Real Property and Business Litigation Report

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Manuel Farach

Lightfoot v. Cendant Mortgage Corp. --- U.S. ---, Case No. 14–1055 (2017).
The Federal National Mortgage Association's ("FNMA") "sued and be sued clause," 12 U. S. C. §1723a(a), does not confer federal court jurisdiction in all cases involving FNMA.

Kroma Makeup Eu, LLC v. Boldface Licensing + Branding, Inc., Case No. No. 15-15060 (11th Cir. 2017).
Applying *Koechli v. BIP International, Inc.*, 870 So. 2d 940 (Fla. 1st DCA 2004), the Eleventh Circuit rules that equitable estoppel may be used to compel non-signatories to engage in arbitration only when the dispute with the signatory falls within the scope of the arbitration clause in the main dispute.

Nipper v. Walton County, Case No. 1D16-512 (Fla. 1st DCA 2017).
Government seeking to enjoin violations of its zoning code must demonstrate (1) a clear legal right to the relief, (2) inadequacy of a legal remedy, and (3) irreparable injury if the relief is not granted. Moreover, alternative remedies are ignored and irreparable harm is presumed when government seeks an injunction to enforce its police power.

The Bank of New York Mellon v. Glenville, Case No. 2D15-5198 (Fla. 2nd DCA 2017).
Without citing conflict with *Straub v. Wells Fargo Bank, N.A.* 182 So.3d 878 (Fla. 4th DCA 2016), the Second District holds that Florida Statute section 45.031(7)(b) requires any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale itself; within sixty days of the later certificate of sale does not comply with the statute.

Lucey v. 1010 Logic, Inc., Case No. 2D15-5325 (Fla. 2nd DCA 2017).
The burden of proving an affirmative defense in the face of a summary judgment does not shift to the non-moving party until the moving party establishes prima facie entitlement to summary judgment.

Indian Creek Country Club, Inc. v. Indian Creek Village, Case No. 3D14-439 (Fla. 3d DCA 2017).
A municipal special assessment can only be imposed if the property assessed derives a special benefit from the service provided and when the assessment is fairly and reasonably apportioned according to the benefits received. Whether to impose a special assessment is a legislative function which can be overturned only if there is no substantial, competent evidence to support the decision.

Schumacher v. Reback Realty, Inc. Case No. 4D16-0755 (Fla. 4th DCA 2017).
For purposes of determining a real estate sales commission, whether or not more than one sales agent "participates" in a transaction is a question of fact precluding summary judgment.

Sand Lake Hills Homeowners Association, Inc. v. Busch, Case No. 5D16-21 (Fla. 5th DCA 2017).
The "false or fictitious filing" provision of the Marketable Record Title Act, Florida Statute section 712.08, merely requires that a filing be false or fictitious (intent is irrelevant) before awarding attorney's fees for the false filing.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, as successor trustee to JPMorgan Chase Bank, N.A., as trustee on behalf of the Certificateholders of the CWHEQ, Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D, Appellant, v. DIANNE D. GLENVILLE A/K/A DIANE D. GLENVILLE A/K/A DIANE GLENVILLE and MARK S. GLENVILLE, Appellees.	)	Case No. 2D15-5198

Opinion filed January 20, 2017.

Appeal from the Circuit Court for Manatee County; John F. Lakin, Judge.

Anthony R. Smith and Kendra J. Taylor of Sirote & Permutt, P.C., Winter Park; and Shaun K. Ramey and Matthew R. Feluren of Sirote & Permutt, P.C., Fort Lauderdale, for Appellant.

Sheryl A. Edwards of The Edwards Law Firm, PL, Sarasota, for Appellees.

SLEET, Judge.

The Bank of New York Mellon appeals the trial court's order denying its claim for surplus funds from a foreclosure sale.[1] Because the bank's claim was untimely, we affirm.

Under section 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. The record reflects that the underlying property was sold at public auction on July 2, 2015, and that the bank filed its claim for surplus funds as a subordinate lienholder on September 2, 2015, sixty-two days after the date the property was sold. The trial court denied the bank's claim as untimely filed. On appeal, the bank argues that a foreclosure sale is not complete until the clerk issues the certificate of sale. Because the certificate of sale in this case was issued on July 6, 2015, the bank claims that it had until September 4, 2015, to file a claim and that therefore its September 2, 2015, filing was timely. We disagree.

"The interpretation of a statute is a question of law, and it is therefore subject to a de novo review." Mathews v. Branch Banking & Tr. Co., 139 So. 3d 498, 500 (Fla. 2d DCA 2014) (citing W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 8 (Fla. 2012)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious

[1]Diane and Mark Glenville were the property owners and defendants in the foreclosure action. They are entitled to the surplus funds remaining with the clerk more than sixty days after the foreclosure sale pursuant to section 45.031(7)(b), Florida Statutes (2015).

meaning." Gulf Atl. Office Props., Inc. v. Dep't of Revenue, 133 So. 3d 537, 539 (Fla. 2d DCA 2014) (quoting Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005)).

This court has previously explained that "the language in section 45.031(7)(b) is clear and unambiguous: any person claiming a right to the surplus funds must file a claim with the clerk no later than sixty days after the sale." Dever v. Wells Fargo Bank Nat'l Ass'n, 147 So. 3d 1045, 1047 (Fla. 2d DCA 2014); see also Mathews, 139 So. 3d at 500 ("The language of section 45.031(7)(b) is clear and unambiguous in requiring that any person claiming a right to the surplus funds 'MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE.' " (emphasis omitted)). This subsection only refers to the "sale," not the "certificate of sale." § 45.031(7)(b). This is significant because section 45.031 assigns particular and distinct meanings to the terms "sale" and "certificate of sale" and does not use them interchangeably. See § 45.031(4) ("After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party . . . ." (emphasis added)); .031(5) ("If no objections to the sale are filed within [ten] days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party." (emphasis added)). Reading subsection (7)(b) to require a claim for surplus funds to be filed within sixty days of the certificate of sale—instead of the actual sale itself—would render subsection (4) meaningless and would confuse the meaning of other subsections of the statute.

Additionally, such a reading would be inconsistent with this court's prior case law interpreting section 45.031(7)(b). In Mathews, this court explained that the bank "was required to file a claim with the clerk within sixty days after the sale of the

property to preserve any claim it may have had to the surplus funds." 139 So. 3d at 500 (emphasis added). Similarly, in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period. 147 So. 3d at 1047. Although using either date would not have changed the fact that the banks' claims were untimely, in both cases this court interpreted the language of the statute to refer to the date of the actual sale, not the issuance of the certificate of sale. See Mathews, 139 So. 3d at 499-500; Dever, 147 So. 3d at 1047.

Accordingly, the bank filed its claim outside the statutory window, and we must affirm the trial court's order denying the claim. In so doing, we note that the two cases on which the bank relies on appeal—In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995), and Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d 1271, 1275 (Fla. 2d DCA 2009)—are inapplicable here because they both concern a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031.

Affirmed.

LaROSE and BADALAMENTI, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed January 18, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D14-439
Lower Tribunal Nos. 10-29182 & 11-32522

Indian Creek Country Club, Inc., etc.,
Appellant/Cross-Appellee,

vs.

Indian Creek Village, etc.,
Appellee/Cross-Appellant.

An appeal from the Circuit Court for Miami-Dade County, Marc Schumacher, Judge.

Akerman LLP and Carmen I. Tugender (Ft. Lauderdale); Akerman LLP and Gerald B. Cope, Jr., Brian P. Miller, and Michael B. Chavies, for appellant/cross-appellee.

Weiss Serota Helfman Cole & Bierman, P.L. and Edward G. Guedes, Joseph H. Serota, Stephen J. Helfman, and John J. Quick, for appellee/cross-appellant.

Before SUAREZ, C.J., and LAGOA and LOGUE, JJ.

SUAREZ, C.J.

Indian Creek Country Club appeals from two final orders: 1) a Final Judgment in the Club's favor finding certain special assessments to be invalid, and

2) Partial Final Summary Judgment in favor of Indian Creek Village ["the Village"] finding a 1996 Agreement between the two entities void. Indian Creek Village cross-appeals from the special assessments Final Judgment. For the reasons detailed below, we affirm the trial court's Final Judgment in favor of the Club but we reverse the trial court's Partial Final Summary Judgment wherein the trial court declared the 1996 Agreement to be void.

