

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division
www.flsb.uscourts.gov

IN RE:

Case No. 13-35141-EPK
Chapter 11

PALM BEACH COMMUNITY
CHURCH, INC.,

Debtor.

**DEBTOR'S SECOND MEMORANDUM OF LAW IN OPPOSITION TO PROPERTY
APPRAISER'S MOTION TO INVOKE JURISDICTION [ECF 255]**

THE PROPERTY APPRAISER LACKS STANDING

1. In his *Motion to Invoke Jurisdiction* [ECF 255], the Property Appraiser for Palm Beach County, Florida (the "**Property Appraiser**") asks that this Court issue an order precluding litigation as to the issue of property tax exemption on *res judicata* grounds. However, the Property Appraiser has suffered no direct harm and would not suffer a direct harm if the matter were to be litigated.

2. The Eleventh Circuit, in *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990), has outlined the 3-part test for standing, and the Property Appraiser fails to get past the first prong: "[T]he party asserting standing must have suffered actual injury or show imminence of such injury." *See also In re Whittle*, 449 B.R. 427, 429 (M.D. Fla. 2011) ("To demonstrate standing, a party must show (1) he has suffered, or imminently will suffer, an injury-in-fact...") *In re Wood Theaters, LLC*, 491 B.R. 591, 595 (Bankr.M.D. Fla. 2013) ("For constitutional standing, a plaintiff is required to have suffered an injury that is concrete and actual.").

3. In *Whittle*, 449 B.R. 427 at 430, the bankruptcy court held that members of an LLC could not bring a 523 non-dischargeability action because the LLC itself was harmed, and not the

members individually. As the plaintiffs themselves were not creditors, they lacked standing and their complaint was consequently dismissed.

4. In the case at bar, the Property Appraiser is not a creditor and therefore lacks standing to bring his motion. The property taxes at issue were paid to the Tax Collector and the Tax Collector, not the Property Appraiser, is the claimant. The Tax Collector filed the proof of claim, and any potential refund would be paid by the Tax Collector and not the Property Appraiser.

5. As Mr. Clyman, attorney for the Property Appraiser, stated at the last hearing on this matter, the Property Appraiser is not involved in the transaction where the property taxes were paid, and even pointed out how the Property Appraiser is distinct from the Tax Collector. The Property Appraiser has the statutory duty to review a property's value and whether exemptions apply; however, the Property Appraiser is never the receiver of the administrative expenses at issue here.

6. In fact, the Property Appraiser was never a party in interest at all in the bankruptcy case. Notice was not required to be provided to the Property Appraiser, and the Property Appraiser was not involved in the confirmation or reorganization process in any way.

7. With regard to the Property Appraiser's *res judicata* argument, the 11th Circuit has held that such a position requires four elements:

- (1) the prior decision must have been rendered by a court of competent jurisdiction;
- (2) there must have been a final judgment on the merits;
- (3) both cases must involve the same parties or their privies; and**
- (4) both cases must involve the same causes of action.

In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir.2001) (emphasis added).

8. Here, we do not have the same parties involved. The Tax Collector and the Property Appraiser are two separate, distinct entities. As an illustration, in any taxpayer suit contesting the assessment of any tax, the Property Appraiser and Tax Collector are individually named as necessary parties. *See* Fla. Stat. 194.181. If these two parties were the same, then the Florida Legislature would not have made such a distinction. Accordingly, the Property Appraiser and Tax Collector are not the same parties and by statute do not represent the same legal interest.

9. Furthermore, the Florida Statutes outline the separate and distinct roles that the Appraiser and Collector have. For example, Fla. Stat. 193.023 outlines the duties of the Property Appraiser in making assessments, which includes physical inspection of subject properties. By contrast, the role of the Tax Collector is outlined in a separate section of the statutes, specifically Chapter 197, which only addresses collections and in which the Tax Collector's role of actually collecting the property tax is outlined.

10. Pursuant to 11 U.S.C. § 503(a), “[a]n entity may timely file a request for payment of an administrative expense...” Here, the entity that filed its request, and the entity that received payment as an administrative expense, was the Tax Collector, not the Property Appraiser.

