IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

CASE No.: 3D19-0300
L.T. CASE NO.: 2017-CA-008285-01

CITY OF OPA-LOCKA, FLORIDA,
Appellant,

vs.

GEORGE SUAREZ, et al.,
Appellees.

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

As a municipality, the City of Opa-locka is a sovereign entity entitled to immunity both from the costs of litigation and judgments except where such immunity has been waived by the Florida legislature or by the City pursuant to an express, written contract.

Plaintiffs sued the City of Opa-locka seeking $20 million in damages in connection with the City's operation of its public water utility. Chapter 180, Florida Statutes grants municipalities broad authority to control the operation of their water utility and to make rules and regulations governing the use and operation of the utility service. In connection with this authority, the City adopted Section 21, City of Opa-locka Code of Ordinances ("Water Utility Ordinance"), which governs the City's operation of its water utility.

The Plaintiffs filed a class action complaint against the City asserting breach of contract, civil theft (which has been dismissed), and injunctive relief claims alleging that the City breached its contract with the Plaintiffs and all other similarly situated water customers by using the water utility deposits to fund governmental activities and by allegedly using broken water meters to calculate and bill their water usage which Plaintiffs allege led to overcharges by the City. The Plaintiffs proposed two classes: one asserting claims related to the City's use of the water utility deposits and the other as to overcharges.

The City's decision to use the water deposits for governmental purposes and its decision as to when and how to fund the replacement of water meters are governmental functions protected by sovereign immunity unless the City waived such immunity by the terms of an express contract with the water customers. The issue on this appeal is whether the Plaintiffs can avoid summary judgment on their breach of contract claim without establishing the existence of an express written contract with terms the Plaintiffs allege have been breached by the City.

Pursuant to the City's Water Utility Ordinance, the City has two contracts with its water customers: (1) a water services application; and (2) a deposit contract both of which are required for water customers to receive water services from the City. The Plaintiffs, however, did not sue for breach of these contracts and they did not attach or identify these contracts or any other contract as the basis of their breach of contract and injunction claims. The City moved for summary judgment arguing that the Plaintiffs failed to identify any contract or contractual terms to establish that the City waived its sovereign immunity or, more importantly, which preclude the conduct for which the Plaintiffs complain.

In response to the City's motion for summary judgment, the Plaintiffs conceded that the water service application and the utility deposit contract were the only two contracts applicable to the City's water utility service. For the purposes of summary judgment, those writings contain the *only express written terms*

establishing the scope of the City's contractual waiver of its immunity for a breach of contract claim. The terms of those contracts, however, were not pled or even referenced in Plaintiffs' complaint. Plaintiffs do not allege that any term of those contracts have been breached. Moreover, neither the water service application nor the deposit contract contains any provision precluding the City from the conduct which Plaintiffs complain. That required summary judgment in the City's favor.

The City also moved for summary judgment based on the Plaintiffs' lack of standing because the Plaintiffs failed to establish that they were members of the class that they sought to represent with respect to the customer deposits. The Plaintiffs presented no evidence that they were entitled to a return of their deposits, were at risk of not having their deposits returned when they are entitled to receive them, and presented no evidence that they have been damaged in any way by the City's use of the water deposits. As such, they lack standing to challenge the City's sovereign immunity and bring a claim or represent a class based on the City's use of the deposits.

Even though Plaintiffs failed to submit evidence of any express contract with terms which they alleged have been breached, the trial court ruled that the City was not entitled sovereign immunity for the breach of contract claim. In so ruling, the trial court ignored the terms of the deposit contract and the water service application which define the scope of the City's contractual waiver of immunity. In the face of

the Plaintiffs' failure to submit any contract with terms supporting their allegations as well as the deposit contract and the water service application (which negate Plaintiffs' allegations), the trial court ruled that a contract addressing the alleged conduct must exist, even if not express. This ruling disregards well established Florida law that a sovereign waives it sovereign immunity only by terms of an express, written contract. The trial court erred. This Court should reverse and order the trial court to enter summary judgment for the City on Plaintiffs' breach of contract and injunctive claims.

STATEMENT OF THE CASE

A. Plaintiffs Sue the City for $20 Million.

The City of Opa-locka is currently under state oversight. *See* Summary Judgment Hr'g Tr. 6:12-13, Jan. 9, 2019 [APP. 0509]. That is one of the measures the State has employed to assist the City to self-correct its prior fiscal issues. One of the City's essential governmental functions is operating a water utility that provides water and sewer services to its residents.