FACTS

The Village is a coastal Florida municipality within whose boundaries exists Indian Creek Island, on which the gated, private Indian Creek Country Club ["Club"] is located. The Club operates a golf course, clubhouse, docks and tennis courts for its members. The Island also has 41 single family homes, and is connected to the mainland Village by a public road and bridge with guardhouse, although the Island is entirely private. The Club is accessed by private road; most of the Club's 300 members live elsewhere. The Village has its own land and marine police force to provide 24/7 law enforcement and traffic services to Village residents and also provides general law enforcement and police assistance to the Club and Village residents on the Island. The Club pays approximately $34,000 in ad valorem taxes to the Village to cover the annual cost of these services.

In 2008, the Village hired a contractor, Government Services Group, Inc., ["GSG"] to evaluate the Village's budget and to develop a special assessments to support the police department, as well as to recommend how to apportion such an

assessment. GSG determined that 97% of the police department's time and budget were spent on security matters such as manning the guard house that controls access to the Island and providing for ground and water patrol of the Island. GSG recommended a special assessment to cover that 97%. GSG recommended that the special assessment be allocated based on what it termed "an equivalent residential unit" (ERU). Each residential buildable lot was to be assigned one ERU. Therefore, each of the residential buildable lots was assessed $25,510 (the amount of one ERU). The GSG recommended assigning 33.02 ERU's to the Club's Golf Course property arriving at a proposed special assessment of $843,340.00 for the Club. In 2010, based on GSG's recommendations, the Village passed an $843,340.00 special assessment against the Club for security services intended to cover 97% of the Village's police budget. The Club brought a declaratory judgment action against the Village to challenge the legality of the assessment. While that suit was pending, the Village obtained passage of legislation in the 2011 session, by floor amendment, that amended Florida's special assessment statute to say "a municipality that has a population fewer than 100 persons . . . may also levy and collect special assessments to fund special security and crime prevention services and facilities, including guard and gatehouse facilities." § 170.201(1) Fla. Stat. (2011). This amendment was added to a bill entitled "An Act relating to local government accountability." The Village imposed the special assessment on the Club in 2011, increasing the Club's taxes to $1,724,763.00.[1] The Club brought

another suit to challenge the 2011 assessment and the two cases were consolidated. The Club argued that this amendment violated the single subject act, as the tacked-on amendment had no logical relationship to the bill.

Additionally, as part of the proceedings below, the Village asked the trial court to set aside a 1996 Agreement between the Village and the Club, which Agreement canceled the Village's lease of the road and bridge from the Club, gave the bridge to the Village in as-is condition, and gave the Village the right to patrol the Club's private road for the sole purpose of "enforcing State and County traffic laws." The 1996 Agreement also provided that if there were any special tax assessments levied against all property in the Village, the Club would be assessed in the same proportion as its assessment for ad valorem taxes. The Village moved for partial summary judgment on its request to invalidate the 1996 Agreement, arguing that several of the Village Councilmembers voting on the Agreement in 1996 were, at that time, Club members, which, the Village argued, created a conflict of interest. The trial court granted partial summary judgment in favor of the Village on this issue, concluding that the Councilmembers who were also Club members should not have voted as they stood to gain special private benefit from the Agreement.

After a bench trial, the court ruled that, 1) the 2010 special assessment against the Club was invalid for failing to meet either prong of the two-part test for

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[1] This includes the sum of the 2010 and 2011 assessments.

evaluating the validity of such special assessments as set forth in City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992), 2) the 2011 special assessment was invalid for failing to meet the second prong of the two-part test, but, 3) also found that the 2011 statutory amendment was validly enacted and satisfied the first part of the two-part test by conferring a special benefit on the property so assessed, rejecting the Club's single-subject violation argument.

The Club appeals from that part of the final declaratory judgment finding special benefit to the Club based on the 2011 statutory amendment, despite the favorable ruling finding the 2011 assessment invalid. The Club also appeals from the order granting the Village's Amended Motion for Partial Summary Judgment invalidating the 1996 Agreement.

THE 2010-2011 SPECIAL ASSESSMENTS

"[A] valid special assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received." Sarasota Cty. v. Sarasota Church of Christ, 667 So. 2d 180, 183 (Fla. 1995) (citing City of Boca Raton v. State, 595 So. 2d 25, 30 (Fla. 1992)). "These two prongs both constitute questions of fact for a legislative body rather than the judiciary." Id. at 183. "[T]he standard [of review] is the same for both prongs; that is, the legislative determination as to the existence of special benefits and as to the apportionment of the costs of those benefits should be upheld unless the

determination is arbitrary." Id. at 184; City of Winter Springs v. State, 776 So. 2d 255, 258 (Fla. 2001). "Even an unpopular decision, when made correctly, must be upheld." Id. at 261. See also Morris v. City of Cape Coral, 163 So. 3d 1174, 1176-77 (Fla. 2015).

"The apportionment of benefits is a legislative function, and if reasonable people may differ as to whether the land assessed was benefitted by the local improvement, the finding of the city officials must be sustained." Roche v. City of Hollywood, 55 So. 2d 909 (Fla. 1952); City of Boca Raton, 595 So. 2d at 30. But if there is no competent substantial evidence in the record to support a finding of benefit, then the presumption of correctness does not attach to the municipality's findings of special benefit – and then the court must review the trial court's decision based on ordinary findings of fact. See City of N. Lauderdale v. SMM Properties, 825 So. 2d 343, 348 (Fla. 2002). That test was set forth in Lake County v. Water Oak Management Corp., 695 So. 2d 667, 669 (Fla. 1997). In Lake County, the Court stated that "In evaluating whether a special benefit is conferred to property by the services for which the assessment is imposed, the test is not whether the services confer a 'unique' benefit or are different in type or degree from the benefit provided to the community as a whole; rather the test is whether there is a 'logical relationship' between the services provided and the *benefit to real property*." Id. [emphasis supplied].

In reviewing the record, this Court must ascertain whether it contains competent substantial evidence that the special assessments against the Club property for security and law enforcement services would confer a special benefit to the Club's real property (i.e., golf course, clubhouse, tennis courts) in reduction of insurance costs, increased property values, etc., that the benefits would exceed the amount of the assessments, and that the benefits would be in proportion to the assessments. See City of Boca at 30; City of N. Lauderdale v. SMM Properties, 825 So. 2d 343, 348 (finding that no competent substantial evidence supported the municipality's findings that the special assessment provided special benefit to the properties, although the municipality did make general findings that there was a special benefit to the assessed property). Just saying it is so does not make it so: "a legislative body cannot by its fiat make a special benefit to sustain a special assessment where there is no special benefit." Id. at 348 (citations omitted).

The trial court found record evidence that:

- At no time does the Club use services of on-duty police officers to provide security for Club events;
- The Village's full-time police officers patrol the road to the island where the Club exists;
- The Village's marine patrol supports the sovereign function of the Village to protect its citizens and property by deterring crime; the marine patrol keeps the public from coming ashore on the private island;
- The Village's public service aides limit land access to the island;

- The Village relied on assessment recommendations of GSG that were clearly erroneous, arbitrary, or without basis in reason, and were clearly unsupported by competent substantial evidence;

- No evidence in the record that "special" benefits were conferred on the Club's real property from the provision of general law enforcement that would justify the additional assessments; GSG did not perform any studies to determine whether the real property in the Village was specially benefitted from security service, i.e., increased property values, lowered insurance premiums, etc., and there was no available data that could quantify how, if at all, the services that are the subject of the special assessment impact the value of the Club.

The trial court concluded that it was not its job to approve or disapprove of the methodology that GSG used to formulate a recommended assessment value. The trial court did, however, determine that there was no record evidence (i.e., data) to support the 2010 and 2011 special assessments as against the Club, and thus invalidated the assessments as arbitrary.

