IN THE CIRCUIT COURT OF THE
13TH JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

GENERAL CIVIL DIVISION

CASE NO. 13-CA-11087

THOMAS HALSNIK,
BLACK PEARL LIMOUSINE LLC,
KENRICK GLECKLER, and
DANIEL FAUBION,

Plaintiffs,

vs.

THE HILLSBOROUGH COUNTY
PUBLIC TRANSPORTATION
COMMISSION, and
VICTOR CRIST, in his official
capacity as Chairman of the
Hillsborough County Public
Transportation Commission,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PTC'S MOTION TO DISMISS

Plaintiffs Thomas Halsnik, Black Pearl Limousine, LLC, Kenrick Gleckler and Daniel Faubion, by and through their undersigned counsel, hereby file this Memorandum in Opposition to the Motion to Dismiss filed by The Hillsborough County Public Transportation Commission[1] as follows.

I. Introduction

As stated in Plaintiffs' Complaint, Plaintiffs are a Hillsborough County limousine driver and his small company, who would like to charge customers lower prices, and two residents of

[1] Defendant Crist also filed a separate Motion to Dismiss arguing that he should not have been included as a defendant.

Hillsborough County who would like to pay lower prices. Standing in their way is the minimum fare rule (the "Rule") enacted by Defendant Hillsborough County Public Transportation Commission (the "PTC"), as well as the Special Act of the Florida Legislature (the "Enabling Statute") which provides the PTC with the authority to set prices. The Rule mandates that all limousine drivers charge at least fifty dollars ($50.00) per ride, no matter how short the ride.

The Plaintiffs brought their claims pursuant to the Florida Constitution's Due Process and Equal Protection Clauses. The Florida Supreme Court has a long history of striking down price restrictions as unconstitutional under these provisions of the Florida Constitution. This precedent includes cases brought by the sellers of goods and services, as well as by voluntary customers who simply want to pay less through free market competition between sellers.

Nonetheless, Defendant PTC has filed a motion to dismiss. However, all of Defendant's arguments are incorrect as a matter of law, as shown by the relevant precedent and even by the PTC's own rules. Therefore, Defendant's Motion to Dismiss must be denied.

II. Legal Standard

"[W]hen presented with a motion to dismiss, the trial court is required to 'treat the factual allegations of the complaint as true and to consider those allegations in the light most favorable to the plaintiffs.' " Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 734-35 (Fla. 2002) (quoting Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood, 676 So. 2d 500, 501 (Fla. 4th DCA 1996)).

Each pleading shall contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla.R.Civ.P. 1.110(b)(2). "Where a complaint contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same, it is error to dismiss the action on the ground

that more specific allegations are required." Rio v. Minton, 291 So. 2d 214, 215 (Fla. 2d DCA 1974) (quoting Fontainebleau Hotel Corp. v. Walters, 246 So. 2d 563, 565 (Fla. 1971)).

III. Legal Argument

Defendant PTC has asserted four legal arguments which the PTC claims require dismissal: (i) Plaintiffs failed to exhaust administrative remedies by not alleging that they applied for a variance; (ii) voluntary customers have no due process rights under the Florida Constitution; (iii) Plaintiffs cannot obtain declaratory relief because Plaintiffs have not alleged sufficient doubt as to their rights; and (iv) Plaintiffs failed to allege a clear legal right that would allow them to obtain injunctive relief. All of Defendant's arguments are without merit, and they will now be addressed in turn.

A. Defendant PTC's Exhaustion Argument is Inapplicable to this case

Defendant PTC's first argument is that the Plaintiffs cannot move forward with this case because they have not alleged that they sought a variance from the PTC. There are multiple independent reasons requiring Defendant PTC's argument to fail. These are that the PTC's variance rule could not provide the requested relief to either the consumer plaintiffs or the entrepreneurial plaintiffs, and even if it could, the doctrine of futility bars Defendant PTC's argument.

i. The Variance Rule does not Provide Relief to Customers

As an initial matter, the PTC's exhaustion argument must fail with respect to Plaintiffs Gleckler and Faubion, who are consumers, not drivers. Gleckler and Faubion are not directly regulated by the PTC (though they are certainly harmed by its regulations), and there is no procedure by which they could ask for a personal "variance" from the PTC's rules.

