bailey Tomato Co. v. Bailey*, 463 So.2d 1255 (Fla. 1st DCA 1985).^{2/} Florida Law requires that the movant for a summary judgment

^{2/} The summary judgment procedure in federal court is not regarded as a disfavored procedural shortcut, but as an integral part of the federal rules, which

demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Allstate Insurance Co. v. Powell*, 420 So.2d 113 (Fla. 4th DCA 1982). If the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law, the motion for summary judgment must be granted. *Rule 1.510(e), Florida Rules of Civil Procedure; Connell v. Sledge*, 306 So.2d 194 (Fla. 1st DCA 1975). In order to overcome a motion for summary judgment, the Plaintiff must establish a record that demonstrates a genuine issue of material fact as to some element of the case that is disputed by the Defendant. *Hitchcock v. F.S. Disposition, Inc., et al.*, 704 So.2d 1118 (Fla. 2d DCA 1998). More specifically, once the Defendant demonstrates the absence of a genuine issue of material fact by showing that the Plaintiff is unable to present requisite proof as required by the

are designed to secure the just, speedy and inexpensive determination of every action. *Celotex Corp. V. Catrett*, 477 U.S. 317, 327 (1986). The very purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986). Similarly, Florida courts should not treat the summary judgment procedure with any less respect. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *see also Keller v. Penovich*, 262 So.2d 243 (Fla. 4th DCA 1972). Even Florida is recognizing the advantage of granting final summary judgments when appropriate in order to avoid the time and expense of trial. *See, The Florida Bar Journal/October 2006, Allowing Interlocutory Appeals from Orders Denying Summary Judgment by Robert G. Kerrigan, at page 42.*

pleadings, the Court must grant the motion for summary judgment. *Simme v. Helms*, 345 So.2d 721 (Fla. 1997). *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *Sasson v. Rockwell Mfg. Co.*, 715 So.2d 1066 (Fla. 3d DCA 1998); *Board of Trustees v. Florida Public Utilities Co.*, 599 So.2d 1356 (Fla. 1st DCA 1992).

The Plaintiff is seeking to enforce a subpoena in accordance with the City of Key West charter amendment establishing the CRB. This procedure is equitable in nature and is governed by *F.S. §26.012(2)(c)* and (3). *Crapo v. HCA, Inc.*, 968 So.2d 54 (Fla. 1st DCA 2007); *Sirgany International, Inc. v. Miami-Dade County*, 887 So.2d 381 (Fla. 3d DCA 2004).

1. There is no delegated authority for the CRB to have subpoena

power:

Municipalities have only such powers as are granted them by the legislature in express terms or arise by implication as an incident to powers expressly granted. Since Monroe County is not chartered³/, all the authority granted to the City of Key West comes from the *Florida Constitution, Article VIII, §2*; and *F.S. §166.021* [Municipalities].

The City of Key West Charter contains no investigative and subpoena power for any of its elected officials and/or city employees and administrators. As noted

³ / Monroe County is governed by a Code.

in *Barry v. Garcia*, 573 So.2d 932 (Fla. 3d DCA 1991), there must be a clear authority to either issue a subpoena by municipal officials in the first instance or for them to delegate this power to nonelected persons. Then, if the city opts to change the manner in delegating the power to another entity of an independent board, the change must be accomplished with the passage of an ordinance.

Regardless of the passage of an ordinance, **there must first be the existence of the power by municipal officials.**

The Municipal Home Rule Powers Act^{4/} permits a municipality to act if (1) it is exercising its authority for a valid municipal purpose, and (2) there is no constitutional or statutory limit on the exercise of that authority. *Pleasures II Adult Video, Inc. v. City of Sarasota*, 833 So.2d 185 (Fla. 2d DCA 2002).

The reliance of *Timoney v. City of Miami*, 990 So.2d 614 (Fla. 3d 2008) is without merit. The City of Miami is a municipality within the County of Miami-Dade. The preamble to the Miami Dade charter espouses the desire to “serve [the] present and future needs, and to endow our municipalities with the rights of self determination in their local affairs...” The Miami-Dade Home Rule Charter empowers its Board to “make investigations of county affairs...and for these

^{4/} F.S. §166.021.

purposes...subpoena witnesses ...and require the production of records.”^{5/}

Similarly, the CRB’s reliance on *Dibb v. County of “San Diego*, 884 P.2d 1003 (Cal. 1994) is without merit since the statutory and constitutional make up of San Diego is not akin to Monroe County and the City of Key West and whether there was a proper delegation of authority.

There is no provision in the Municipal Home Rule Powers Act to make investigations or subpoena witnesses in order to carry out the purpose of making investigations.

