

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

PINELLAS HEMATOLOGY AND
ONCOLOGY, P.A.,
Petitioner,

Case No.: 16-000047AP-88A
UCN: 522016AP000047XXXXCI

v.

DAVID DRESDNER, M.D.,
Respondent.

Opinion Filed _____

Petition for Writ of Certiorari
from decision of Special Magistrate
Pinellas County Office of Human Rights
Pinellas County, Florida

Jamie Moore Marcario, Esq.
Attorney for Petitioner

William P. Cassidy, Jr., Esq.
Attorney for Respondent

PER CURIAM.

Pinellas Hematology and Oncology, P.A. seeks certiorari review¹ of the oral ruling on its Motion to Stay Proceedings and Compel Arbitration and the “Findings and Order” of the Special Magistrate for the Pinellas County Office of Human Rights, both rendered against it on August 15, 2016. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The Petition is granted.

¹ Although this case was filed as an appeal, the proper remedy is a petition for writ of certiorari; therefore, the Court will treat it as such. See Fla. R. App. P. 9.040(c); Villa Lyan, Inc. v. Perez, 159 So. 3d 940, 943 (Fla. 3d DCA 2015).

Statement of Case

This case involves an issue of first impression. In late 2015, Pinellas County enacted a Wage Theft and Recovery Ordinance ("Ordinance") to "eliminat[e] the underpayment or nonpayment of wages earned by persons working in the county." §70-303, Pinellas Cnty., FL, Code of Ordinances. Any person employed in the county who is owed more than sixty dollars in unpaid wages may file a complaint with the Pinellas County Office of Human Rights ("PCOHR"). *Id.* at § 70-305. It is undisputed that in March 2015, PHO entered into a "Physician Employment Agreement" with David M. Dresdner, M.D., P.A. ("DMD PA"). At some point, a conflict arose and PHO withheld payments allegedly due to DMD PA.

On May 11, 2016, Dr. Dresdner filed a complaint with PCOHR under the Ordinance asserting that Pinellas Hematology and Oncology, P.A. ("PHO") failed to pay him wages owed. On May 16, PCOHR mailed PHO a letter informing it of the wage complaint and procedures. On May 19, PHO responded via email asserting that Dr. Dresdner was never an employee of PHO; therefore, the Ordinance did not apply. On May 20, PCOHR sent out a form letter to both parties acknowledging PHO's response, but indicating that the claim was still in dispute and offering to facilitate the conciliation process required by the Ordinance. On May 24, PHO emailed PCOHR to again assert that Dr. Dresdner did not have an employment contract with PHO, rather DMD PA had a contract to perform certain services. On May 29, PHO sent another email to PCOHR and attached a letter and a form agreeing to conciliation. The email requested PCOHR respond to the attached letter and specify why this is a wage theft issue when it is a contract between two professional associations. The attached letter asserted the same arguments and questioned why the Ordinance applied to a contract dispute. Further, PHO asked PCOHR "to look at this issue closely one more time" before sending the parties to conciliation. On May 31, PCOHR emailed PHO stating that whether a claim is valid is determined by the Special Magistrate, and if conciliation fails, "the Special Magistrate will look at the contracts both parties provide and determine whether or not [Dr. Dresdner] was an employee and if [PHO] owes him wages under the Ordinance." PHO responded back via email and stated the conciliation was premature because it assumes an employee/employer relationship. PHO asked if anyone at PCOHR would look at the

contract before scheduling conciliation. PCOHR responded in the negative and asked if PHO still wanted to participate in conciliation. PHO stated that the process did not make sense, but PHO would participate.