Plaintiffs sued the City based on decisions made by the City in connection with the operation of its water utility. In a putative class action lawsuit seeking $20 million, Plaintiffs filed breach of contract, civil theft, and injunctive relief claims for injuries dating back to January 1, 2000. Only the breach of contract and injunctive relief claims are at issue in this appeal. Plaintiffs alleged that the City breached a

contract with its residents by operating broken meters that allegedly resulted in overcharges for water service and by using water deposits to fund government operations. Without attaching or identifying the contract, the Plaintiffs alleged that their contracts with the City were identical, that Plaintiffs complied with all the terms, and that the City breached numerous terms that resulted in overcharging residents for water use. First Am. Compl. ¶¶ 61-65 ("Compl.") [APP. 0101].

For instance, and as relevant to the damages and injunctive relief pled, Plaintiffs alleged that the City breached the following contractual terms: (1) to maintain accurate water meters; (2) to accurately account and bill water customers; (3) to secure deposits; and (4) to provide water at reasonable costs "under the terms of the water utility." *Id.* at ¶¶ 65, 67. Beyond those "contractual terms," Plaintiffs further alleged that Opa-locka also violated the City Code, the City Charter, Florida Statutes, and Florida's constitution and, by doing so, that "constitutes a breach of contract." *Id.* at ¶ 66.

Plaintiffs never attached the terms of the alleged contract, or the City Code, City Charter or the Florida Constitution, to either their Complaint or their First Amended Complaint. *But see* Fla. R. Civ. P. 1.130(a) (All . . . contracts . . . on which action may be brought . . . or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading."). Nor

did either pleading identify what provisions of which writings were the basis for Plaintiffs' claims. *See generally* Compl [APP. 0083 – 182].

B. The City Moves for Summary Judgment on Sovereign Immunity.

Nearly a year and a half after Plaintiffs filed this lawsuit, the City moved for summary judgment, asserting, among other things, sovereign immunity. *See* The City of Opa-locka's Motion for Summary Judgment and Incorporated Memorandum of Law ("MSJ") [APP. 0198 – 0216]. The City contended that it remained immune from a breach of contract claim unless Plaintiffs' allegations were founded on an express, written contract with terms related to the conduct on which Plaintiffs based their claim. *E.g.*, MSJ at 10 (citing authorities) [APP. 0207]. The City demanded the Plaintiffs produce the contract that is the basis for their claims. *Id.* at 9-10. The City contended that there was no contract that precluded its use of the water deposits—as long as the deposits are timely returned when due—and there was no contract that required the City to maintain new water meters. [APP. 0212]. In support of its position, the City submitted at summary judgment the two writings that water customers are required to sign—a water application and a utility deposit contract—as a condition of receiving water service. The express terms of those documents preclude Plaintiffs' breach of contract and injunctive relief claims.

The City initially produced, by way of affidavit, a deposit slip that residents sign before the City commences water utility services, i.e., the utility deposit

contract. *See* Declaration of Ann Barnett (Barnett Decl.), MSJ at Ex. A at Ex. 1 [APP. 0215 – 216]. That deposit slip contradicted an essential claim of Plaintiffs' lawsuit: that the City was contractually required to place water deposits submitted by residents in a segregated account that the City was not permitted to use. *Compare id. with* Compl. ¶¶ 17, 43, 65 [APP. 0087; APP. 0095; APP. 0101].

The deposit slip established the rights to the deposited funds before cancellation of water services and afterward. Barnett Decl. at Ex. 1 [APP. 0215 – 216]. As to the use of deposited funds before cancellation of water services, the deposit slip provided:

> AS A DEPOSIT TO GUARANTEE THE DUE PAYMENT OF ANY AND ALL INDEBTEDNESS FOR WATER SERVICE OR CHARGES INCIDENT TO THE WATER DEPARTMENT CONNECTIONS, WHICH MAY BE [ ] [sic] BECOME DUE TO THE CITY OF OPA LOCKA, FLORIDA. ***BY THE CONSUMER NAMED HEREIN, THIS DEPOSIT IS MADE WITH THE EXPRESS UNDERSTANDING AND AGREEMENT THAT ALL OR ANY PART THEREOF MAY BE APPLIED BY THE CITY OF OPA LOCKA, FLORIDA, AT ANY TIME IN SATISFACTION OF . . . [THE] GUARANTEE [;] AND THAT THE CITY OF OPA LOCKA, MAY USE . . . [THE] DEPOSIT AS FULLY AS IF THE . . . CITY WERE THE ABSOLUTE OWNER THEREOF***.