We agree with the trial court that both the 2010 and 2011 assessments were unsupported by competent substantial evidence and, therefore, are invalid. GSG considered several methodologies for evaluating how the special assessments could be calculated (traffic frequency over the bridge; land area/lot size; frontage measurements; "equivalent residential units" or ERUs). GSG ultimately used the ERU measure, which assigned 33.02 ERUs to the Club's golf course property – by assuming that land area was equal to 40 buildable residential lots, and thus a $25,510 assessment per buildable lot resulted in a special assessment for the Club's golf course of $842,340.00. GSG then used this numeric to recommend an

assessment value to the Village, which then imposed that assessment on the Club. The problem is that golf course and tennis court land is not residential. GSG did not consider how the Club actually used its real property, or distinguished between the structure of the clubhouse versus tennis courts and golf course areas. GSG failed to consider the use of the golf course property and whether the Club would be benefitted by $842,324.00 worth of law enforcement security services. GSG failed to conduct studies to determine; (a) how the Club's golf course property benefits from the police department's services; (b) whether or not a golf course requires the same level of security as do developed multimillion dollar residential homes; (c) the historical use of the Club's property or even that of any other property on the Island, and; (d) whether the Club, as the only non-residential property with an 18-hole golf course on the Island, actually requires the amount of manpower and services included in the special assessment, or whether a Club requires the only the type and level of "security" services already being funded.

The Village argues that there is evidence in the form of deposition testimony that the special assessments benefit the real property by; (i) increasing property values; (ii) preventing vandalism of and access to the island properties; (iii) enhancing the safety and enjoyment of real property; and, (iv) reducing insurance premiums. But GSG failed to provide any evidence that the assessments would have a measurable positive benefit to the Club's real property in any of these respects. There is no evidence in the record to show that any of the real property

owners (residential or commercial) would get lower insurance premiums as a result of the Village providing general law enforcement to its residents' real property; there appears to be no evidence in the record of an increase in law enforcement capabilities and patrols as a result of the special assessment; there is no data to show that property values would increase as a benefit of the general law enforcement provided to the Village and Club. Here, the "security" services funded by the special assessment are not "similar" to law enforcement services: they are the same law enforcement services provided before and after the special assessment was passed. Even if a special assessment may constitute replacement funding for services previously funded by ad valorem taxation, those services must pass the special benefit and apportionment tests.

We therefore affirm the trial court's order finding both the 2010 and 2011 assessments are unsupported by competent substantial evidence and are thus invalid.

APPELLEE VILLAGE'S CROSS-APPEAL OF THE FINAL JUDGMENT REGARDING THE 2010 AND 2011 SPECIAL ASSESSMENTS.

The Village argues that there was indeed competent substantial evidence to support the special assessments, and that the trial court erred to find there was none. The Village argues that there was evidence – all in the form of witness testimony – of deterrence of vandalism, enhanced enjoyment of use of property, reduced insurance premiums, enhanced property values. Our review of the record did not disclose any data indicating that

enhanced property values or reduced insurance premiums would occur as a result, and the trial court was not convinced that "enhanced enjoyment of property" as a result of ordinary police services already being provided is a "special benefit to real property" that warranted the special assessments.

Regarding the methodology used by GSG to calculate the special assessments, we defer to the trial court's discretion. The trial court found the assessments were not fairly apportioned by whatever methodology the Village used. Because we conclude there was no competent substantial evidence of a logical relationship between the services provided and the benefit to the property, the Village's cross-appeal from the final judgment fails.

THE 2010 AMENDMENT TO SECTION 170.201 FLORIDA STATUTES (2011)

We review the trial court's conclusions of law on the issue of the single-subject rule and the 2011 amendment to section 170.201 de novo. As set forth in Lewis v. Leon Cnty., 73 So. 3d 151, 153-54 (Fla. 2011):

> Although our review is de novo, statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome. "[S]hould any doubt exist that an act is in violation . . . of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law."

Given the presumption of constitutionality and legislative validity, the single subject rule requires that, 1) the law embrace one subject, 2) the law may include any matter that is "properly connected" to the subject, and 3) the subject shall be

briefly included in the title.[2] An amendment or provision is "properly connected" to the subject if the connection is natural or logical, or if there is a reasonable explanation for how the provision is necessary to the subject, or tends to make the purpose of the legislation more effective. Franklin v. State, 73 So. 3d at 153 (Fla. 2004). The party challenging the validity of the legislation must prove invalidity *beyond a reasonable doubt*. Id. at 153.

We affirm the trial court's determination that the 2011 amendment to section 170.201 was constitutional. The trial court determined that the first prong of the 2011 special assessment was not supported by competent substantial evidence – there was nothing in the record to show that the Club's real property got any additional "special" benefit from the assessment's funding of Village security services. The Club argues that the trial court should not have gone further to rule that special benefit to the real property was established by the 2011 legislative amendment to section 170.201, and that the statute was constitutional because the amendment was related to government accountability. The Club asks this Court to find the 2011 legislative amendment to section 170.201 violated the single subject rule because it was unrelated to the subject matter of the bill, and was thus unconstitutional. If the amendment to the statute were unconstitutional, the Club

[2] The short title of Chapter 170 is "An act relating to local government accountability." The floor amendment to the statute introduced a mechanism to allow small municipalities to find alternative methods to fund "special security and crime prevention services and facilities, including guard and gatehouse facilities" through special assessments. The bill was signed by the Governor in June 2011 and became effective October 1, 2011.

argues, the trial court could not have found that the 2011 special assessment met the first prong of City of Boca's test (special benefit to real property) simply by virtue of being included in the legislation.

We understand the Appellant's arguments on this issue. The title and substance of the bill is not so unrelated, however, to the bill's overall nature to warrant reversing in what would in essence be a futile act – if the panel declares the amendment unconstitutional by finding the 2011 amendment violated the single subject rule, and as a result the first prong of the special assessments test (benefit to real property) was not met, the outcome remains the same: the 2011 assessment against the Club is still invalid because it did not meet either the first or the second prong of Boca's special assessment test, i.e., no special benefit to real property and unreasonable apportionment of the assessment against Club property. "When a single subject could not be easily determined, and when doubts arose as to whether the various provisions were connected to the subject this Court has consistently analyzed the act with every reasonable doubt in favor of validity. Franklin, 887 So. 2d at 1075. We therefore affirm the trial court on this issue.

ORDER GRANTING THE VILLAGE'S MOTION FOR PARTIAL SUMMARY JUDGMENT INVALIDATING THE 1996 AGREEMENT BETWEEN THE TWO PARTIES

The 1996 Agreement between the two parties contains language that limited the Village's ability to impose future assessments against the Club by limiting any future special assessments to the current ad valorem tax rate: "The Club agrees to

pay its share pro rata to its assessed valuation of any special tax assessment levied against all property in the Village." The Village argued that this tied its hands as to any future increase in assessments against the Club. In order to get around this, the Village challenged the validity of the Agreement itself by arguing that four of the Village Council members who voted in favor of the Agreement were also Club Members or were married to Club Members and thus had a vested interest in voting for the Agreement. The trial court agreed that this dual status created a conflict of interest, and those Council Members should have abstained from voting on the Agreement. The trial court based its conclusion following section 112.3143 (3), Florida Statutes (2013) which provides,

> (3)(a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

The trial court concluded that this statute controlled the actions of the Mayor and three Village Council Members who were also Club Members, and that the contract was voidable.[3]

What is considered a threshold "private gain or loss" is also set forth in section 112.3143(d)(1), (2), and (3), which provide:

> (d) "Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:
>
> 1. The size of the class affected by the vote.
>
> 2. The nature of the interests involved.
>
> 3. The degree to which the interests of all members of the class are affected by the vote.
>
> 4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.
>
> The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

§ 112.3143, Fla. Stat. (2013). The Club points out that, by these measures, any "interest" those voting Council Members had in approving the Agreement does not rise to the level of "special private gain or loss." The size of the Club Membership class at the time was around 291 persons; the nature of the interests involved were speculative, that is, there were no special assessments planned in 1996, and indeed

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[3] (1) Any contract that has been executed in violation of this part is voidable: (a) By any party to the contract. Fla. Stat. Ann. § 112.3175 (West).

none occurred until 2010; the degree to which the interests of all Club members may have been affected by the vote was not known until 2010, and then the Club would have to apportion that special assessment across all the Club membership, thus diluting any "special private gain or loss" to the four Club members who voted for the 1996 Agreement.

