Supreme Court of Florida

No. SC11-830

CITY OF PALM BAY,
Appellant,

vs.

WELLS FARGO BANK, N.A.,
Appellee.

[May 16, 2013]

CANADY, J.

In this case we consider whether a municipal ordinance may validly establish superpriority status for municipal code enforcement liens. In City of Palm Bay v. Wells Fargo Bank, N.A., 57 So. 3d 226 (Fla. 5th DCA 2011), the Fifth District Court of Appeal concluded that such an ordinance superpriority provision is invalid because it conflicts with a state statute and that the City's lien accordingly did not have priority over the lien of Wells Fargo's mortgage that was recorded before the City's lien was recorded. Palm Bay sought review, and we accepted jurisdiction based on the Fifth District's certification of the following question of great public importance:

> Whether under Article VIII, section 2(b), Florida Constitution, section 166.021, Florida Statutes and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?

City of Palm Bay v. Wells Fargo Bank, N.A., 67 So. 3d 271, 271 (Fla. 5th DCA 2011) (mem.).

On appeal, the City argues that the ordinance superpriority provision is within the "broad home rule powers" of the City. Petitioner's Brief on the Merits at 5, City of Palm Bay v. Wells Fargo Bank, N.A., No. SC11-830 (Fla. May 16, 2013). The City contends that because the Legislature has made certain exceptions to the general rules governing the priority of liens, municipalities have the power to likewise make exceptions. For the reasons we explain, we conclude that the Fifth District correctly decided that the ordinance superpriority provision is invalid. Accordingly, we answer the certified question in the negative. Before explaining our conclusion, we will review the pertinent provisions of the Palm Bay ordinance, the constitutional and statutory provisions relevant to the City's exercise of power, and the statutory framework governing the priority of interests based on recorded instruments.

I. BACKGROUND

City of Palm Bay Ordinance 97-07 provides for the operation of the City's Code Enforcement Board and contains the following superpriority provision:

> Liens created pursuant to a Board order and recorded in the public record shall remain liens coequal with the liens of all state[,] county[,] district[,] and municipal taxes, superior in dignity to all other liens[,] titles[,] and claims until paid, and shall bear interest annually at a rate not to exceed the legal rate allowed for such liens and maybe foreclosed pursuant to the procedures set forth in Florida Statutes, Chapter 173.

City of Palm Bay, Ordinance No. 97-07, § 1 (1997).

Chapter 162, Florida Statutes (2004), contains the Local Government Code Enforcement Boards Act. Section 162.03, Florida Statutes (2004), authorizes municipalities to establish by ordinance local code enforcement boards. Section 162.09(3), Florida Statutes (2004), provides that "[a] certified copy of [a code enforcement] order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." The Act contains no provision expressly authorizing municipalities to establish superpriority for such liens.

Article VIII, section 2(b), Florida Constitution, contains a general provision relating to the exercise of municipal powers: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." (Emphasis added). Section 166.021, Florida Statues (2004),

contains general provisions governing the exercise of municipal powers under the framework established in article VIII, section 2(b). Section 166.021(1) states: "As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law." Section 166.021(3) provides in pertinent part as follows:

> The Legislature recognizes that pursuant to the grant of power set forth in section 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
>
> . . . .
>
> (c) Any subject expressly preempted to state or county government by the constitution or by general law . . . .

The priority of interests in real estate under Florida law is generally determined by the operation of three statutes. Section 28.222(2), Florida Statutes (2004), requires the clerk of the circuit court to record instruments in the official records and to "keep a register in which he or she shall enter at the time of filing the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument." Section 695.11, Florida Statutes (2004), provides that "[t]he sequence of [official register numbers required under section 28.222] shall determine the priority of recordation"

so that "[a]n instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series." The legal significance of priority of recordation comes into play in the context of the rule established in section 695.01(1), Florida Statutes (2004), which provides as follows: "No conveyance, transfer, or mortgage of real property, or of any interest therein . . . shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law."[1]

The Legislature has, however, provided separately for the priority of certain liens over the priority established under chapter 695. For example, section 197.122(1), Florida Statutes (2004), provides that "[a]ll taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens." Similarly, section 170.09, Florida Statutes (2004), provides that special

1. The Fifth District states that section 695.11 "codifies . . . the common law rule of first in time, first in right." Palm Bay, 57 So. 3d at 227. Although it has no bearing on the preemption question at issue in this case, we note that this characterization of Florida law is misleading. The comment incorrectly leaves section 695.01(1) out of consideration and suggests that priority of recordation necessarily establishes priority of right. A thoughtful discussion of the operation of Florida law in determining priority of interests in real property is contained in Argent Mortgage Co., LLC, v. Wachovia Bank N.A., 52 So. 3d 796 (Fla. 5th DCA 2010); see also Van Eepoel Real Estate Co. v. Sarasota Milk Co., 129 So. 892 (Fla. 1930).

assessment liens are "coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid."