After conciliation failed, the matter was set for hearing. On July 5, 2016, PHO submitted its answer to the wage theft complaint, asserting again that “[t]his is a commercial dispute between two businesses, and not an employer and employee.” It further maintained that the Ordinance was inapplicable because DMD PA is not a natural person as required by the Code, and the agreement does not provide for wages, it unambiguously states payments will be made to DMD PA. On August 15, 2016, a hearing was held before a Special Magistrate appointed by PCOHR. At the start of the hearing, PHO made an ore tenus motion to stay the proceedings and compel arbitration (“Motion to Compel Arbitration”). After listening to argument of counsel, the Special Magistrate held “that the arbitration clause is either inapplicable to this proceeding or has been waived by participation up to this point in the process.” After the hearing, the Special Magistrate’s final order held that Dr. Dresdner was an employee of PHO and that PHO owed Dr. Dresdner \$68,548.39 in unpaid wages. Pursuant to the Ordinance, the Special Magistrate awarded Dr. Dresdner three times that amount for a total of \$205,645.17, plus \$457.78 in costs. PHO then filed the instant action challenging the final order and the denial of its Motion to Compel Arbitration.

Standard of Review

“Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.” Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). “[T]he issue of whether a [tribunal] has subject matter jurisdiction involves a question of law that is reviewed de novo.” Solar Dynamics, Inc. v. Buchanan Ingersoll & Rooney, P.C., 211 So. 3d 294, 296 (Fla. 2d DCA 2017) (citations and quotations omitted).

Analysis

PHO raises several challenges to the Special Magistrate's final order and the denial of its Motion to Compel Arbitration; we find merit only in PHO's contention that the Special Magistrate's final order is void because PCOHR lacks subject-matter jurisdiction. Although PHO incorrectly contends PCOHR lacks subject-matter jurisdiction because the wage claim is subject to an arbitration agreement, PHO correctly argued to PCOHR that it lacked subject-matter jurisdiction because this is a complex business transaction between two professional associations. See Bland v. Green Acres Group, L.L.C., 12 So. 3d 822, 824 n.3 (Fla. 4th DCA 2009) ("An arbitration clause does not deprive a court of subject-matter jurisdiction. Instead, much like a judicial forum selection clause, an arbitration clause constitutes a prospective choice of forum.") (internal citations and quotations omitted).

"[S]ubject-matter jurisdiction concerns the power of the [lower tribunal] to deal with a class of cases to which a particular case belongs." Cunningham v. Standard Guar. Ins. Co., 630 So. 2d 179, 181 (Fla. 1994). Subject-matter jurisdiction is conferred on a tribunal by constitution, statute, or ordinance. See Strommen v. Strommen, 927 So.2d 176, 179 (Fla. 2d DCA 2006) ("It cannot be conferred by waiver, acquiescence, or agreement of the parties."). A lack of subject matter jurisdiction makes a judgment void. Id. Although PHO only presented the professional association argument to PCOHR below and did not brief it in this appeal, subject-matter jurisdiction can be raised at any time, even by the Court. See Hardman v. Koslowski, 135 So. 3d 434, 436 (Fla. 1st DCA 2014) ("[A]n appellate court has an independent duty to recognize a jurisdictional defect even if not raised by either party.").

The Ordinance states:

For any employer to fail to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation, shall be wage theft; and such a violation shall entitle an employee, upon a finding by a special magistrate appointed by the county or by a court of competent jurisdiction that an employer is found to have unlawfully failed to pay wages, to receive three times the amount of back wages.

§ 70-306, Code. The Ordinance defines employee as a natural person. Id. at § 70-305. "A corporation is not a natural person." Nicholson Supply Co. v. First Fed. Sav. & Loan

Ass'n of Hardee Cnty., 184 So. 2d 438, 440 (Fla. 2d DCA 1966). A professional association “is recognized in law as a legal corporate entity separate and distinct from the persons comprising it.” Gershuny v. Martin McFall Messenger Anesthesia Prof'l Ass'n, 539 So. 2d 1131, 1133 (Fla. 1989) (citation omitted).

Here, a review of the record indicates that the “Physician’s Employment Agreement” was actually a complex business transaction between two professional associations. The first line of the agreement states that it “is made and entered into . . . by and between Pinellas Hematology Oncology, **P.A.**, (the “Practice”) and David M. Dresdner, M.D., **P.A.** (the “Physician”).” Under financial arrangements, the agreement states that “[t]he Practice will make the [a]nnual [s]alary payments to David Dresdner, M.D., P.A.” Because the contract is between two professional associations and the only money paid out or owed was to DMD PA, not Dr. Dresdner individually, PCOHR lacked subject-matter jurisdiction since the entity owed money was not a natural person under the Ordinance.