As the financial impact of the 1996 Agreement on the financial interests of the four voting Club members was speculative, we conclude that it was not a statutory voting ethics violation at the time of the execution of the Agreement, and therefore reverse the Partial Summary Judgment finding the 1996 Agreement voidable.

CONCLUSION

We affirm the Final Judgment regarding the 2010 and 2011 special assessments, and reverse the Partial Summary Judgment regarding the 1996 Agreement.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15060

D.C. Docket No. 6:14-cv-01551-PGB-GJK

KROMA MAKEUP EU, LLC,
a United Kingdom Limited Liability Company,

Plaintiff-Appellee,

versus

BOLDFACE LICENSING + BRANDING, INC.,
a Nevada Corporation, et al.,

Defendants,

KIMBERLY KARDASHIAN,
a California resident,
KOURTNEY KARDASHIAN,
a California Resident,
KHLOE KARDASHIAN,
a California Resident,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(January 18, 2017)

Before ED CARNES, Chief Judge, ANDERSON, Circuit Judge, and ROSENBERG,[*] District Judge.

ED CARNES, Chief Judge:

Kimberly, Kourtney, and Khloe Kardashian appeal the district court's denial of their motion to compel arbitration of Kroma Makeup, EU's claims against them for cosmetics trademark infringement. At first blush, the issue appears to require application of Florida's doctrine of equitable estoppel under which a party to an agreement who relies on it in a dispute with a non-party can be required by that non-party to comply with other terms of the agreement, including the arbitration clause. But there is a wrinkle in this case: the arbitration clause which the non-party to the agreement is seeking to enforce is explicitly limited to disputes between the parties. What then?

I.

By Lee Tillett, Inc. developed and registered a trademark for a line of cosmetics products known as Kroma cosmetics beginning in 2004. In 2010 Tillett contracted with Jay Willey Ltd. giving Willey the exclusive right to sell Kroma

[*] Honorable Robin L. Rosenberg, United States District Judge for the Southern District of Florida, sitting by designation.

cosmetics in the United Kingdom and European Union. That agreement expired in October 2012 and Tillett entered into a new one with Kroma EU, which contained similar terms giving Kroma EU the exclusive rights to sell and distribute Kroma products in the United Kingdom and European Union. It also gave Kroma EU the right to use the Kroma trademark. The new agreement contained an arbitration clause, which stated:

> If it is impossible to settle the disputes peacefully, the Parties agree that the disputes arising between them concerning the validity, interpretation, termination or performance of the present Contract, should be considered [in] independent arbitration in the State of Florida, United States.

(emphasis added).

While that contract was in effect and with Kroma makeup being sold in the United States and Europe, the Kardashians entered into a licensing agreement with Boldface Licensing + Branding, Inc. to create a Kardashian makeup line called "Khroma." After the Khroma product line was released, Boldface filed a lawsuit against Tillett seeking declaratory judgment that the Khroma name did not infringe on Tillett's Kroma trademark. Tillet filed trademark infringement counterclaims against Boldface and added the Kardashians as counterclaim defendants. Tillett, Boldface, and the Kardashians settled that lawsuit in April 2014. Despite Tillett's representations to Kroma EU that it was protecting Kroma EU's interests and

recovering damages on its behalf, Tillett later refused to share any of its settlement recovery.

As a result, Kroma EU filed this lawsuit asserting trademark infringement and tortious interference claims against Boldface, vicarious liability for trademark infringement claims against the Kardashians, and a promissory estoppel claim against Tillett. Tillett and the Kardashians both filed motions to compel arbitration. The district court granted Tillett's motion to compel Kroma EU to arbitrate, and neither that ruling nor Tillett is in this appeal. The court, however, denied the Kardashians' motion to compel Kroma EU to arbitrate its claims against them, and this is their appeal from that denial. See 9 U.S.C. § 16(a)(1)(B) ("An appeal may be taken from . . . an order . . . denying a petition under [the Federal Arbitration Act] to order arbitration to proceed . . . .").

II.

We review de novo a district court's denial of a motion to compel arbitration. Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1170 (11th Cir. 2011). In doing so, "we apply the federal substantive law of arbitrability, which is applicable to any arbitration agreement within the coverage of the FAA," keeping in mind the "healthy regard for the federal policy favoring arbitration." Id. (quotation marks omitted). Arbitration is, however, a matter of contract, and "the FAA's strong proarbitration policy only applies to disputes that the parties have

agreed to arbitrate." Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004). The issue of whether a non-signatory to an agreement can use an arbitration clause in that agreement to force a signatory to arbitrate a dispute between them is controlled by state law. See Lawson, 648 F.3d at 1170–71. The Kardashians and Kroma EU agree that Florida law controls on that issue.

While the Kardashians are not signatories to the agreement between Kroma EU and Tillett, they contend that they can compel arbitration of Kroma EU's claims against them by using Florida's doctrine of equitable estoppel. Under that doctrine, a defendant who is a non-signatory to an agreement containing an arbitration clause can force arbitration of a signatory's claims when "the signatory . . . must rely on the terms of the written agreement in asserting its claims against the nonsignatory . . . ." Allscripts Healthcare Sols., Inc. v. Pain Clinic of Nw. Fla., Inc., 158 So. 3d 644, 646 (Fla. 3d DCA 2014). A non-signatory, however, cannot invoke the doctrine to compel arbitration of claims that are not within the scope of the arbitration clause. Equitable estoppel does not allow a non-signatory to an agreement to alter and expand an arbitration clause that would not otherwise cover the claims asserted. What this means is that in order to establish that they are entitled to compel arbitration under Florida's doctrine of equitable estoppel, the Kardashians must show both that Kroma EU is relying on the

agreement to assert its claims against them and that the scope of the arbitration clause covers the dispute.

That two-step framework comes from the Florida District Court of Appeal's decision in Koechli v. BIP International, Inc., 870 So. 2d 940 (Fla. 1st DCA 2004). There the court first concluded that because the signatory plaintiff was claiming rights under the agreement, the non-signatory defendants could invoke equitable estoppel to estop the plaintiff from denying the defendants access to the arbitration provision in the agreement between the plaintiff and the other signatory to it. Id. at 941–42, 944–45. The court's analysis, however, did not end there. Instead, the court felt it necessary to determine whether the arbitration clause, which covered "any dispute between the parties as to any matter arising out of or relating to this contract," id. at 944 n.1, was broad enough to cover the dispute between the plaintiff who was a party to the agreement and the defendants who were not, id. at 945–46. Even though they technically were non-parties, the defendants were agents of a party to the agreement, had received rights and obligations under the contract, and were being sued for their actions taken as a signatory's agents pursuant to the contract. Id. That was enough. The Koechli court concluded that, "in the context of the unique facts of this case," the non-signatories were in the relevant sense parties to the contract because they had received rights and

obligations under it and because the claims arose from their actions taken as a signatory's agents. Id.

What the Koechli court's analysis means is that under Florida law even if a non-signatory to an agreement containing an arbitration clause can invoke the doctrine of equitable estoppel to access that clause, she can compel arbitration under it only if her dispute with the signatory falls within the scope of the arbitration clause.[1] Here, the arbitration clause states that "the Parties agree that the disputes arising between them concerning the validity, interpretation, termination or performance" of the Agreement will be arbitrated. If the Kardashians are not considered "parties" to the agreement within the scope of the arbitration clause, they cannot use equitable estoppel to compel arbitration of the claims, even if the doctrine were otherwise applicable in this case.