Id. (emphases added). The deposit slip provided the conditions in which a customer is entitled to a return of the water deposit:

> UPON DISCONTINUANCE OF ANY OR ALL SERVICES COVERED BY THIS DEPOSIT, AND THE PRESENTATION OF THIS RECEIPT, TOGETHER WITH PROPER IDENTIFICATION, THE CITY OF OPA LOCKA AGREES TO REFUND TO THE … CONSUMER OR WHOEVER MAY BE LAWFULLY ENTITLED

> THERETO, THAT PORTION OF THE DEPOSIT APPLYING TO THE SERVICE OR SERVICES DISCONTINUED, LESS ANY AMOUNTS THEN DUE TO THE CITY OF OPA LOCKA, FLORIDA.

Id. In sum then, the deposit slip established that the City was permitted to act as "absolute owner" of the deposited funds until a resident discontinued water services, at which point the City had to refund the deposit minus any amounts then owed to the City. *See id.* The City produced evidence at summary judgment that none of the Plaintiffs discontinued water services with the City—and, thus, had no claim (or injury due) to deposited funds. MSJ at 5, 8; Barnett Decl. ¶ 6 [APP. 0202 – 203; APP. 0213]. The Plaintiffs never contested that evidence. The City accordingly argued that each Plaintiff lacked standing to assert a claim against City related to water deposits. MSJ at 8 [APP. 0205].

Like the deposit slip and the application, nothing in the City's Water Utility Ordinance precludes the City from using the water utility deposits as needed for governmental needs. The Water Utility Ordinance provides:

> Upon the request of the owner or consumer making such deposit or their assigns, for discontinuation of service and upon payment of all charges arising out of any service on said premises, the deposit shall be refunded.

§ 21-80(c), City Code.

The City Water Utility Ordinance also contradicted another breach of contract claim by Plaintiffs. As to the allegation that the City allegedly used broken or old water meters to measure water usage, the Water Utility Ordinance provides:

> Service is to be furnished only upon signed application accepted by the department, and the conditions of such application and the resulting contract for service are binding upon the consumer as well as upon the department. Applications are accepted by the department with the understanding that *there is no obligation on the part of the department to render service other than that which is then available* ***from its existing equipment***.

§ 21-23, City Code (emphases added). The City Code permits a presumption that the meter reads are correct. § 21-90, City Code ("When the service rendered by the department is measured by meters, the department's accounts thereof shall be accepted and received at all times, places and courts as prima facie evidence of the quantity of water delivered to the consumer."). The Code authorizes residents to contest their meter reads and have the City compensate for the amount of those tests if the meter reads are off by 2%. § 21-91, City Code. The City Code further authorized the City to estimate bills where meters were "defective," "damaged, destroyed or required repair." § 21-93, City Code.

C. Plaintiffs Fail to Identify the Contract That Is the Basis for Their Claims.

Plaintiffs responded to the summary judgment motion three months later, after conducting additional written and oral discovery. *See* Plaintiffs' Memorandum of Law in Opposition to Defendant City of Opa-locka's Motion for Summary Judgment

("Opposition") [APP. 0449 – 0465]. Before submitting that Opposition, the Plaintiffs propounded and received additional discovery. *See, e.g.,* Plaintiffs' Notice of Taking Deposition Duces Tecum, dated Sept. 13, 2018 [APP. 0217 – 0220].

Plaintiffs still failed, however, to produce or identify the terms of the express contract underlying their breach of contract claim. *See id.* Instead, Plaintiffs conceded that the deposit slip, which belied their claims, was a valid contract between them and the City. *See* Opposition at 8-9 ("The written deposit receipt is an express contract between the City and its water customers.") [APP. 0456 – 0457]. Relying on the City Charter, Plaintiffs further pointed to a water service application as evidencing that an express contract with residents existed. *Id.* at 9. The Water Utility Ordinance provides that the water service application is the contract between the City and the waters customers. § 21-23, City Code. Filed later by the City, that application included no contractual terms. *See* Reply in Support of the City of Opa-locka's Summary Judgment Motion at Ex. A, Ex. 1 [APP. 0479 – 0481]. Finally, as to Plaintiffs' claims that the City breached a contract in its use of water deposits on other City budget items, Plaintiffs contended that they "need not establish an ordinance or provision preventing the City from using the deposit for a purpose other than securing payment of the water bill." Opposition at 4 [APP. 0452].