As described in the Complaint, Plaintiffs Gleckler and Faubion seek to "freely bargain for services" without the "protectionist barrier to competition" created by the Rule. See Compl. ¶¶ 36, 56, 61, 66-67, 78, 81-82, 89, 94, 97, 100. The Florida Supreme Court has held that the right of voluntary customers to "freely bargain for services" is protected by the Due Process Clause of the Florida Constitution. See Chicago Title Ins. Co. v. Butler, 770 So. 2d 1210, 1220 (Fla. 2000) (ruling in favor of land developer's due process challenge against statutes which imposed minimum price restrictions on real estate insurance).

For example, in Dep't. of Ins. v. Dade County Consumer Advocates Office, 492 So. 2d 1032 (Fla. 1986), the Dade County Consumer Advocates brought a due process challenge under the Florida Constitution against anti-rebate statutes because the statutes prevented "price competition." Id. at 1033. The Florida Supreme Court agreed with the consumer advocates office and found the statutes to be unconstitutional restrictions on the bargaining power of consumers. Id. at 1035.

Consumer Plaintiffs Gleckler and Faubion seek the same thing as the plaintiffs in Chicago Title and Dade County Consumer Advocates – the consumer bargaining power that results from price competition among all of the service providers in a market. In the words of the Florida Supreme Court, Plaintiffs Gleckler and Faubion seek "choice in the price of products or services, the choice of which is the cornerstone of a competitive, free-market economy." Chicago Title, 770 So. 2d at 1220.

This relief could never be obtained through a mere variance, and this is especially true in the case at hand. PTC Rule 1-20.001(4)(a) sets the minimum amount limousine drivers are allowed to charge. Although it certainly harms consumers, it is technically a restriction on drivers, not customers. In fact, the Rules themselves remove any doubt as to how they are

enforced: "It shall be unlawful for any Certificate holder, or Driver to charge, demand, or request any fare or Rates that violate the Rates established pursuant to these Rules." PTC Rule 1-9.001(1).

In short, Plaintiffs Gleckler and Faubion seek the right to bargain for services in the competitive, free market economy promised to them by the Florida Constitution and the Florida Supreme Court. As the PTC's variance procedure cannot provide this constitutionally mandated relief, the PTC's argument must fail.

ii. The Plain Language of the PTC's Rule States that it does not Apply to this Situation

The PTC's argument that Plaintiffs Halsnik and Black Pearl, the limousine driver and company, failed to exhaust administrative remedies must also fail, as the plain language of the PTC's own variance rule makes it clear that it does not apply to this situation.

While the PTC's rules do provide a procedure to grant a variance, they do so only in limited circumstances not present here. As explained by PTC Rule 1-14.001:

> Variances and waivers shall be granted when the Person subject to the rule demonstrates that the purpose of the Special Act will be or has been achieved by other means by the Person *and* when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the Person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a Rule affects a particular Person in a manner significantly different from the way it affects other similarly situated Persons who are subject to the Rule.

PTC Rule 1-14.001(4) (emphasis supplied).

Therefore, to obtain a variance regarding the minimum fare rule, a driver would need to demonstrate that: (i) the purpose of the Special Act in authorizing the minimum fare rule has been achieved by other means by the applicant; *and* (ii) that the driver is facing some sort of substantial hardship or is affected by the minimum fare rule differently than other drivers. Not

only would Plaintiffs Halsnik and Black Pearl fail to qualify for a variance, but they would not even meet either prong of the test.

Regarding the first prong, the premise of this lawsuit is that the purpose of the minimum fare—protecting favored established businesses from economic competition—is illegitimate. Plaintiffs do not contend that they could ever achieve this purpose on their own, nor do they contend that they would want to do so even if they could. Because it is impossible for Plaintiffs Halsnik and Black Pearl to "achieve [this purpose] by other means," it would be similarly impossible for the PTC to grant them a variance from the minimum fare.

Regarding the second prong, Plaintiffs Halsnik and Black Pearl have not alleged that they suffer some unique or special harm from the minimum fare. Instead, the Complaint states that the harm was to all "smaller limousine and car service entrepreneurs" and that Plaintiffs Halsnik and Black Pearl have suffered the same harm as any limousine business owners who would like to expand their businesses by offering better deals to customers. Compl. ¶¶ 21, 32, 36, 40, 46-47, 49-50, 102, 109-110, 114, 125. Of course, all of the Complaint's allegations must be accepted as true for the purposes of a motion to dismiss. See Siegle, 819 So. 2d at 734-35. Therefore, as a matter of law, Defendant's argument must fail regarding the second prong as well.

iii. The Doctrine of Futility bars Defendant's Argument

Even if we were to overlook the fact that the plain language of the PTC's own rules reveals that variances are not available to the Plaintiffs, the PTC's argument would have another defect. The doctrine of futility bars the PTC's exhaustion argument, especially at the motion to dismiss stage.