The Kardashians point to no Florida decisions indicating that a Florida court would deem them parties to the agreement for arbitration clause purposes. While Florida courts have on some occasions concluded that a non-signatory defendant can invoke an arbitration clause that limits arbitration to disputes between "the

[1] The Kardashians argue that World Rentals & Sales, LLC v. Volvo Construction Equipment Rents, Inc., 517 F.3d 1240 (11th Cir. 2008), indicates that equitable estoppel can be used to compel arbitration even when the arbitration clause itself does not cover the dispute. The World Rentals decision cited and applied federal case law when analyzing the doctrine of equitable estoppel. Id. at 1248. That, we have since learned, was error. See Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630–31, 129 S. Ct. 1896, 1902 (2009). State law, not federal law, applies. For that reason, World Rentals is not controlling on the equitable estoppel issues in this case.

parties," in those cases the non-signatory defendants were officers and agents of a signatory, and they had themselves received rights and taken on obligations under the agreement. See Koechli, 870 So. 2d at 946; Ocwen Fin. Corp. v. Holman, 769 So. 2d 481, 483 (Fla. 4th DCA 2000) (concluding that an arbitration clause mandating arbitration of disputes between the parties included defendants who received rights and obligations under the agreement and who were sued for actions taken as officers and directors of a signatory). And the Florida Third District Court of Appeal has noted that this agent, officer, or director relationship "is critical to the exception" in decisions including Koechli and Ocwen for concluding that a non-signatory is a party under a contract's terms. Turner Constr. Co. v. Advanced Roofing, Inc., 904 So. 2d 466, 470 (Fla. 3d DCA 2005).

The Kardashians contend that our conclusion — that equitable estoppel is limited to compelling arbitration only if the plaintiff's claims are covered by the arbitration clause — is inconsistent with the doctrine's equitable nature.[2] They argue that the doctrine, based on notions of fairness, should operate to permit a non-signatory who is not bound to an agreement to enforce it notwithstanding the fact that the claim is outside of the arbitration clause's scope. Such a holding

[2] The Kardashians also contend that we are bound by our decision in MS Dealer Service Corp. v. Franklin, 177 F.3d 942, 944, 947–48 (11th Cir. 1999), which applied federal equitable estoppel to compel arbitration under an arbitration clause covering disputes "between the parties hereto." That decision, however, is inapplicable, because here we are applying Florida's doctrine of equitable estoppel, not federal equitable estoppel law. Not only that, but the question of whether the clause covered disputes involving non-signatory parties was neither raised nor decided in MS Dealer.

would be, well, inequitable. Under it, we would effectively be rewriting the agreement between the signatories about which disputes they would arbitrate to require one of them to arbitrate disputes that they had not agreed to. That would violate the basic principle that parties can be forced to arbitrate only disputes that they have agreed to arbitrate. See Klay, 389 F.3d at 1200 ("In the absence of an agreement to arbitrate, a court cannot compel the parties to settle their dispute in an arbitral forum."); see also Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1238 (11th Cir. 2008) ("[A] party may not be compelled to arbitrate if he did not agree to do so."). Kroma EU never consented to arbitrate any disputes between it and the Kardashians or any other non-signatory. All it consented to arbitrate were disputes between it and the other party, which was Tillett.

Consider this hypothetical. Parties A and B enter an agreement with five parts. They include a provision that obligates them to arbitrate disputes arising under Part I but not any other parts. Party B gets into a dispute with C, who was not a party to the agreement, involving the proper interpretation of Part V. Even though Party B relies on the agreement for his claim against outsider C, no court would conclude that C could use the doctrine of equitable estoppel to force Party B to arbitrate their dispute. The reason is that the arbitration provision in the hypothetical does not cover that dispute, regardless of who the dispute is between. To hold otherwise would require more than giving the outsider access to the

arbitration provision; it would also require rewriting that provision. The same reasoning applies in this case where the arbitration provision covers only "disputes arising between" the parties to the agreement, regardless of which part of the agreement is in dispute. Allowing the Kardashians to force Kroma EU to arbitrate their dispute would also require rewriting the arbitration provision in the agreement between Kroma EU and Tillett.

This does not mean that equitable estoppel can never be used by a non-signatory to force a signatory to the agreement to arbitrate a dispute involving the agreement. If the parties had consented in the arbitration clause to arbitrate any disputes concerning the validity, interpretation, etc., of the contract, instead of consenting to arbitrate only "disputes arising between them" (emphasis added) concerning the validity, interpretation, etc., of the contract, the Kardashians may have been able to use equitable estoppel to require Kroma EU to arbitrate the dispute between it and them. But, as the "between them" language shows, that is not what the parties to the agreement consented to do in the arbitration provision.

Our holding is that Florida's doctrine of equitable estoppel permits a non-signatory to an agreement to avail herself of an arbitration clause only when the claims asserted against her fall within the scope of the clause that the signatories had agreed upon. This is consistent with the reasoning behind the doctrine, which is that "[o]ne cannot both take advantage of contract provisions to seek to impose

liability . . . and at the same time avoid another contract term or provision for which it has no use." Giller v. Cafeteria of S. Beach Ltd., LLP, 967 So. 2d 240, 242 (Fla. 3d DCA 2007). One does not avoid or violate an arbitration clause by refusing to arbitrate a dispute that is not covered by the clause.

Like makeup, Florida's doctrine of equitable estoppel can only cover so much. It does not provide a non-signatory with a scalpel to re-sculpt what appears on the face of a contract. The district court correctly denied the Kardashians' motion to compel Kroma EU to arbitrate the dispute between them.

AFFIRMED.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LIGHTFOOT ET AL. *v.* CENDANT MORTGAGE CORP., DBA PHH MORTGAGE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14–1055. Argued November 8, 2016—Decided January 18, 2017

The Federal National Mortgage Association (Fannie Mae) is a federally chartered corporation that participates in the secondary mortgage market. By statute, Fannie Mae has the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U. S. C. §1723a(a). When petitioners Beverly Ann Hollis-Arrington and her daughter Crystal Lightfoot filed suit in state court alleging deficiencies in the refinancing, foreclosure, and sale of their home, Fannie Mae removed the case to federal court, relying on its sue-and-be-sued clause as the basis for jurisdiction. The District Court denied a motion to remand the case to state court and later entered judgment against petitioners. The Ninth Circuit affirmed. In concluding that the District Court had jurisdiction under Fannie Mae's sue-and-be-sued clause, the court relied on *American Nat. Red Cross* v. *S. G.*, 505 U. S. 247, which it read as establishing a rule that when a sue-and-be-sued clause in a federal charter expressly authorizes suit in federal court, it confers jurisdiction on the federal courts.

Held: Fannie Mae's sue-and-be-sued clause does not grant federal courts jurisdiction over all cases involving Fannie Mae. Pp. 6–16.

(a) This Court has addressed the jurisdictional reach of sue-and-be-sued clauses in five federal charters. Three clauses were held to grant jurisdiction—*Osborn* v. *Bank of United States*, 9 Wheat. 738; *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447; *American Nat. Red Cross* v. *S. G.*, 505 U. S. 247—while two were found wanting—*Bank of United States* v. *Deveaux*, 5 Cranch 61; *Bankers Trust Co.* v. *Texas & Pacific R. Co.*, 241 U. S. 295. Describing the earlier decisions as this Court's "best efforts at divining congressional intent retrospec-

Syllabus

tively," 505 U. S., at 252, the Court in *Red Cross* concluded that those decisions "support the rule that a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts," *id.*, at 255.

In specifically mentioning the federal courts, Fannie Mae's sue-and-be-sued clause resembles the three clauses this Court has held confer jurisdiction. But unlike those clauses, Fannie Mae's clause adds the qualification "any court of competent jurisdiction," 12 U. S. C. §1723a(a). Thus, the outcome here turns on the meaning of "court of competent jurisdiction."

A court of competent jurisdiction is a court with the power to adjudicate the case before it, Black's Law Dictionary 431, and a court's subject-matter jurisdiction defines its power to hear cases, see *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89. It follows that a court of competent jurisdiction is a court with a grant of subject-matter jurisdiction covering the case before it. This Court has understood that phrase as a reference to a court with an existing source of subject-matter jurisdiction. See, *e.g.*, *Ex parte Phenix Ins. Co.*, 118 U. S. 610. On this understanding, Fannie Mae's sue-and-be-sued clause is most naturally read not to grant federal courts subject-matter jurisdiction over all cases involving Fannie Mae but to permit suit in any state or federal court already endowed with subject-matter jurisdiction.