Plaintiffs submitted multiple affidavits and depositions with their opposition but none of which identified the contract or its breached terms. *See* Plaintiffs' Notice

of Filing Deposition of Ann Barnett, dated Nov. 27, 2018 [APP. 0221 – 0367]; Plaintiffs' Notice of Filing Deposition of Marilyn Petit-Frere, dated Nov. 27, 2018 [APP. 0368 – 0436]; Plaintiffs' Notice of Filing Affidavit of Newall Daughtrey, dated Nov. 27, 2018 [APP. 0443 – 0448]; Plaintiffs' Notice of Filing Affidavit of Charmaine Parchment, dated Nov. 27, 2018 [APP. 0437 – 0442]. Plaintiffs instead relied on sworn statements from then-former City officials about what those City officials believed the City was obligated to do pursuant to the contractual terms Plaintiffs never entered in the summary judgment record, quoted, or cited. *See, e.g.*, Affidavit of N. Daughtrey ¶ 6 ("The City improperly stole the taxpayer customer utility deposits and used them for improper purposes that were not authorized. They took the people's water deposits that were supposed to be kept in safe keeping and used them for raises, and other activities that they were not authorized to be used for." (citing nothing)); Affidavit of C. Parchment ¶ 7 (stating similarly and citing noting) [APP. 0446; APP. 0441].

Two days before the Court's hearing on summary judgment, Plaintiffs electronically filed their eight verbatim declarations, casting doubt that there was any express, written contract with the City that governed any of their claims. [APP. 0482 – APP. 0498]. Plaintiffs' declarations relied on oral statements they said an unidentified City water utility clerk made to each of them when they commenced water utility services with the City. *See, e.g.*, Declaration of G. Suarez ("When I

gave the City my deposit, the City agreed that this was my personal money. I was personally informed by the clerk in the Water Department that my deposit would be segregated and made available to me once I had been a customer for a period of time.") [APP. 0485 – 0486].

The Plaintiffs now asserted this purported oral representation was the basis for their breach of contract claim related to the City's treatment of water deposits. *E.g., id.,* at ¶ 7 ("Based on the express agreement between the City and me at the time I made my deposit, the City did not have my permission to use my money for any other purpose."). Each Plaintiff declared: "By taking my deposit money and using it for other purposes, the City failed to adhere to its agreement." *Id.*; Decl. T. Suarez ¶ 7 [APP. 0487]; Decl. A. Raad ¶ 7[APP. 0489]; Decl. C. Raad ¶ 7 [APP. 0491]; Decl. N. Ervin ¶ 7[APP. 0493]; Decl. A. Ervin ¶ 7[APP. 0495]; Decl. S. Barret ¶ 7 [APP. 0497]. Neither Plaintiffs' counsel at the summary judgment hearing nor the Court in its order relied on these declarations.

D. The Court Denies Sovereign Immunity to the City Following a Hearing.

Plaintiffs again submitted no evidence of the terms of the express contract with the City that was the basis for their claims at the summary judgment hearing. *See generally* Hr'g Tr., Jan. 9, 2019 [APP. 0501 – 0652]. Plaintiffs merely referred to terms of the City Charter and Code that reflected that the water service application, which contains no terms supporting the Plaintiffs breach of contract claim, is the

contract governing the City's relationship with its water customers. *See* Hr'g Tr. at 80:23, 87:2-6, 89:1-8 (discussing §§ 21-23, 21-38, City Code, and § 3.8, City Charter) [APP. 0583, APP. 0590, APP. 0592].

The Court ruled at the hearing that the City was not entitled to sovereign immunity. Hr'g Tr. at 121:23 – 122:6 [APP. 0624 – 0625]. The Court agreed that the terms that were the basis of the residents' $20 million claims against the City were not in writing. *Id.* at 123:10-12, 122-24 – 123:5 [APP. 0625 – 0626]. But the Court found an express written contract existed somewhere:

> I find that there is an express contract that is a written contract. I find that they have alleged breaches as enumerated in their complaint, even though they are not expressly written in the so-called receipt [i.e., referring to the deposit slip].
>
> I find that, that taken as a whole, the ordinances and the implied nature of the contractual relationship between the City and its residents to provide water and an accurate price to maintain [sic] to maintain deposits is all -- all to be considered express terms, even though they're not in writing.

Id. at 122:19 – 123:5.