Although the CRB relies upon *Barry v. Garcia*, 573 So.2d 932 (Fla. 3d DCA 1991), as support for its subpoena power, in actuality, the Third District Court of Appeal, in limiting the right of a non-elective board from exercising subpoena power, stated at page 936:

Generally a municipality derives its power of subpoena in connection with its power to legislate, or when exercised, a quasi judicial power. When a **municipal charter** of special act grants the use of subpoena power and prescribes, if any, **its manner of delegation, the specific delegation authorized** is the only means available by the governing authorities to the exclusion of any general grant of power or authority.[emphasis added]

^{5/} / It was this power which was specifically delegated to its Office of Inspector General. *Sirgany International, Inc. v. Miami-Dade County*, 887 So.2d 381, n.1 (Fla. 3d DCA 2004).

Nowhere can the CRB exhibit to this Court or in its exhibits that the CRB was delegated subpoena power from an elected official.

2. There is no delegated authority for the CRB to have subpoena power as to this Defendant:

Even if the subpoena power of an independent board is lawful, the execution of this power is not unrestricted. In *Timoney v. City of Miami Civilian Investigation Panel*, 917 So.2d 885 (Fla. 3d 2005) the court's refusal to enforce a subpoena for highly sensitive operation records was upheld.

So, too, in *Demings v. Orange County*, 15 So.3d 604 (Fla. 5th DCA 2009), the court refused to allow an independent review board subpoena a sworn police officer because to mandatory provisions of *F.S. §112* prevail as the investigation of sworn police officers.

In fact, the Fifth DCA panel stated:

We note that the Attorney General has reached a similar conclusion. In an informal opinion of the Attorney General of Florida, dated March 22, 2004, the city attorney for Key West asked whether the city could create a board with the authority to "receive, investigate and make recommendations regarding complaints of police officer misconduct independent of the internal affairs procedures established by the [police department] pursuant to section 112.533(1), Florida Statutes." Beginning with the presumption that such ordinances and charters were valid, the Attorney General concluded that the statute provided the "exclusive means to investigate complaints against law enforcement officers" and the Legislature's prescription of such procedure effectively prohibited investigations from being done in any other manner. He also concluded that there did "not appear to be any provision for a citizens complaint review board to utilize the investigative procedures contained in Part VI, Chapter

112” or “to operate as the receiving entity for complaints against law enforcement officers” under that statute. Subsequently, in Opinion of the Attorney General of Florida 2006-35 (2006), the Attorney General reached the same conclusion in a formal opinion, finding that the Miami-Dade Police Department was the “exclusive” agency responsible for receiving, investigating and determining complaints against its officers pursuant to section 112.533, and can therefore offer no insight on a county’s authority under current law.

We have also considered the County’s citation to *Timoney v. City of MiamiCitizens Review Panel*, 990 So.2d 614 (Fla. 3d 2008), and find that case equally unhelpful. *Timoney*, dealt with a city police chief, a law enforcement officer expressly exempted from the chapter 112 investigation. See §112.531(1), Fla. Stat. (2008). Accordingly, from our reading of *Timoney*, it seems clear that the local board’s authority to investigate a complaint in light of section 112.533 was never raised as an issue in that case. In fact, section 112.533 is neither cited nor discussed in *Timoney*.

3. Miscellaneous:

The Plaintiff has failed to indicate that all conditions precedent to the issuance of the subpoena have been met as specified in the charter amendment attached to the complaint.

IV. CONCLUSION:

Regardless of whether this Court wants to hold that the Citizen’s Review Board has no subpoena power or that its subpoena power does not extend to sworn police officers exempt by the provisions of *Chapter 112, Florida Statutes (2009)*, there is no legal, factual or jurisdictional basis for this court to refuse to grant to the Defendant, PABLO RODRIGUEZ, a final summary judgment in his favor and to deny the relief the Plaintiff requested in its complaint.

V. CERTIFICATE OF SERVICE:

I HEREBY CERTIFY that a true and correct copy of the foregoing
MOTION FOR FINAL SUMMARY JUDGMENT, furnished this 6th day of
November, 2009, by U.S. Mail, postage prepaid, to:

ROBERT CINTRON, JR., ESQ.
317 Whitehead Street
Key West, Florida 33040
Tel. (305) 296-5676
Fax.(305) 296-4331

Respectfully submitted,

RHEA P. GROSSMAN, P.A.
2650 West State Road 84
Suite 103
Ft. Lauderdale, FL 33312
954 791 2010
954 791 2141-FAX
ATTORNEY FOR PABLO RODRIGUEZ

By: /s/Rhea P. Grossman
RHEA P. GROSSMAN
Florida Bar #092640

DATED: November 6, 2009
Ft. Lauderdale, Florida