Red Cross does not require a different result. It did not set out a rule that an express reference to the federal courts suffices to make a sue-and-be-sued clause a grant of federal jurisdiction. Rather, it restated "the basic rule" of *Deveaux* and *Osborn* that a sue-and-be-sued clause conferring only a general right to sue does not grant jurisdiction to the federal courts. 505 U. S., at 253. Pp. 6–11.

(b) Fannie Mae's arguments against reading its sue-and-be-sued clause as merely capacity conferring are unpersuasive. Its alternative readings of "court of competent jurisdiction" are premised on the already rejected reading of *Red Cross*. The prior construction canon of statutory interpretation does not apply because none of the cases on which Fannie Mae relies suggest that Congress in 1954 would have surveyed the jurisprudential landscape and necessarily concluded that the courts had already settled the question whether a sue-and-be-sued clause containing the phrase "court of competent jurisdiction" confers jurisdiction on the federal courts. Finally, Fannie Mae's appeals to congressional purpose do not call into question the plain text reading of its sue-and-be-sued clause. Pp. 11–16.

769 F. 3d 681, reversed.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 14–1055

CRYSTAL MONIQUE LIGHTFOOT, ET AL., PETITIONERS *v.* CENDANT MORTGAGE CORPORATION, DBA PHH MORTGAGE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 18, 2017]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The corporate charter of the Federal National Mortgage Association, known as Fannie Mae, authorizes Fannie Mae "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U. S. C. §1723a(a). This case presents the question whether this sue-and-be-sued clause grants federal district courts jurisdiction over cases involving Fannie Mae. We hold that it does not.

I

A

During the Great Depression, the Federal Government worked to stabilize and strengthen the residential mortgage market. Among other things, it took steps to increase liquidity (reasonably available funding) in the mortgage market. These efforts included the creation of the Federal Home Loan Banks, which provide credit to member institutions to finance affordable housing and economic development projects, and the Federal Housing Administration (FHA), which insures residential mort-

gages. See Dept. of Housing and Urban Development, Background and History of the Federal National Mortgage Association 1–7, A4 (1966).

Also as part of these efforts, Title III of the National Housing Act (1934 Act) authorized the Administrator of the newly created FHA to establish "national mortgage associations" that could "purchase and sell [certain] first mortgages and such other first liens" and "borrow money for such purposes." §301(a), 48 Stat. 1252–1253. The associations were endowed with certain powers, including the power to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." §301(c), *id.*, at 1253.

In 1938, the FHA Administrator exercised that authority and chartered the Federal National Mortgage Association. Avoiding a mouthful of an acronym (FNMA), it went by Fannie Mae. See, *e.g.,* Washington Post, July 14, 1940, p. P2 ("'Fanny May'"); N. Y. Times, Mar. 23, 1950, p. 48 ("'Fannie Mae'"). As originally chartered, Fannie Mae was wholly owned by the Federal Government and had three objectives: to "establish a market for [FHA-insured] first mortgages" covering new housing construction, to "facilitate the construction and financing of economically sound rental housing projects," and to "make [the bonds it issued] available to . . . investors." Fed. Nat. Mortgage Assn. Information Regarding the Activities of the Assn. 1 (Circular No. 1, 1938).

Fannie Mae was rechartered in 1954. Housing Act of 1954 (1954 Act), §201, 68 Stat. 613. No longer wholly Government owned, Fannie Mae had mixed ownership: Private shareholders held its common stock and the Department of the Treasury held its preferred stock. The 1954 Act required the Secretary of the Treasury to allow Fannie Mae to repurchase that stock. See *id.*, at 613–615. It expected that Fannie Mae would repurchase all of its preferred stock and that legislation would then be enacted

to turn Fannie Mae over to the private stockholders. From then on, Fannie Mae's duties would "be carried out by a privately owned and privately financed corporation." *Id.*, at 615. Along with these structural changes, the 1954 Act replaced Fannie Mae's initial set of powers with a more detailed list. In doing so, it revised the sue-and-be-sued clause to give Fannie Mae the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." *Id.*, at 620.

In 1968, Fannie Mae became fully privately owned and relinquished part of its portfolio to its new spinoff, the Government National Mortgage Association (known as Ginnie Mae). See Housing and Urban Development Act of 1968 (1968 Act), 82 Stat. 536. Fannie Mae "continue[d] to operate the secondary market operations" but became "a Government-sponsored private corporation." 12 U. S. C. §1716b. Ginnie Mae "remain[ed] in the Government" and took over "the special assistance functions and management and liquidating functions." *Ibid.* Ginnie Mae received the same set of powers as Fannie Mae. See §1723(a); see also 1968 Act, §802(z), 82 Stat. 540 (minor revisions to §1723a(a)).

This general structure remains in place. Fannie Mae continues to participate in the secondary mortgage market. It purchases mortgages that meet its eligibility criteria, packages them into mortgage-backed securities, and sells those securities to investors, and it invests in mortgage-backed securities itself. One of those mortgage purchases led to Fannie Mae's entanglement in this case.

B

Beverly Ann Hollis-Arrington refinanced her mortgage with Cendant Mortgage Corporation (Cendant) in the summer of 1999. Fannie Mae then bought the mortgage, while Cendant continued to service it. Unable to make her payments, Hollis-Arrington pursued a forbearance ar-

rangement with Cendant. No agreement materialized, and the home entered foreclosure. Around this time, Cendant repurchased the mortgage from Fannie Mae because it did not meet Fannie Mae's credit standards.

To stave off the foreclosure, Hollis-Arrington and her daughter, Crystal Lightfoot, pursued bankruptcy and transferred the property between themselves. These efforts failed, and the home was sold at a trustee's sale in 2001. The two then took to the courts to try to undo the foreclosure and sale.

After two unsuccessful federal suits, the pair filed this suit in state court. They alleged that deficiencies in the refinancing, foreclosure, and sale of their home entitled them to relief against Fannie Mae. Their claims against other defendants are not relevant here.

Fannie Mae removed the case to federal court under 28 U. S. C. §1441(a), which permits a defendant to remove from state to federal court "any civil action" over which the federal district courts "have original jurisdiction." It relied on its sue-and-be-sued clause as the basis for jurisdiction. The District Court denied a motion to remand the case to state court.

The District Court then dismissed the claims against Fannie Mae on claim preclusion grounds. After a series of motions, rulings, and appeals not related to the issue here, the District Court entered final judgment. Hollis-Arrington and Lightfoot immediately moved to set aside the judgment under Federal Rule of Civil Procedure 60(b), alleging "fraud upon the court." App. 95–110. The District Court denied the motion.

The Ninth Circuit affirmed the dismissal of the case and the denial of the Rule 60(b) motion. 465 Fed. Appx. 668 (2012). After Hollis-Arrington and Lightfoot sought rehearing, the Ninth Circuit withdrew its opinion and ordered briefing on the question whether the District Court had jurisdiction over the case under Fannie Mae's sue-

and-be-sued clause. 769 F. 3d 681, 682–683 (2014).

A divided panel affirmed the District Court's judgment. The majority relied on *American Nat. Red Cross* v. *S. G.*, 505 U. S. 247 (1992). It read that decision to have established a "rule [that] resolves this case": When a sue-and-be-sued clause in a federal charter expressly authorizes suit in federal courts, it confers jurisdiction on the federal courts. 769 F. 3d, at 684. The dissent instead read *Red Cross* as setting out only a "'default rule'" that provides a "starting point for [the] analysis." 769 F. 3d, at 692 (opinion of Stein, J.). It read "any court of competent jurisdiction" in Fannie Mae's sue-and-be-sued clause to overcome that default rule by requiring an independent source for jurisdiction in cases involving Fannie Mae. *Ibid.*

Two Circuits have likewise concluded that the language in Fannie Mae's sue-and-be-sued clause grants jurisdiction to federal courts. See *Federal Home Loan Bank of Boston* v. *Moody's Corp.*, 821 F. 3d 102 (CA1 2016) (Federal Home Loan Bank of Boston's identical sue-and-be-sued clause); *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust ex rel. Fed. Nat. Mortgage Assn.* v. *Raines*, 534 F. 3d 779 (CADC 2008) (Fannie Mae's sue-and-be-sued clause). Four Circuits have disagreed, finding that similar language did not grant jurisdiction. See *Western Securities Co.* v. *Derwinski*, 937 F. 2d 1276 (CA7 1991) (Under 38 U. S. C. §1820(a)(1) (1988 ed.), Secretary of Veterans Affairs' authority to "sue and be sued . . . in any court of competent jurisdiction, State or Federal"); *C. H. Sanders Co.* v. *BHAP Housing Development Fund Co.*, 903 F. 2d 114 (CA2 1990) (Under 12 U. S. C. §1702 (1988 ed.), Secretary of Housing and Urban Development's authority "in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal"); *Industrial Indemnity, Inc.* v. *Landrieu*, 615 F. 2d 644 (CA5 1980) (*per curiam*) (similar); *Lindy* v. *Lynn*, 501 F. 2d 1367 (CA3 1974) (similar).