The Court dismissed Plaintiffs' civil theft claim, but granted leave for Plaintiffs to assert a conversion claim instead founded upon the same grounds as the breach of contract allegations related to the water deposits. *See id.* at 121:15-22. The Court entered a written order adopting its reasoning at the hearing. Corrected Order, dated Jan. 13, 2019 [APP. 0499 – 0500].

The City timely appealed the order denying sovereign immunity.

STANDARD OF REVIEW

The issue of sovereign immunity is a legal issue subject to the *de novo* standard of review. *Town of Gulf Stream v. Palm Beach Cty.*, 206 So. 3d 721, 725 (Fla. 4th DCA 2016). This Court also reviews *de novo* an order on a motion for summary judgment, construing the evidence in favor of the non-movant. *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 446 (Fla. 4th DCA 2015).

SUMMARY OF ARGUMENT

The City of Opa-locka is entitled to the privilege of sovereign immunity, which protects a sovereign from burdensome interference with its governmental functions and allows the entity to maintain control over government funds. Here, the Plaintiffs complain about the City's operation of its water utility in general, its use of utility deposit funds for governmental purposes, and its failure to expend funds to purchase and/or repair water meters to the Plaintiffs' liking. Before Plaintiffs, however, can acquire a $20 million judgment against the City, they must establish an exception to the City's sovereign immunity.

The City accepts that its immunity is waived to the extent it breaches an express, written contract. The Plaintiffs are therefore required to identify a contract with terms that the City allegedly breached in order to overcome the City's immunity. Although Plaintiffs purported to bring a breach of contract claim against the City for use of water utility deposits and alleged overcharges

resulting from broken water meters, at summary judgment they failed to present a written contract with terms the City breached. The fact that the City did not operate the water utility in the manner these Plaintiffs would have liked—namely segregating the water deposits and installing newer water meters—is not enough to overcome sovereign immunity absent an express written contract in which the City agreed to operate as such. This Court should reverse the trial court's denial of sovereign immunity.

First, as a procedural matter, Plaintiffs did not submit the terms of the contract that they alleged the City breached before the summary judgment hearing, as required by the civil rules. That alone required summary judgment for the City.

Second, Plaintiffs lacked standing to even challenge the City's sovereign immunity with respect to their deposit claims. The summary judgment evidence established that City residents had no rights with respect to deposits until they discontinued service. Because none of the Plaintiffs have discontinued water service, they lack standing to complain about the deposits.

Third, the summary judgment evidence either belied or was silent with respect to Plaintiffs' claims regarding the deposits and overcharges. The evidence Plaintiffs submitted was improper and incompetent to create any dispute of fact.

Fourth, the City Code evidences that the matters that Plaintiffs complain about are subject to the governmental discretion of the City. At bottom, the

Plaintiffs do not assert breach of any express agreement; they assert dissatisfaction with the City's Code. There is no waiver of sovereign immunity for such allegations.

For those reasons, this Court should reverse and instruct the trial court to enter summary judgment to the City as to Plaintiffs' deposit and overcharge claims because the City remains immune on this record.

ARGUMENT

"Sovereign immunity is the 'privilege of the sovereign not to be sued without its consent.'" *Israel*, 178 So. 3d at 446. "In Florida, sovereign immunity is the rule rather than the exception." *Id.* "Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the vast number of citizens affected by actions of a government." *S. Roadbuilders, Inc. v. Lee Cty.*, 495 So. 2d 189, 190 n.1 (Fla. 2d DCA 1986). Sovereign immunity "is a positively necessary and rational safeguard of taxpayers' money." *Id.*

"[A] municipality waives the protections of sovereign immunity only when it enters into an express contract." *Israel*, 178 So. 3d at 447. Immunity remains, however, where the claims do not arise from breaches of expressed contracts. *See S. Roadbuilders*, 495 So. 2d at 190-91; *see also Strout v. Sch. Bd. of Broward Cty., Fla.*, No. 15-61257, 2016 WL 4804075, at *8-9 (S.D. Fla. Feb. 1, 2016). A duly

authorized written contact is required to establish that sovereign immunity has been waived. *Pan-Am Tobacco Corp. v. Dep't of Corr*., 471 So. 2d 4, 5-6 (Fla. 1984).

I. The City Was Entitled to Summary Judgment Because Plaintiffs Did Not Meet Their Burden to Produce an Express Contract That Was Breached.