"The law requires no futile act." Artz v. City of Tampa, 102 So. 3d 747, 751 (Fla. 2d DCA 2012) (reversing dismissal of complaint due to exhaustion of administrative remedies where pursuing the administrative remedies would be futile) (citations omitted).

The Complaint describes a situation in which it would be futile to seek a variance. Compl. ¶¶ 39, 42-43. At most, Defendant PTC's argument raises a question of disputed fact as to whether it would have been futile, which would therefore not be appropriate for a motion to dismiss. See, e.g., Brock v. Bowein, 99 So. 3d 580, 584-85 (Fla. 2d DCA 2012) ("A motion to dismiss is not a substitute for a motion for summary judgment.") (citations omitted).

Indeed, not only would the PTC be unable to overcome the futility argument at this stage, but it is difficult to see how the PTC ever could. After all, the Plaintiffs are not merely attempting to lower the minimum fare rule, but remove it altogether. The idea that a commission which has repeatedly and consistently refused to lower the minimum fare amount by so much as a penny would suddenly, prior to the filing of this lawsuit, agree to do away with the minimum fare requirement altogether epitomizes the very situation the doctrine of futility was designed to address.

B. Voluntary Customers Possess Due Process Rights

Defendant's second argument is that customers' "voluntary payment of the minimum limousine fare in the past and future is insufficient as a matter of law to entitle them to due process." Mot. ¶ 26. As mentioned above, the Florida Supreme Court strongly disagrees.

Indeed, not only has the Florida Supreme Court consistently allowed similar claims, but in Dade County Consumer Advocates, the Court even took the time to examine its long history of striking down protectionist laws like the one at issue here, while making sure to point out that

"[h]istorically, this Court has carefully reviewed laws that curtail the economic bargaining power of the public." 492 So. 2d at 1034-35 (citations omitted).

Although the Florida Supreme Court's precedent in striking down restrictions like the one in this case stretches back for many years, it is a more recent case in the line that is most applicable to Defendant's argument.

In Chicago Title, a land developer asserted a due process challenge under the Florida Constitution to a price restriction that prevented real estate insurance agents from offering him discounts below a statutorily required minimum price. 770 So. 2d at 1214. In ruling for the developer, the Florida Supreme Court discussed its precedent that anti-rebate statutes deprive "customers of their property without due process in violation of Article I, Section 9 of the Florida Constitution." Id. at 1215 (citing Dade County Consumer Advocates Office v. Dep't of Ins., 457 So. 2d 495, 497 (Fla. 1st DCA 1984)).

Regarding the developer himself, the Florida Supreme Court held that the price restrictions "infringe upon a citizen's property rights and unconstitutionally restrict a citizen's right to freely bargain for services." 770 So. 2d at 1220. The Court also made sure to mention its distaste for those laws that "simply deprive the consuming public of a choice in the price of products or services, the choice of which is the cornerstone of a competitive, free-market economy." Id. Ultimately, the Florida Supreme Court affirmed the developer's successful due process challenge, as a voluntary customer, to the laws that prevented sellers from offering him a discount. Id. at 1221.

In support of its argument that voluntary customers do not have due process rights under the Florida Constitution, the PTC primarily relies on two cases, City of Key West v. Florida

Keys Cmty. Coll., 81 So. 3d 494 (Fla. 3d DCA 2012), and Gargano v. Lee County Bd. of County Comm'rs., 921 So. 2d 661 (Fla. 2d DCA 2006). Neither poses any barrier to Plaintiffs' case.

The first case, City of Key West, does not address a private customer's due process challenge to a law restricting price competition. Rather, the issue was whether a community college had waived sovereign immunity when it made voluntary payments for utilities from another public entity. 81 So. 3d at 497-500. Moreover, the voluntary payment doctrine briefly discussed in the portion cited by the PTC involved the question of whether a plaintiff could seek compensatory damages in the form of reimbursement for money that the plaintiff voluntarily chose to pay. Id. at 500. Plaintiffs do not seek compensatory damages, and City of Key West is therefore irrelevant to this action.