We granted certiorari, 579 U. S. ___ (2016), and now reverse.

II

Fannie Mae's sue-and-be-sued clause authorizes it "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U. S. C. §1723a(a). As in other federal corporate charters, this language serves the uncontroversial function of clarifying Fannie Mae's capacity to bring suit and to be sued. See *Bank of United States* v. *Deveaux*, 5 Cranch 61, 85–86 (1809). The question here is whether Fannie Mae's sue-and-be-sued clause goes further and grants federal courts jurisdiction over all cases involving Fannie Mae.

A

In answering this question, "we do not face a clean slate." *Red Cross*, 505 U. S., at 252. This Court has addressed the jurisdictional reach of sue-and-be-sued clauses in five federal charters. Three clauses were held to grant jurisdiction, while two were found wanting.

The first discussion of sue-and-be-sued clauses came in a pair of opinions by Chief Justice Marshall. The charter of the first Bank of the United States allowed it "'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever.'" *Deveaux*, 5 Cranch, at 85. Another provision allowed suits in federal court against certain bank officials, suggesting "the right to sue does not imply a right to sue in the courts of the union, unless it be expressed." *Id.,* at 86. In light of this language, the Court held that the first Bank of the United States had "no right . . . to sue in the federal courts." *Ibid.* The Court concluded that the second Bank of the United States was not similarly disabled. Its charter allowed it "'to sue and be sued, plead and be impleaded, answer and be answered,

defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.'" *Osborn* v. *Bank of United States,* 9 Wheat. 738, 817 (1824). The Court took from *Deveaux* "that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts." 9 Wheat., at 818. By contrast, the second Bank's charter did grant jurisdiction to the federal circuit courts because it used "words expressly conferring a right to sue in those Courts." *Ibid.*

A mortgage dispute between a railroad and its creditor led to the next consideration of this issue. The Texas and Pacific Railway Company's federal charter authorized it "'to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States.'" *Bankers Trust Co.* v. *Texas & Pacific R. Co.*, 241 U. S. 295, 302 (1916). This Court held that the clause had "the same generality and natural import as" the clause in *Deveaux*. 241 U. S., at 304. Thus, "all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court . . . whose jurisdiction as otherwise competently defined was adequate to the occasion." *Id.,* at 303.

Another lending dispute, involving defaulted bonds, led to the next statement on this issue. The Federal Deposit Insurance Corporation's (FDIC) sue-and-be-sued clause authorized it "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." 12 U. S. C. §264(j) (1940 ed.). In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 455 (1942), this Court held that federal jurisdiction over the case was based on the FDIC's sue-and-be-sued clause. See *Red Cross*, 505 U. S., at 254 (expressing no "doubt that the Court held federal jurisdiction to rest on the" sue-and-be-sued clause).

This Court's most recent discussion of a sue-and-be-sued clause came in *Red Cross*, which involved a state-law tort

suit related to a contaminated blood transfusion. It described the previous quartet of decisions as reflecting this Court's "best efforts at divining congressional intent retrospectively," efforts that had put "Congress on prospective notice of the language necessary and sufficient to confer jurisdiction." *Id.,* at 252. Those decisions "support the rule that a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.,* at 255. Under that rule, the Court explained, the result was "clear." *Id.,* at 257. The Red Cross' sue-and-be-sued clause, which permits it to "sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States," 36 U. S. C. §300105(a)(5), confers jurisdiction. *Red Cross*, 505 U. S., at 257. "In expressly authorizing [suits] in federal courts, using language . . . in all relevant respects identical to [the clause in *D'Oench*] on which [the Court] based a holding of federal jurisdiction just five years before [its enactment], the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction." *Ibid.*

Armed with these earlier cases, as synthesized by *Red Cross*, we turn to the sue-and-be-sued clause at issue here.

B

Fannie Mae's sue-and-be-sued clause resembles the clauses this Court has held confer jurisdiction in one important respect. In authorizing Fannie Mae "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal," 12 U. S. C. §1723a(a), it "specifically mentions the federal courts." *Red Cross,* 505 U. S., at 255. This mention of the federal courts means that Fannie Mae's charter clears a hurdle that the clauses in *Deveaux* and *Bankers Trust* did not.

But Fannie Mae's clause differs in a material respect from the three clauses the Court has held sufficient to

grant federal jurisdiction. Those clauses referred to suits in the federal courts without qualification. In contrast, Fannie Mae's sue-and-be-sued clause refers to "any *court of competent jurisdiction*, State or Federal." §1723a(a) (emphasis added). Because this sue-and-be-sued clause is not "in all relevant respects identical" to a clause already held to grant federal jurisdiction, *Red Cross*, 505 U. S., at 257, this case cannot be resolved by a simple comparison. The outcome instead turns on the meaning of "court of competent jurisdiction" in Fannie Mae's sue-and-be-sued clause.

A court of competent jurisdiction is a court with the power to adjudicate the case before it. See Black's Law Dictionary 431 (10th ed. 2014) ("[a] court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy"). And a court's subject-matter jurisdiction defines its power to hear cases. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998) (Subject-matter jurisdiction is "the courts' statutory or constitutional power to adjudicate the case" (emphasis deleted)); *Wachovia Bank, N. A.* v. *Schmidt*, 546 U. S. 303, 316 (2006) ("Subject-matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases"). It follows that a court of competent jurisdiction is a court with a grant of subject-matter jurisdiction covering the case before it. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1878) ("[T]here must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit").

As a result, this Court has understood the phrase "court of competent jurisdiction" as a reference to a court with an existing source of subject-matter jurisdiction. *Ex parte Phenix Ins. Co.*, 118 U. S. 610 (1886), provides an example. There, the Court explained that a statute "providing for the transfer to a trustee of the interest of the owner in the

vessel and freight, provides only that the trustee may 'be appointed by any court of competent jurisdiction,' leaving the question of such competency to depend on other provisions of law." *Id.,* at 617. See also *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 506–507 (1900) (statute authorizing suit "'in a court of competent jurisdiction' . . . unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts"). *Califano* v. *Sanders*, 430 U. S. 99 (1977), provides another. It held that §10 of the Administrative Procedure Act, codified in 5 U. S. C. §§701–704, did not contain "an implied grant of subject-matter jurisdiction to review agency actions." 430 U. S., at 105. In noting that "the actual text . . . nowhere contains an explicit grant of jurisdiction," the Court pointed to two clauses requiring "judicial review . . . to proceed 'in a court specified by statute' or 'in a court of competent jurisdiction'" and stated that both "seem to look to outside sources of jurisdictional authority." *Id.,* at 105–106, and n. 6.

On this understanding, Fannie Mae's sue-and-be-sued clause is most naturally read not to grant federal courts subject-matter jurisdiction over all cases involving Fannie Mae. In authorizing Fannie Mae to sue and be sued "in any court of competent jurisdiction, State or Federal," it permits suit in any state or federal court already endowed with subject-matter jurisdiction over the suit.

C

Red Cross does not require a different result. Some, including the lower courts here, have understood it to set out a rule that an express reference to the federal courts suffices to make a sue-and-be-sued clause a grant of federal jurisdiction. *Red Cross* contains no such rule.