Although not critical to the determination of the instant Petition, the Court notes that even the Special Magistrate admitted this case involves “a complicated transaction,” and stated:

[T]his is not the type of case I anticipated I would be hearing under this Ordinance. It is certainly atypical. Clearly, there is a dispute between two professional associations that is part of what I heard here today.

But what I do think is that the contract that was entered between these parties is . . . a hybrid between an employment contract and a purchase and sale agreement. It’s got components of both.

And I do see that there is evidence that the doctor elected, for tax purposes, to be treated as an independent contractor; however, I also see numerous indications that the doctor was an employee.

Although the Special Magistrate focused on the distinction between “employee” and “independent contractor,” she found that the contract is a “hybrid” and “a dispute between two professional associations.”

Furthermore, it is clear from the wording of the Ordinance that it was not intended to adjudicate high-value, complex business arrangements. First, the Ordinance’s “Legislative findings of fact” state that one of county’s intentions is to “reliev[e] the burden

on the public that subsidize unscrupulous employers whose employees are forced to rely on public assistance because of unpaid or underpaid wages.” § 70-303, Code. Secondly, the jurisdictional threshold minimum to file a claim under the Ordinance is a mere \$60.² Id. at 70-305. Lastly, wage rate is defined as “any form of monetary compensation which the employee agreed to accept in exchange for performing work for the employer, **whether daily, hourly, or by piece.**” Id. at § 70-305 (emphasis added). Notably absent from the Ordinance is any mention of a yearly salary. See Siegle v. Lee County, 198 So. 3d 773, 775 (Fla. 2d DCA 2016) (“Our interpretation of the plain language of [the code] is reinforced by the canon of statutory construction *expressio unius est exclusio alterius*, under which the mention of one thing implies the exclusion of another. Pursuant to this canon, when a . . . code provision lists the areas to which it applies, it will be construed as excluding from its reach any areas not expressly listed.”) (internal citations and quotations omitted); In re C.N., 51 So. 3d 1224, 1233 (Fla. 2d DCA 2011) (“When a statute enumerates the things upon which it is to operate, it should be construed as excluding from its operation things of the same class or category which it does not mention.”) (citations omitted).

Additionally, the Board of County Commissioner’s meeting minutes and a staff memorandum indicate that the Ordinance was intended to fill the gap left by the non-existent state-level enforcement of wage claims and the protection offered by federal law, which has jurisdiction only over employers with gross sales in excess of \$500,000 or instances where interstate commerce is involved. See Amended Memorandum from Paul Valenti, Director of Human Rights to Board of County Commissioners, Wage Theft Recovery Ordinance (June 3, 2015), available at https://www.pinellascounty.org/bcc_work/2015_07_30/_agenda.pdf; Pinellas Board of County Commissioners, Board Meeting (Oct. 20, 2015), available at http://www.pinellasclerk.org/asplInclude2/pdf/bcc_minutes/bc102015.pdf. The memorandum states that “[t]his necessarily means smaller employers, such as small restaurants, landscaping companies, contractors, and many other service-oriented businesses, are not subject to federal law. Even when

² The Court notes with concern the lack of any jurisdictional monetary maximum. The Ordinance is patterned after one in Miami-Dade County, which in 2014, awarded an average of only \$2079 per complainant. In contrast, the total amount of wages recovered by Dr. Dresdner against PHO was \$68,548, which is 32 times that amount.

federal jurisdiction flows from use of an instrumentality of interstate commerce, not all employees of the business are necessarily covered.” Amended Memorandum from Paul Valenti. The memorandum extols the virtues of the proposed Ordinance including, “[p]roviding a forum for filing such complaints without cost to the complainant,” and stating that “the status quo ill serves many victims of wage theft (particularly as many work in industries **with lower wages and benefits, with a concomitant lack of resources and/or ability to vindicate their rights on their own**), and that “smaller employers, where numerous problems exist, are covered.” Id. (emphasis added).

Conclusion

Because PCOHR was without subject-matter jurisdiction over a complex business transaction between two professional associations, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is GRANTED.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ____ day of _____, 2018.

Original order entered on January 26, 2018, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Patricia A. Muscarella.

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