In the second case raised by the PTC, Gargano, a resident of the defendant county alleged that a toll booth operated by the county charged an unreasonably high toll and that the county had failed to use the toll proceeds to adequately repair the corresponding bridge. 921 So. 2d at 663. The resident asked the court to strike down the toll as unconstitutional and award various forms of damages, including a refund of the tolls paid. Id. at 663, 667-68. The court held that the resident had standing to bring the constitutional challenge, but could not seek monetary damages. Id. at 666, 668. In other words, Gargano stands for the proposition that Plaintiffs are allowed to seek exactly the kind of declaratory and injunctive relief they currently seek.

C. Declaratory Relief is Necessary

In Section III of its motion, the PTC attempts to make two arguments. The first is that Plaintiffs have failed to show a "bona fide, actual, present and practical need" for a declaration due to the supposed availability of the administrative process. Mot. ¶ 28. However, this is merely a restatement of the flawed exhaustion argument discussed above. See supra Part III.A;

Mot. ¶¶ 10-11, 27-28. The second argument is that Plaintiffs failed "to allege the requisite element of 'doubt' as to their rights" because "Plaintiffs appear quite certain in their allegations that the Minimum Fare Rule lacks any constitutional or statutory basis." Mot. ¶ 29.

The PTC's argument in favor of a rule against confident plaintiffs ignores both the law and the factual situation described by the Complaint. Although Plaintiffs are confident that the PTC's actions are unconstitutional, the Plaintiffs are also aware that exercising their constitutional rights in violation of the PTC's Rule will result in fines and other penalties to the respective limousine drivers and businesses. See Compl. ¶¶ 49, 57, 61-67, 72-95; PTC Rules 1-9.001(1), 1-12.001(1)(a)(4), 1-20.001(4)(a), 1-21.001. Therefore, as alleged in the Complaint, there is clearly doubt as to the enforceability of Plaintiffs' constitutional rights.

The solitary case the PTC cites in support of its supposed rule against confident plaintiffs is State Farm Mut. Auto Ins. v. Wallace, 209 So. 2d 719 (Fla. 2d DCA 1968). However, State Farm says no such thing, as it merely stands for the proposition that someone seeking declaratory relief must show that there is some doubt over the enforceability of the right at issue and some necessity for the court to make a determination. Id. at 721.

Moreover, Florida's declaratory judgment statute instructs that it "is to be liberally administered and construed" in order to grant relief, and nowhere does it say that confident plaintiffs are exempted from its protections. Fla. Stat. § 86.101 (2013).

The Complaint more than meets the requirements for declaratory relief. Over the course of sixteen pages, it describes a situation where Plaintiffs believe the Minimum Fare Rule and Enabling Statute are unconstitutional, but their rights are so much in doubt that the PTC does not recognize them at all, has continued to enforce the allegedly unconstitutional laws and has "consistently refused to repeal" the allegedly unconstitutional laws, thereby requiring the

Plaintiffs to seek the assistance of this Court to hopefully obtain "declaratory relief to determine the extent of their rights in Hillsborough County, Florida." Compl. ¶¶ 17-18, 28-34, 36, 43, 83-95, 97, 105.

As Plaintiffs have met the requirements to assert a claim for declaratory relief, and as there is no precedent to support Defendant PTC's argument against confident plaintiffs, Defendant PTC's argument must fail as a matter of law.

D. Plaintiffs Possess a Clear Legal Right to Injunctive Relief

Finally, the PTC argues that the Plaintiffs have failed "to state the existence of a 'clear legal right' which could entitle them to permanent injunctive relief." Mot. ¶ 32. The Motion does not explain how the Plaintiffs supposedly failed to allege a clear legal right, but cites to K.W. Brown v. McCutchen, 819 So. 2d 977, 979 (Fla. 4th DCA 2002).

In K.W. Brown, members of the National Association of Securities Dealers (the "NASD") sought an injunction to prevent their customers from filing an arbitration claim. The court held that NASD members were required to follow NASD arbitration rules, and therefore the NASD members had no clear legal right to relief. Id. at 980-81. K.W. Brown has nothing to do with the case at hand.

It is axiomatic that individuals whose constitutional rights have been violated have a clear legal right to injunctive relief. See, e.g., North Florida Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 615-16, 639-40 (Fla. 2003) (affirming trial court's entry of permanent injunction to bar enforcement of unconstitutional statute). Therefore, Defendant's argument is without merit.

IV. Conclusion

All four of the arguments asserted in the PTC's Motions to Dismiss fail as a matter of law. Therefore, the motion should be denied, and the case should be allowed to proceed.

DATED this 3rd day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 2013, a true and correct copy of PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PTC'S MOTION TO DISMISS was filed with the Clerk of the court and also sent to the following counsel of record:

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