

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,)
)
 Petitioner,)
)
vs.) Case No. 99-2863T
)
AK MEDIA GROUP, INC.)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 2, 1999, by video teleconference between Tallahassee and Fort Lauderdale, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sheauching Yu, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

For Respondent: Mark S. Ulmer, Esquire
11900 Biscayne Boulevard, Suite 612
Miami, Florida 33181

STATEMENT OF THE ISSUES

Whether Respondent's outdoor advertising permits BU 839 and BU 840 became void pursuant to the provisions of Section 479.07(5)(a), Florida Statutes.

PRELIMINARY STATEMENT

On August 18, 1998, Petitioner issued to Respondent two state outdoor advertising permits to build and maintain a two-faced sign at a specified location in Palm Beach County. One permit was for the sign facing north and the other was for the sign facing south. On May 21, 1999, Petitioner issued a notice to Respondent that the two permits were void because a completed sign had not been erected at the permitted location within 270 days from the issuance of the permits. In reaching that determination, Petitioner relied on the provisions of Section 479.07(5)(a), Florida Statutes, and the definition of the term "completed sign" contained in Rule 14-10.0011(2)(c), Florida Administrative Code. Respondent timely challenged Petitioner's determination that the permits are void, the matter was referred to Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Ralph Paciello and Fred Harper, both of whom are employees of the Department of Transportation. Petitioner presented three exhibits, each of which was admitted into evidence. Official recognition was taken of all relevant statutes and rules.

Respondent presented the testimony of Greg Hibbs, an employee of Respondent. Respondent presented pre-marked exhibits 1 through 10, 12 through 25, 27 through 37 (these were

re-marked as composite exhibit 44), and 38 through 43, each of which was accepted into evidence.

A Transcript of the proceedings was filed on October 1, 1999. Petitioner and Respondent filed proposed recommended orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On August 18, 1998, Petitioner issued valid state outdoor advertising permit numbers BU 839 and BU 840 to Respondent for a sign with two faces, one facing north and the other facing south, to be erected at a specified location on the west side of State Road 5, 2000 feet north of PGA Boulevard in Palm Beach County, Florida.

2. Section 479.07(5)(a), Florida Statutes, provides, in pertinent part, as follows:

. . . If the permittee fails to erect a completed sign on the permitted site within 270 days after the date on which the permit was issued, the permit will be void, and the department may not issue a new permit to that permittee for the same location for 270 days after the date on which the permit became void. 1/

3. Petitioner adopted the following definition at Rule 14-10.001(2)(c), Florida Administrative Code, on June 28, 1998:

(c) "Completed Sign", for the purposes of Section 479.07(5)(a), Florida Statutes, means the erection of the sign structure as described in the permit, as well as

attachment of the facing to the structure,
and the posting of a message to the facing.

4. Petitioner asserts the permits became void by operation of law on May 16, 1999, because that date is 271 days from August 18, 1998, the date the subject permits were issued. As of May 16, 1999, no completed sign had been erected by Respondent on the permitted site as the term "completed sign" has been defined by Rule 14-10.001(2)(c), Florida Administrative Code. Petitioner notified Respondent on May 21, 1999, that the subject permits were void.

5. No representative of Petitioner misled or lulled Respondent into inaction at any time pertinent to this proceeding.

6. Palm Beach County, the local permitting agency, requires a "Special Permit" before an outdoor advertising sign can be erected within its jurisdiction. Respondent applied for such a Special Permit for the subject signs on March 10, 1998. Palm Beach County issued Respondent a Special Permit for the subject location, but imposed a special condition, to which Respondent agreed. The special condition required Respondent to remove one of its other signs worth approximately \$100,000.

7. In addition to the Special Permit, Respondent was required to obtain from Palm Beach County a building permit for this project. That building permit was issued May 14, 1998.

8. Respondent applied to Petitioner for the two permits that are at issue in this proceeding on May 18, 1998. On June 16, 1998, Petitioner denied Respondent's application on the grounds that additional information was needed. After the additional information was supplied, the subject permits were issued on August 18, 1998.

9. On November 15, 1998, Respondent finished the site work that had to be done before the sign could be constructed.

10. The Palm Beach County building permit expired 160 days after it was issued. Respondent secured the renewal of that permit on January 20, 1999.

11. Petitioner placed orders for the sign construction in February 1999. The structural components arrived at the permitted site on April 5, 1999. Between April 5 and April 9, 1999, a 25-foot deep hole was dug, into which the 47-foot long, 4-foot diameter steel monopole was lowered by crane, and six tons of concrete were poured to construct a foundation and support for the sign superstructure. On April 9, 1999, Palm Beach County approved the final inspection of the excavation and foundation. On April 13, 1999, the superstructure of the sign was lifted onto the steel monopole by crane and installed, thereby completing construction of the two-faced sign. 2/ The cost of this construction totaled approximately \$50,000.

