IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ANITA YANES AND BRITTNEY SMITH,

Appellants,

v.

Case No. 5D19-1853

OC FOOD & BEVERAGE LLC. D/B/A RACHEL'S AND WEST PALM BEACH FOOD AND BEVERAGE LLC., D/B/A RACHEL'S ADULT ENTERTAINMENT AND STEAK HOUSE,

Appellees.

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Opinion filed July 24, 2020

Appeal from the Circuit Court
for Orange County,
Keith A. Carsten, Judge.

Matthew W. Dietz, of Disability Independence Group, Inc., Miami, for Appellants.

Jeffrey Newton, County Attorney, and Elaine Marquardt Asad, Orange County Attorney's Office, Orlando, and Raul J. Aguila, City Attorney, City of Miami Beach, and Robert F. Rosenwald, Jr., First Assistant City Attorney, and Faroat I. Andasheva, Assistant City Attorney, Miami Beach, Amici Curiae, for Appellants.

Diana L. Martin, of Cohen Milstein, Sellers & Toll, PLLC, Palm Beach Gardens, and Lindsay Nako, Berkeley, California, and Julie Wilensky, National Center for Lesbian Rights, San Franciso, California, Amici Curiae, for Appellants.

Steven G. Mason, of Steven G. Mason, P.A., Altamonte Springs, for Appellees.

EVANDER, C.J.,

Anita Yanes and Brittney Smith ("Appellants") appeal an order dismissing their complaint for sexual discrimination against an adult entertainment nightclub ("Rachel's"). Appellants alleged that Rachel's denied them access to a public accommodation based on their sex, in violation of Orange County Ordinance 22-42, when it refused them entry because they were not accompanied by a man. The complaint was brought pursuant to Orange County Ordinance 22-4 which states, in pertinent part, that an aggrieved individual may commence a civil action in a court of competent jurisdiction against the person alleged to have committed a discriminatory practice. Rachel's filed a motion to dismiss the complaint, arguing that the ordinances in question were invalid because they were preempted by and/or in conflict with provisions set forth in the Florida Civil Rights Act ("FCRA")—chapter 760 of the Florida Statutes.

Appellants filed a written response to Rachel's motion, asserting that the ordinances in question were constitutional because they were not preempted by, nor in conflict with, the FCRA. Appellants further argued that Rachel's motion to dismiss should be denied because they had failed to join Orange County("the County") as a party to the

suit, as required by section 86.091, Florida Statutes (2018).[1] No representative of the County appeared at the hearing on Rachel's motion to dismiss. Rachel's counsel advised the trial court that it had apprised the County's attorney, both by phone and email, of the nature of the case, but the County was never made a party to the action.

The trial court agreed with Rachel's that the county ordinances were preempted by FCRA and ultimately dismissed Appellants' complaint. Because we conclude that section 86.091, Florida Statutes (2018), required Rachel's to join the County as a party, we reverse and decline to address whether chapter 760 preempts Orange County Ordinances 22-4 and 22-42.

Section 86.091 provides:

> *When declaratory relief is sought*, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings. *In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard.* If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.

[1] Appellants also asserted that Rachel's was required to comply with Florida Rule of Civil Procedure 1.071. That rule provides that when a party files a pleading, written motion, or other document drawing into question the constitutionality of a state statute or a county or municipal charter ordinance, or franchise, it must promptly serve notice of the pleading, motion, or other document on the Attorney General or the state attorney of the judicial circuit in which the action is pending, by either certified or registered mail. Here, the record reflects that shortly before the hearing on the motion to dismiss, Rachel's filed a notice asserting that it had notified the state attorney of its challenge to the county ordinances in question.

(emphasis added). Rachel's argues that because it was a defendant in a suit for damages, it was not required by section 86.091 to bring the County into the lawsuit. We disagree.

