

County Civil Court: CIVIL PROCEDURE – Summary Judgment. Trial court erred in entering final summary judgment for city against plaintiff whose property was damaged by golf balls from city owned driving range. Genuine issues of material fact remained. Final judgment reversed and remanded for further proceedings. *Gordon v. City of St. Petersburg, Florida*, No. 11000036AP-88B (Fla. 6th Cir. App. Ct. May 24, 2012).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

BRENDA GORDON,

Appellant,

Ref.No. 11000036AP-88B

v.

UCN: 522011AP000036XXXXCV

CITY OF ST. PETERSBURG, FLORIDA,

Appellee.

_____ /

ORDER AND OPINION

THIS CAUSE is before the Court on an appeal filed by Plaintiff, Brenda Gordon, from the County Court’s Order Granting Defendant’s Motion for Summary Judgment (Order), entered on March 31, 2011, in favor of Appellee, City of St. Petersburg, Florida. Upon review of the briefs and the record, and being otherwise fully advised, this Court reverses the Order and remands this matter back to the trial court for further proceedings as set forth below.

On October 22, 2010, Appellant filed an amended complaint alleging that the Defendant, City of St. Petersburg, negligently designed, modified, and maintained the golf driving range

located at Dell Holmes Park in St. Petersburg, and that this negligence caused damage to Appellant's property. On April 8, 2011, Appellee, City of St. Petersburg, filed its Amended Motion to Dismiss, Motion for Summary Judgment, and/or Judgment on the Pleadings. On May 5, 2011, the trial court granted Defendant's Amended Motion for Summary Judgment, and/or Judgment on the Pleadings. The lower court's order does not state the court's reasoning in granting summary judgment. Appellant moved for Reconsideration, and this Motion for Reconsideration was denied.

Appellate courts review a ruling on summary judgment de novo. Law Office of James M. Thomas, Esq., P.A. v. WorkNet Pinellas, Inc., No. 09-000015AP-88A (Fla. 6th Cir. App. Ct. August 17, 2010). A motion for summary judgment shall be rendered forthwith if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Florida Statute § 1.510(c).

Appellee, in its Answer to Appellant's Appellate Brief, correctly states that "upon tendering competent evidence that there are no genuine issues of material fact, the burden shifts to the party opposing the motion to present counter evidence which reveal genuine issues." Landers v. Milton, 370 So.2d (Fla. 1979). Appellee goes on to state, "It is not enough for the opposing party to assert that an issue does exist." Relying on these statements of law, Appellee reasoned, and the lower court apparently agreed, that since Appellant did not present counter-evidence in the form of affidavits or other proof, Appellant did not meet her burden necessary to withstand summary judgment. However, as discussed by the Florida Supreme Court in Wills v. Sears, Roebuck & Co., 351 So.2d 29, 31 (Fla. 1977), if the moving party does not present competent evidence showing conclusively that there was no genuine issue of material fact in the

first place, the burden to produce counter evidence never shifts to the non-moving party. The

Wills Court Stated:

Respondent argues that when a movant refutes the material factual issues raised in the complaint and shows the nonexistence of a genuine issue as to any material fact, summary judgment is proper if the opposing party merely stands upon the allegations of the complaint and fails to present anything to show a disputed issue of fact. While we agree with this statement of law, we find it inapplicable to the instant cause where respondent has initially failed to meet its task of proving the requirements of Fla.R.Civ.P. 1.510(c).

Id.

This principle was further explained in Holl v. Talcott, 191 So.2d 40, 43 (Fla.1966):

This means that before it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party.

“If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.” Snyder v. Cheezem Dev. Corp., 373 So.2d 719, 720 (Fla. 2d 1979). This is especially true in negligence actions. Wills at 30.

Appellant’s Amended Complaint alleges several theories of negligence: negligent design, modification, and maintenance of City owned golf driving range; failure to enforce compliance with City erected warning signs; and that the City knew or should have known of the inherently dangerous condition it created with the design and modification of the golf driving range.

Appellant alleges that Appellee’s negligence caused her damages in the amount of \$4,816.00

Appellee’s Motion to Dismiss and supporting affidavits merely deny Appellant’s claims. They fall far short of conclusively proving the non-existence of a genuine issue of material fact. If anything, the affidavits raise even more questions of fact. None of the affidavits submitted by

Appellee in support of its Motion addressed the negligent design or modification of the golf course. With respect to the failure to enforce City posted signs directing golfers to hit away from homes, the supporting affidavits state only that they have erected these signs, they say nothing of Appellee's alleged failure to enforce the signs. The recurring theme running through the Appellee's affidavits is that Dell Homes Park has been used as a driving range for over 40 years, well before Appellant moved into her home. In the same breath that Appellee's affidavits attempt to establish the Park's prior use as a golf range, the affidavits discuss the major changes Dell Homes Park underwent in 2006. In short, Appellee never met its initial burden of proving the non-existence of any genuine issue of material fact. Because the pleadings and summary judgment evidence on file show that genuine issues of material fact remain, the granting of summary judgment was improper.

Accordingly, the trial court's order granting the Appellee summary judgment is hereby

REVERSED, AND this case is hereby **REMANDED** back to the trial court for further proceedings consistent herewith.

DONE AND ORDERED in St. Petersburg, Pinellas County, Florida, on May_____, 2012.

Original order entered on May 24, 2012 by Circuit Judges Amy M. Williams, Peter Ramsberger and Pamela A.M. Campbell.

Copies furnished to:

Brenda Gordon
2245 Murilla Way South
St. Petersburg, FL 33712

Kimberly Jackson, Esq.
Assistant City Attorney
City of St. Petersburg, FL 33731-2842
P.O. Box 2842