Plaintiffs alleged the City breached an express contract and thus waived sovereign immunity, but they failed to establish critical elements related to that claim at summary judgment. "To prevail in a breach of contract action, a plaintiff must prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages." *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 953 (Fla. 3d DCA 2017) (Luck, J.) (citation omitted).

The City moved for summary judgment because the pleadings established no valid agreement between the City and Plaintiffs that the City had breached. *See* MSJ at 3 [APP. 0200]. Indeed, the pleadings neither attached nor disclosed the terms of any agreement between the City and Plaintiffs, much less one that had been breached. *See* Fla. R. Civ. P. 1.130(a) (requiring attaching or describing the terms of a contract at issue). Summary judgment was a proper means to assess whether valid claims existed for trial. For instance, this Court has held: "We consider whether the pleadings and summary judgment evidence before the trial court establish 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." *Villamizar v. Luna Capital Partners, LLC*, 260 So. 3d 355, 358 (Fla. 3d DCA 2018); *see also*

Alexopoulous v. Gordon Hargrove & James, P.A., 109 So. 3d 248, 249 (Fla. 4th DCA 2013) ("The moving party is required to raise the grounds for summary judgment with particularity in order to 'eliminate surprise and to provide the parties a full and fair opportunity to argue the issues.'" (citing also Fla. R. Civ. P. 1.510(c))).

Summary judgment is appropriate when the non-moving party fails to timely meet its burden to produce evidence showing a genuine issue for trial. *See Wolentarski v. Anchor Prop. & Cas. Ins. Co.*, 252 So. 3d 277, 277-78 (Fla. 3d DCA 2018) ("Because the [plaintiffs] failed to timely submit any evidence or filings in opposition to [the defendant's] motion for summary judgment, there was no record evidence of a material issue of disputed fact. The trial court, therefore, correctly granted [the defendant's] motion for summary judgment."); *see also* Fla. R. Civ. P. 1.510(c) ("To the extent that summary judgment evidence has not already been filed with the court, the adverse party must serve a copy on the movant pursuant to Florida Rule of Judicial Administration 2.516 at least 5 days prior to the day of the hearing if service by mail is authorized, or by delivery, electronic filing, or sending by e-mail no later than 5:00 p.m. 2 business days prior to the day of hearing. The judgment sought must be rendered immediately 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.").

In the present case, the City was entitled to summary judgment because after nearly two years of discovery; months of discovery after submission of the summary judgment motion; and Plaintiffs' filing of depositions, affidavits, and declarations, Plaintiffs failed to disclose the terms of an express contract that the City breached. *See Wolentarski*, 252 So. 3d at 277-78. Plaintiffs had to produce the contract they alleged to have been breached before they could proceed with their claims. *See, e.g., Knowles v. C. I. T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977) (reversing judgment for plaintiffs where plaintiff had not proven the existence of a valid contract); *Deauville Hotel*, 219 So. 3d at 953. They did not do so before the summary judgment hearing (or thereafter).

Not only had Plaintiffs failed to submit any evidence of any express contract that the City breached, but the affidavits of former City officials were not competent to establish the terms of a contractual obligation related to the treatment of water deposits. *See, e.g.*, Aff. Daughtrey; Aff. Parchment; *Page v. Fernandina Harbor Joint Venture by and through Fernandina Marina Inv'rs, Ltd.*, 608 So. 2d 520, 523 (Fla. 1st DCA 1992) (affirming summary judgment and rejecting a defendant's interpretation of a contract that a lease established the improvements were owned by the plaintiff as a "legal opinion [that] does not create a disputed

issue of fact"), *disapproved of on other grounds by Sebring Airport Auth. v. McIntyre,* 642 So. 2d 1072, 1074 (Fla. 1994); *Harrison v. Consumers Mtg. Co.*, 154 So. 2d 194, 195 (Fla. 1st DCA 1963) (affirming summary judgment and noting that plaintiff's affidavit was insufficient to support agency relationship because it was based principally on hearsay "or constitute legal conclusions of the affiant"); *see also infra* Part III (discussing the parol evidence rule).

This Court must reverse summary judgment on this deficient record alone and for this reason alone. *See Knowles*, 346 So. 2d at 1043; *see also* Fla. R. Civ. P. 1.510(c). There is simply no contract in the summary judgment record that is the basis for any of Plaintiffs' claims that they wish to present to a jury.