II. ANALYSIS

Based on the provisions of article VIII, section 2(b), Florida Constitution, and the related provisions in section 166.021, we have acknowledged that "[i]n Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers." City of Hollywood v. Mulligan, 934 So. 2d 1238, 1243 (Fla. 2006). We have also stated that—as is recognized in section 166.021—"a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State." Hollywood, 934 So. 2d at 1243. But we have never interpreted either the constitutional or statutory provisions relating to the legislative preemption of municipal home rule powers to require that the Legislature specifically state that the exercise of municipal power on a particular subject is precluded. Instead, we have held that "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." Barragan v. City of Miami, 545 So. 2d 252, 254 (Fla. 1989). We have also recognized that where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, "a municipality's concurrent legislation must not conflict with state law." Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993).

The critical phrase of article VIII, section 2(b)—"except as otherwise provided by law"—establishes the constitutional superiority of the Legislature's power over municipal power. Accordingly, "[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." Thomas, 614 So. 2d at 470. When a municipal "ordinance flies in the face of state law"—that is, cannot be reconciled with state law—the ordinance "cannot be sustained." Barragan, 545 So. 2d at 255. Such "conflict preemption" comes into play "where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute." 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012).

Here, it is undisputed that the Palm Bay ordinance provision establishes a priority that is inconsistent with the priority established by the pertinent provisions of chapter 695. In those statutory provisions, the Legislature has created a general scheme for priority of rights with respect to interest in real property. Giving effect to the ordinance superpriority provision would allow a municipality to displace the policy judgment reflected in the Legislature's enactment of the statutory provisions. And it would allow the municipality to destroy rights that the Legislature established by state law. A more direct conflict with a statute is hard to imagine. Nothing in the constitutional or statutory provisions relating to municipal home rule or in the Local Government Code Enforcement Boards Act provides any

basis for such a municipal abrogation of a state statute. The conflict between the Palm Bay ordinance and state law is a sufficient ground for concluding that the ordinance superpriority provision is invalid.

We categorically reject the City's argument that the legislative enactment of exceptions to a statutory scheme provides justification for municipalities to enact exceptions to the statutory scheme. No authority supports this argument. The power to create exceptions to a legislative scheme is the power to alter that legislative scheme. "Fundamental to the doctrine of preemption is the understanding that local governments lack the authority to craft their own exceptions to general state laws." 5 McQuillin Mun. Corp. § 15:18 (3d ed. 2012). Although municipalities generally have "the power to enact legislation concerning any subject matter upon which the state Legislature may act," § 166.021(3), Fla. Stat. (2004), in exercising their power within that scope municipalities are precluded from taking any action that conflicts with a state statute. In this context, concurrent power does not mean equal power.

III. CONCLUSION

The Fifth District correctly concluded that the superpriority provision of the Palm Bay ordinance is invalid because it conflicts with state law. We approve that determination and answer the certified question in the negative.

It is so ordered.

POLSTON, C.J., and LEWIS, QUINCE, and LABARGA, JJ., concur.
PERRY, J., dissents with an opinion, in which PARIENTE, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PERRY, J., dissenting.

The majority holds that the City of Palm Bay's home rule authority does not provide it with the authority to enact an ordinance providing code enforcement liens superior priority over prior recorded mortgages. Because I disagree that the ordinance irreconcilably conflicts with the mechanical recording statute provided in section 162.09, Florida Statutes (2004), or that the Florida Legislature has expressed a scheme "so pervasive as to evidence an intent to preempt the particular area,"[2] I would find that the city's ordinance was properly enacted. Accordingly, I dissent.

The majority reasons that section 162.09(3) "contains no provision expressly authorizing municipalities to establish special priority for such liens." Maj. op. at 3. However, this is not the appropriate test to determine whether a municipality has exceeded its powers. The City of Palm Bay does not require the Legislature's express permission to act under its home rule powers. Section 166.021(1) states in relevant part that "municipalities . . . may exercise any power for municipal

2. Sarasota Alliance for Fair Elections Inc. v. Browning, 28 So. 3d 880, 886, 888 (Fla. 2010).

purposes, except when expressly prohibited by law." Further, section 166.021(3)(c) provides that the municipality has the power to enact legislation concerning any subject matter upon which the Legislature may act except "[a]ny subject expressly preempted to state or county government by the constitution or by general law. . . ." (Emphasis added). Thus, it is not whether the Legislature has expressly authorized municipal power, but whether such power has been expressly prohibited. Here, there has been no express preemption that would prohibit the City's action.