Rachel's sought (and successfully obtained below) a judicial declaration that Orange County Ordinances 22-4 and 22-42 were invalid. To conclude that Rachel's could successfully obtain declaratory relief against the County, without the County being a party, would contravene the plain language of this statute. *See Dep't of Educ. v. Glasser*, 622 So. 2d 944, 948 (Fla. 1993) ("We hold that the Department of Education should have been named as a party to the trial court proceedings. . . . We have said that before any proceeding for declaratory relief is entertained all persons who have an 'actual, present, adverse and antagonistic interest in the subject matter' should be before the court. (internal citations omitted));[2] *see also Bohentin v. CESC, Inc., et al.*, No. 2016-CA-002411 (Fla. 2d Cir. Ct. Sept. 27, 2017) (requiring defendants wishing to challenge constitutionality of ordinance to file declaratory judgment claim under section 86.091 and name county as party).

Rachel's also argues that section 86.091 is procedural in nature and cannot "supplant" Florida Rule of Civil Procedure 1.071. We reject this argument. The Florida Supreme Court has provided the following guidelines to ascertain whether a statute is procedural or substantive in nature:

[2] In the instant case, Appellants took an adverse position to Rachel's on the issue of the validity of the County's ordinances. However, it is not difficult to imagine a scenario, as apparently occurred in *Glasser*, where neither party to the litigation makes an effort to oppose a declaration that certain legislation is invalid. By requiring a county to be made a party by a litigant challenging the validity of a particular county ordinance, section 86.091 reduces the potential for a "friendly" lawsuit.

> *Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which *fix and declare the primary rights of individuals with respect towards their persons and property.* On the other hand, *practice and procedure* "encompass the *course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights* or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses.

Massey v. David, 979 So. 2d 931, 936–37 (Fla. 2008) (citing *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991)). "[W]here a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail." *Massey*, 979 So. 2d at 937.

Here, chapter 86 is substantive in nature. *See* § 86.101, Fla. Stat. (2018) ("This chapter is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed."). Pursuant to section 86.011, the Legislature-authorized circuit and county courts to "declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." Particularly relevant to this case, the Legislature authorized trial courts to grant declaratory relief where there was a question as to the validity of a statute or ordinance. *See* § 86.021, Fla. Stat. (2018). The requirement set forth in section 86.091 that a county be made a party "[i]n any proceeding concerning the validity of a county . . . ordinance" is

intimately intertwined with the substantive rights created by chapter 86. Specifically, the Legislature authorized trial courts to grant declaratory relief in proceedings concerning the validity of a county ordinance—but only if the county was made a party to those proceedings.

We also reject Rachel's suggestion that section 86.091 conflicts with Florida Rule of Civil Procedure 1.071. Rule 1.071 requires a party that files a pleading, written motion, or other document drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise, to give notice to the Attorney General or the state attorney of the judicial circuit in which the action is pending. The rule does not negate, in any way, the statutory requirement that a county be made a party where a litigant is seeking a declaration concerning the validity of a county ordinance.

Finally, Rachel's failure to join the County as a party cannot be excused because the County declined the opportunity to file a motion to intervene in the case below. First, section 86.091 mandated that the County be made a party. Second, an intervenor is not assured of having the same procedural rights as a party. *See* Fla. R. Civ. P. 1.230 ("Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion."). Similarly, the fact that this court permitted the County to file an amicus curiae brief in this appeal does not render harmless the trial court's error in failing to require the County to be joined as a party. Amici are limited in the arguments they can make to an appellate court. *See Westphal v. City of St. Petersburg*, 194 So. 3d 311, 315 n.2 (Fla. 2016) ("[W]e do not consider arguments raised by amici curiae that were not raised by

the parties."); *see also Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982), *approved sub nom*., *Acton v. Ft. Lauderdale Hosp.*, 440 So. 2d 1282 (Fla. 1983) ("Amici do not have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties.").

Because Orange County was not a party to the action below, or to this appeal, we decline to address Appellants' argument as to whether the trial court erred in holding Orange County Ordinances 22-4 and 22-42 to be unconstitutional. Instead, we reverse the trial court's order dismissing Appellants' complaint and remand for further proceedings in accordance with this opinion.

REVERSED and REMANDED with instructions.

ORFINGER and LAMBERT, JJ., concur.