II. The Plaintiffs Lack Standing to Challenge the City's Sovereign Immunity with Respect to the Deposit Allegations

As to Plaintiffs' complaint that the City used the water utility deposits, this Court can reverse on an independent ground: The trial court lacked jurisdiction to even consider these attacks on the City's sovereign immunity in this instance. "'[I]t is well settled that lack of subject matter jurisdiction may be raised sua sponte by an appellate court even if neither party raises issue." *Dep't of Rev. v. Daystar Farms, Inc.*, 803 So. 2d 892, 895 (Fla. 5th DCA 2002). "Thus, '[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order.'" *Id.* at 895-96 (reversing lower

court upon finding that claimant lacked standing to bring claim in the first instance).

The record evidence established that Plaintiffs lacked standing to complain about the handling of water deposits because they had water service with the City and thus had no entitlement to a refund. Barnett Decl. ¶ 6; *see also State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (describing that a plaintiff must demonstrate an injury in fact, "which is concrete, distinct and palpable, and actual or imminent" to have standing). Nor was there any record evidence at summary judgment that Plaintiffs were about to discontinue service or that the City would be unable to provide refunds to them in that event. The record established that City was entitled to act as the "absolute owner" of the deposits until discontinuance of service. Absent an injury related to the water deposits, Plaintiffs lacked standing to assert a claim that the City waived its sovereign immunity. This Court may, and should, reverse in part on that ground alone.

III. Sovereign Immunity Bars Plaintiffs' Breach of Contract Claim Because Plaintiffs Failed to Establish the Existence of a Contract with Terms They Seek to Enforce Against the City.

A municipality waives its sovereign immunity protection only by entering into an express written contract. *Pan-Am Tobacco*, 471 So. 2d at 5-6. "Moreover, waiver will not be found as a product of inference of implication." *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp*., 908 So. 2d 459, 472 (Fla. 2005).

"When an alleged contract is merely implied, however, these sovereign immunity protections remain in force." *Israel*, 178 So. 3d at 447-48.

While the Plaintiffs failed to plead or attach any express written contract(s) or writings supporting their breach of contract claim, the Plaintiffs did concede during the summary judgment proceedings that the only express written contracts between the City and the Plaintiffs in connection with the water utility are the water service application (which contains no terms) and the deposit slip. *See* Opposition at 8-9 [APP. 0449 – 0465]. Thus, these contracts alone determine the scope of any waiver of the City's sovereign immunity. These contracts, however, do not contain any terms, express or implied, that support Plaintiffs' breach of contract allegations against the City.

To the contrary, the deposit slip established as a matter of law that the Plaintiffs' breach of contract allegations regarding water deposits fail. Plaintiffs claimed that the City was obligated to segregate residents' deposits and were prohibited from spending those funds. Decl. T. Suarez ¶ 7 [APP. 0487]; Decl. A. Raad ¶ 7[APP. 0489]; Decl. C. Raad ¶ 7 [APP. 0491]; Decl. N. Ervin ¶ 7[APP. 0493]; Decl. A. Ervin ¶ 7[APP. 0495]; Decl. S. Barret ¶ 7 [APP. 0497]. The contractual provisions in the deposit contract belie those notions. The clear and unambiguous terms of the deposit contract provide that the City could act as the "absolute owner" of deposited funds until a resident discontinued water utility

services, at which point the City must refund the deposited amounts net any amounts owed to the City. Barnett Decl. at Ex. 1 [APP. 0215 – 0216]. There was thus no requirement in any of those contractual terms obligating the City to segregate or refrain from using those funds. The City is obligated to return the funds per the terms of the deposit contract, and Plaintiffs made no allegations and presented no record evidence that the City failed to timely return the deposit to any Plaintiff or any similarly situated water customer upon discontinuance of water utility services.

Nothing in either the deposit slip or the application addresses the alleged overcharge claims. The trial court seemed to acknowledge that, but still deprived the City of sovereign immunity. The trial court was clearly troubled by the Plaintiffs' allegations and went to great lengths to aid the Plaintiffs in maintaining a claim against the City. The trial court held that the City was not entitled to sovereign immunity because an express contract of some form had to exist between the City and Plaintiffs because the City provided water and the Plaintiffs were required to pay. *Id.* at 122:19 – 123:5 [APP. 0625 – 0626]. Ignoring the contracts in the record, the court based her ruling on the terms of some non-existent or yet to be identified contractual writing between the parties. That was reversible error. *See S. Roadbuilders*, 495 So. 2d at 190-91 ("[The company] has not established in the instant action that a breach of the written and binding

instrument occurred."); *Israel*, 178 So. 3d at 447; *see also Strout*, 2016 WL 4804075, at *8-9.