Because the language contained in sections 162.09, 695.11, and related provisions does not expressly conflict with the ordinance, the City was within its authority to enact the ordinance. The majority avoids this outcome by relying on a single line from this Court's decision in Barragan v. City of Miami, 545 So. 2d 252, 254 (Fla. 1989), stating, "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." Maj. op. at 6. The majority's reliance on Barragan here is misguided and misleading.

Barragan concerned an ordinance that permitted the City to deduct workers' compensation benefits from an employee's pension benefits in contradiction to the provisions of section 440.21, Florida Statutes (1987). Because the workers' compensation scheme outlined in chapter 440 explicitly applied to every employer

and employee working in the state, the City's ordinance was expressly preempted by the statute. See Barragan, 545 So. 2d at 254 (citing § 440.03, Fla. Stat. (1987)). In Barragan, Chief Justice Ehrlich emphasized that, "The city should not be permitted to do indirectly that which it cannot do directly." Id. at 255 (Ehrlich, C.J., concurring in result only). In contrast, here the mechanical recording statute does not provide an all-encompassing lien priority scheme. Clearly there is no express preemption of the subject matter concerning the City's ordinance. Yet, the majority maintains that "the Palm Bay ordinance is invalid because it conflicts with state law." Again, the majority applies the improper test.

Express preemption is not the same as implied preemption or conflict—this Court has previously distinguished between these concepts. See Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880, 886, 888 (Fla. 2010) (defining implied preemption as "when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature" and conflict as "when two legislative enactments cannot coexist"); see also Phantom of Brevard Cnty. v. Brevard Cnty., 3 So. 3d 309, 314 (Fla. 2008); City of Hollywood v. Mulligan, 934 So. 2d 1238, 1243, 1246-47 (Fla. 2006) (internal quotations omitted). Here, section 166.021 provides that the City may act except where expressly preempted, not impliedly preempted or in conflict. These are distinct

tests that should not be conflated. However, no matter the test applied here, there is no preemption evident in the statutes, neither explicit nor implicit.

While the majority recognizes that municipalities can legislate concurrently with the Legislature, see Maj. op. at 6 (citing City of Hollywood, 934 So. 2d at 1243), the majority nevertheless "categorically reject[s] the City's argument that the legislative enactment of exceptions to a statutory scheme provides justification for municipalities to enact exceptions to the statutory scheme." Maj. op. at 8. To read the statute and ordinance as unable to coexist ignores that the Legislature has not previously regarded the mechanical recording statute as a pervasive scheme without exemptions. See § 170.09, Fla. Stat. (2004) (providing lien priority and superiority for non-home rule municipality special assessments); § 197.552, Fla. Stat. (2004) (providing superiority for tax deeds except to municipal liens); § 718.116(5)(a), Fla. Stat. (2004) (providing superior lien priority for condominium assessments); § 713.07(2), Fla. Stat. (2004) (providing lien priority for construction liens). Additionally, lien priority can be altered by contract. Likewise, courts have recognized liens with superior priority despite their inferior filing dates. In Gailey v. Robertson, 98 Fla. 176 (Fla. 1929), this Court found that a "mortgagee has no greater vested right . . . than the fee simple owner and the rights of both must yield alike to the sovereign power when exercised to impose proper and lawful taxes." Id. at 179. The Court accordingly found that the

mortgage held by Gailey was not prior in dignity to the lien claimed by the city of Winter Haven, despite its prior recording date. Id. at 177. In First Nationwide Mortg. Corp. v. Brantley, 851 So. 2d 885 (Fla. 4th DCA 2003), the Fourth District found that a city lien was not superior to the mortgage because it "was not the result of municipal services, special assessments or any other type lien covered under section 23-68 of the City's Code of Ordinances." Id. at 887.

I would find that the Legislature has therefore not expressed a pervasive scheme—the statutes on the issue are scattered and separately enacted. Because the Legislature has provided several exemptions to the "first in time" rule, the City may likewise legislate such a rule under its home rule authority. See Wyche v. State, 619 So. 2d 231, 238 (Fla. 1993) ("Although municipalities and the legislature may legislate concurrently in areas not expressly preempted to the state, a municipality's concurrent legislation may not conflict with state law.").

I would likewise find that there is nothing in section 695.11 that expressly preempts the City of Palm Bay's ordinance. As described in Argent Mortgage Co. v. Wachovia Bank, N.A., 52 So. 3d 796, 800 (Fla. 5th DCA 2010), section 695.11 is a "mechanism for determining the time at which an instrument was deemed to be recorded." Because there is no express limitation by section 695.11, The City of Palm Bay had authority under section 166.021 to enact the ordinance. Accordingly, I dissent.

PARIENTE, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fifth District - Case No. 5D09-1810

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