12. On April 14, 1999, Palm Beach County issued a stop work order (red tag) to Respondent for failure to post permit and plans at the job site and because a subcontractor blocked traffic with a crane that was being used to erect the sign structure. This red tag prevented Respondent from doing any further work on the two-faced sign. Had Respondent violated the red tag, it would have been exposed to a civil penalty of \$250 per day and misdemeanor charges.

13. Shortly after it learned that a red tag had been issued on April 14, 1999, representatives of Respondent met with Palm Beach County building officials and disputed their rationale for the red tag.

14. Believing that the red tag issue with Palm Beach County had been resolved, Respondent entered into contracts with advertisers for the respective faces of the two-faced sign, one on April 22 and the other on May 11, 1999. It would have taken less than a day to install advertising copy on these signs.

15. Palm Beach County did not lift its red tag on these signs until July 21, 1999. On August 9, 1999, Palm Beach County approved the two-faced sign on final inspection.

16. Respondent placed advertising copy on both faces of the sign on August 9, 1999.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

18. Petitioner's rule defining the term "completed sign" is not being challenged in this proceeding. Applying that definition to the facts of that case, it is concluded that there was no completed sign at the permitted location within 270 days after the permits were issued by Petitioner.

19. Respondent's position that permits BU 339 and BU 340 are not void is based on the following arguments:

(a) that it did not fail to erect a completed sign within the meaning of the statute because it was prevented from doing so by Palm Beach County's red tag,

(b) that the doctrine of collateral estoppel estops Petitioner from asserting that the permits are void, and/or

(c) that the doctrine of equitable tolling should be applied to extend the 270 day deadline for completion of the signs.

20. Respondent's argument that it did not fail to timely complete the sign within the meaning of Section 479.07(5)(a), Florida Statutes, because it was prevented from doing so by the red tag is rejected. An accepted definition of the term "fail" is to be unsuccessful in attempting to do something. See The American Heritage Dictionary of the English Language. That definition of the term "fail" does not require that the lack of

success be the fault of the entity making the attempt. The evidence clearly established that Respondent was not successful in timely completing the signs.

21. Respondent failed to establish that the doctrine of collateral estoppel should be applied to estop Petitioner from asserting that the permits are void. Succinctly stated, the elements of equitable estoppel are as follows: (a) a representation as to a material fact that is contrary to a later-asserted position; (b) reliance on that representation; and (c) a change in position detrimental to the party claiming estoppel, caused by representation and reliance thereon. See Dolphin Outdoor Advertising v. Department of Transportation, 582 So. 2d 709, 710-11 (Fla. 1st DCA 1991). Respondent did not establish those elements. Moreover, the acts Respondent relies upon in attempting to establish the elements of that doctrine are those of Palm Beach County, not those of Petitioner. Respondent has cited no persuasive authority for its novel argument that the acts of Palm Beach County can be used to establish the elements of collateral estoppel against the Florida Department of Transportation.

22. In Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988), the Supreme Court observed, at 1134, that the doctrine of equitable tolling

. . . has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.

23. An administrative body should exercise its discretion to apply the doctrine of equitable tolling only under compelling circumstances. It is concluded that such compelling circumstances exist in this case.

24. Respondent expended considerable sums on these signs and was working on a schedule to timely complete the signs when Palm Beach County intervened. Respondent would have undoubtedly completed the two-faced sign within the 270 day period had not Palm Beach County prohibited further work on the sign structure at the very end of its completion. Palm Beach County's intervention should be considered an extraordinary circumstance that justifies the application of the doctrine of equitable tolling to toll the running of the 270 day period during the time the Respondent was prohibited from working on the structure because of the red tag. Petitioner should considered the harm to Respondent if the doctrine is not applied. To require Respondent to remove the sign structure under the facts of this case would be a harsh, inequitable result that would serve no valid public purpose.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order that applies the doctrine of equitable tolling and declares permits BU 839 and BU 840 valid.

DONE AND ENTERED this 28th day of December, 1999, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Hearings

Filed with the Clerk of the
Division of Administrative
Hearings
this 28th day of December, 1999.

ENDNOTES

1/ Petitioner established that the purpose of this provision was to prevent sign companies from stockpiling permits.

2/ Section 479.01, Florida Statutes, contains the following definitions:

(6) "Erect" means to construct, build, raise, place, affix, attach, create, paint, draw, or in any other way bring into being or establish; but it does not include any of the foregoing activities when performed as an incident to the change of advertising

message or customary maintenance or repair
of a sign.

* * *

(FORMAT)

(17) "Sign" means any combination of structure and message in the form of an outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, advertising structure, advertisement, logo, symbol, or other form, whether placed individually or on a V-type, back-to-back, side-to-side, stacked, or double-faced display or automatic changeable facing, designed, intended, or used to advertise or inform, any part of the advertising message or informative contents of which is visible from any place on the main-traveled way supporting or displacing a message or informative contents.

* * *

(FORMAT)

(21) "Sign Structure" means all the integrated parts and material, such as beams, poles, and stringers. . . .

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.