The remaining summary judgment evidence was insufficient to establish a waiver of the City's sovereign immunity. As noted above, the testimony of Plaintiffs' affiants was not competent to establish contractual terms that the City supposedly breached. *See supra* Part I. In addition, the affiants' purported contractual terms contradict the terms of the deposit slip and, thus, are improper parol evidence. *Ala. Farm Bureau Mut. Cas. Ins. Co. v. Harris*, 197 So. 2d 567, 570 (Fla. 3d DCA 1967) ("It is well established that where an agreement is clear and unambiguous in its terms, evidence of a different intent by one of the parties than that expressed in the agreement is not competent for the purpose of changing the agreement."); *see also McCarty v. Dade Div. of Am. Hosp. Supply*, 360 So. 2d 436, 439 (Fla. 3d DCA 1978) ("Under the unambiguous provisions of the contract between the defendant American Hospital and the third party defendant G & A Building and Maintenance, the latter was required to clean the hallway in which the plaintiff slipped and fell. Defendant American Hospital as a party to this contract may invoke the parol evidence rule to exclude testimony offered by the plaintiff to vary or contradict the terms of this contract.").

Also improper is Plaintiffs' eleventh-hour declarations (noticeably not mentioned in their pleadings) that they had an oral agreement with the City to

secure their deposits by means of an unidentified City clerk. *See Fellman v. Southfield Farms Corp.*, 747 So. 2d 1035, 1036 (Fla. 4th DCA 1999) (reversing judgment where the issue that an oral contract existed was not pled and thus "fell outside the scope of the pleadings"). Those declarations also are parol evidence. *See authorities supra*.

This Court should reject the notion that such oral agreements by random, unidentified municipal employees may create liability for cities and counties upwards of $20 million. Florida municipalities will face liability with no end if any pronouncement by any employee may create an express contract to which a municipality may be liable. This Court should reverse.

IV. The City Code Supports the City's Sovereign Immunity Defense to Plaintiffs' Claims.

Although not submitted in the summary judgment record, *see* Fla. R. Civ. P. 1.510(c), the trial court relied on the City Water Utility Ordinance to circumvent the requirement that Plaintiffs prove the existence of an express contract to escape sovereign immunity and pursue their breach of contract claims. In any event, and ironically, the City Water Utility Ordinance supports that the actions for which Plaintiffs complain about are within the discretionary government function for which sovereign immunity is designed to protect and demonstrates that the City did not intend to contractually agree to the terms that Plaintiffs seek to enforce.

The City Water Utility Ordinance addresses both the allegations with respect to deposits and the alleged broken water meters. As with the deposit slip, the Code provides that deposits are refunded only upon discontinuation of service. § 21-81, City Code. Regarding water meters, the City Code expressly states that the City is only obligated to provide service to the extent of "its *existing* equipment." § 21-23, City Code (emphasis added). To that end, the Code further creates a presumption of correctness, including in court proceedings, as to the meter reads. § 21-90, City Code. Residents are authorized to challenge those reads and receive relief if they do so. § 21-91, City Code. Another provision of the City Water Utility Ordinance also contemplates that the City may be required to use broken or defective water meters and, in such cases, provides that the City is expressly permitted to estimate water usage. *See* § 21-93, City Code. When considered, the Plaintiffs' allegations are not challenging any express term of an agreement (which they failed to identify after nearly two years). The Plaintiffs take issue with application of the City's ordinances they disagree with. This is not a breach of contract action. It is an action by residents disgruntled about the policy preferences the City's elected leaders have adopted to govern the City's finances and operations of its water utility. The City is entitled to sovereign immunity with respect to such charges.

CONCLUSION

For the foregoing reasons, the trial court erred in denying the City sovereign immunity as a matter law based on the summary judgment record below. This Court should remand and instruct the trial court to enter summary judgment for the City on the Plaintiffs' breach of contract and injunctive relief claims on the grounds that sovereign immunity bars Plaintiffs' claims as pled and, on the grounds, that the Plaintiffs do not have standing as to the water deposit issue.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Type Size and Font utilized in this brief is New Times Roman, 14 point.

By: /s/*Detra Shaw-Wilder*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on June 24, 2019, via electronic mail using the Court's ePortal system upon counsel for Plaintiffs.

By: /s/*Detra Shaw-Wilder*
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