11. In his *Motion to Invoke Jurisdiction*, the Property Appraiser argues that it is in privity with the Tax Collector, and therefore has standing to argue *res judicata*. The Property Appraiser bases its privity argument on two grounds. First, it is a co-defendant to the Tax Collector in the state court action in which the exemption denial was challenged. Second, the Property Appraiser contends that its “duty to assess property is part and parcel of the Tax Collector’s duty to collect taxes thereon and represents a mutuality of interest between both constitutional officers.” *Pg. 11, fn 1*. In support of this argument, the Property Appraiser cites Black’s Law Dictionary, 5th

ed., to define *privity* as “an identification of interest of one person with another as to represent the same legal right.” *Id.*

12. This argument fails in this circumstance, however. While the Property Appraiser and the Tax Collector may be co-defendants in the state court case, the interests in the bankruptcy case are not shared. The Tax Collector, but not the Property Appraiser, is the creditor and party in interest. It was the Tax Collector, not the Property Appraiser, that filed ballots accepting the Debtor’s plan [See ECF 162 and 220] and that filed proofs of claim [See POC 3-1 and 3-2].

13. The case law in this state and this circuit supports this assertion. In *Massey v. David*, 831 So.2d 226, 232 (Fla. 1st DCA 2002), the court held that a party may be found to be in privity for *res judicata* purposes, “...only if the party is bound by the final judgment entered to the same extent as the named parties.” Here, a determination as to the religious exemption would only be binding on the Tax Collector, as that is the entity receiving the funds, and the Property Appraiser would not be bound “to the same extent” as that entity would not have a financial stake in the outcome. *See also Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1472 (11th Cir. 1986)(“Privity’ [for res judicata purposes] describes a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty.”) Here, the Property Appraiser would not be bound nor protected by a judicial determination as to the tax exemption, because the Property Appraiser would not be affected by a refund (or denial thereof) of the property taxes already paid.

THE PROPERTY APPRAISER HAS WAIVED ITS RIGHTS TO RAISE *RES JUDICATA*

14. Even if the Property Appraiser is found to have standing to bring its action, the Property Appraiser is precluded from raising the *res judicata* defense because it failed to plead it as an affirmative defense in the underlying state court action. As can be seen in the attached Exhibit

“A”, which is a copy of the Property Appraiser’s answer to the Debtor’s complaint challenging the denial of the religious exemption, the Property Appraiser raised three affirmative defenses (exemption granted, non-payment of ad valorem assessments, and waiver of VAB hearing) but failed to include the *res judicata* argument. Furthermore, the Property Appraiser filed a motion to dismiss (see attached Exhibit “B”) and again failed to raise this argument.

15. By not previously raising *res judicata* as an affirmative defense in the state court proceeding, the Property Appraiser is now barred from arguing this defense. According to the Florida Rules of Civil Procedure 1.110(d):

In pleading to a preceding pleading a party shall set forth affirmatively...
res judicata ... and any other matter constituting an avoidance or
affirmative defense.... Affirmative defenses appearing on the face of a
prior pleading may be asserted as grounds for a motion.¹

As stated by the Eleventh Circuit in *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1350 (11th Cir. 2007), “[A] party’s failure to raise an affirmative defense in the pleadings results in a waiver of the defense.” Therefore, the Property Appraiser cannot now argue *res judicata* when it failed to do so in its answer in the state court.

WHEREFORE, for the reasons stated herein, the Debtor respectfully requests that this Court deny the Tax Appraiser’s *Motion to Invoke Jurisdiction*, allow for the Debtor to litigate its position as to the 2014 property taxes, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

Furr and Cohen, P.A.
Attorneys for the Debtor
2255 Glades Road, Suite 337W
Boca Raton, FL 33431

¹ Similar language is found in Federal Rule of Civil Procedure 8(c).

(561) 395-0500/(561)338-7532-fax

By /s/ Aaron A. Wernick
Aaron A. Wernick
Florida Bar No. 14059
Email: awernick@furrcohen.com