By its own terms, the rule *Red Cross* restates is "the basic rule" drawn in *Deveaux* and *Osborn* that a sue-and-be-sued clause conferring only a general right to sue does

not grant jurisdiction to the federal courts. *Red Cross*, 505 U. S., at 253. Each mention of a "rule" refers back to this principle. See *id.,* at 255 (reading this Court's sue-and-be-sued clause cases to "support the rule that a . . . 'sue and be sued' provision *may* be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts" (emphasis added)); *id.,* at 256 (*Bankers Trust* applied "the rule thus established" to hold that the railroad's sue-and-be-sued clause did not confer jurisdiction); 505 U. S., at 257 (finding the result "clear" under the "rule established in these cases" because the charter "expressly authoriz[es]" suits in federal courts in a clause "in all relevant respects identical" to one already found to confer jurisdiction).

True enough, the dissent thought *Red Cross* established a broad rule. See 505 U. S., at 271–272 (opinion of Scalia, J.) (describing *Red Cross* as announcing a "rule . . . that any grant of a general capacity to sue with mention of federal courts will suffice to confer jurisdiction" (emphasis deleted)). The certainty of the dissent may explain the lower court decisions adopting a broader reading of *Red Cross*. But *Red Cross* itself establishes no such rule. And such a rule is hard to square with the opinion's thorough consideration of the contrary arguments based in text, purpose, and legislative history. See *id.,* at 258–263.

Nothing in *Red Cross* suggests that courts should ignore "the ordinary sense of the language used," *id.,* at 263, when confronted with a federal charter's sue-and-be-sued clause that expressly references the federal courts, but only those that are courts "of competent jurisdiction."

III

Fannie Mae, preferring to be in federal court, raises several arguments against reading its sue-and-be-sued clause as merely capacity conferring. None are persuasive.

A

Fannie Mae first offers several alternative readings of "court of competent jurisdiction." It suggests that the phrase might refer to a court with personal jurisdiction over the parties before it, a court of proper venue, or a court of general, rather than specialized, jurisdiction. Brief for Respondents 41–45.

At bottom, Fannie Mae's efforts on this front are premised on the reading of *Red Cross* rejected above. In its view, an express reference to the federal courts suffices to confer subject-matter jurisdiction on federal courts. It sees its only remaining task as explaining why that would not render "court of competent jurisdiction" superfluous. See Tr. of Oral Arg. 29–30. But the fact that a sue-and-be-sued clause references the federal courts does not resolve the jurisdictional question. Thus, arguments as to why the phrase "court of competent jurisdiction" could still have meaning if it does not carry its ordinary meaning are beside the point.

Moreover, even if the phrase carries additional meaning, that would not further Fannie Mae's argument. Take its suggestion that a "court of competent jurisdiction" is a court with personal jurisdiction. A court must have the power to decide the claim before it (subject-matter jurisdiction) and power over the parties before it (personal jurisdiction) before it can resolve a case. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 583–585 (1999). Recognizing as much, this Court has stated that the phrase "court of competent jurisdiction," while "usually used to refer to subject-matter jurisdiction, has also been used on occasion to refer to a court's jurisdiction over the defendant's person." *United States* v. *Morton*, 467 U. S. 822, 828 (1984) (footnote omitted). See also *Blackmar* v. *Guerre*, 342 U. S. 512, 516 (1952). But nothing in Fannie Mae's sue-and-be-sued clause suggests that the reference to "court of competent jurisdiction" refers only to a court with

personal jurisdiction over the parties before it. At most then, this point might support reading the phrase to refer to both subject-matter and personal jurisdiction. That does not help Fannie Mae. So long as the sue-and-be-sued clause refers to an outside source of subject-matter jurisdiction, it does not confer subject-matter jurisdiction.

B

Fannie Mae next claims that, by the time its sue-and-be-sued clause was enacted in 1954, courts had interpreted provisions containing the phrase "court of competent jurisdiction" to grant jurisdiction and that Congress was entitled to rely on those interpretations. This argument invokes the prior construction canon of statutory interpretation. The canon teaches that if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning. See *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998).

Fannie Mae points to cases discussing three types of statutory provisions that, in its view, show that the phrase "court of competent jurisdiction" had acquired a settled meaning by 1954.

The first pair addresses the FHA's sue-and-be-sued clause. See 12 U. S. C. §1702 ("sue and be sued in any court of competent jurisdiction, State or Federal"). Two Court of Appeals decisions in the 1940's concluded that the FHA sue-and-be-sued clause overrode the general rule, today found in 28 U. S. C. §§1346(a)(2), 1491, that monetary claims against the United States exceeding $10,000 must be brought in the Court of Federal Claims, rather than the federal district courts. See *Ferguson* v. *Union Nat. Bank of Clarksburg*, 126 F. 2d 753, 755–757 (CA4 1942); *George H. Evans & Co.* v. *United States*, 169 F. 2d 500, 502 (CA3 1948). These courts did not state that their

jurisdiction was founded on the sue-and-be-sued clause, as opposed to statutes governing the original jurisdiction of the federal district courts. See, *e.g.,* 28 U. S. C. §41(a) (1946 ed.). Thus, even assuming that two appellate court cases can "'settle'" an issue, A. Scalia & B. Garner, Reading Law 325 (2012), these two cases did not because they did not speak to the question here.

The second set of cases addresses provisions authorizing suit for a violation of a statute. One arose under the Fair Labor Standards Act of 1938, which authorizes employees to sue for violations of the Act in "any . . . court of competent jurisdiction." §6(d)(1), 88 Stat. 61, 29 U. S. C. §216(b). This Court, in its description of the facts, stated that "[j]urisdiction of the action was conferred by . . . 28 U. S. C. §41(8), and . . . 29 U. S. C. §216(b)." *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 390 (1942). This brief, ambiguous statement did not settle the meaning of §216(b), and thus did not settle the meaning of the phrase "court of competent jurisdiction." The other cases in this set dealt with the Housing and Rent Act of 1947. As enacted, the statute permitted suit in "any Federal, State, or Territorial court of competent jurisdiction." §206(b), 61 Stat. 199. Some courts read §206 not to confer jurisdiction and instead assessed their jurisdiction under the federal-question jurisdiction statute. See, *e.g., Schuman* v. *Greenberg*, 100 F. Supp. 187, 189 (NJ 1951) (collecting cases). At the time, that statute carried an amount-in-controversy requirement, 28 U. S. C. §41(1) (1946 ed.), and so some cases were dismissed or remanded to state court for lack of federal jurisdiction. Congress later amended §206 to permit suit "in any Federal court of competent jurisdiction regardless of the amount involved." Defense Production Act Amendments of 1951, §204, 65 Stat. 147. Congress' elimination of the amount-in-controversy requirement suggests, if anything, it understood that "court of competent jurisdiction" could be read to require an

outside source of jurisdiction.

The third set of cases interpreted provisions making federal jurisdiction over certain causes of action exclusive. Brief for Respondents 36–37. Those cases confirm that the provisions require suit to be brought in federal courts but do not discuss the basis for federal jurisdiction.

In sum, none of the cases on which Fannie Mae relies suggest that Congress in 1954 would have surveyed the jurisprudential landscape and necessarily concluded that the courts had already settled the question whether a sue-and-be-sued clause containing the phrase "court of competent jurisdiction" confers jurisdiction on the federal courts.

C

Fannie Mae ends with an appeal to congressional purpose, or, more accurately, a lack of congressional purpose.

It argues that its original sue-and-be-sued clause, enacted in 1934, granted jurisdiction to federal courts and that there is no indication that Congress wanted to change the status quo in 1954. The addition in 1954 of "court of competent jurisdiction," a phrase that, as discussed, carries a clear meaning, means that the current sue-and-be-sued clause does not confer jurisdiction. An indication whether that meaning was understood as a change from the 1934 Act is not required.*

Fannie Mae next points to its sibling rival, the Federal Home Loan Mortgage Corporation, known as Freddie Mac. The two share parallel authority to compete in the second-

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*The legislative history of the 1934 Act provides some reason to question Fannie Mae's premise about Congress' view of the status quo under the 1934 Act. During debate on this provision, Senator Logan asked Senator Bulkley, the chair of the subcommittee with authority over the bill, about the original sue-and-be-sued clause. Senator Bulkley explained that it merely conferred a capacity to sue and be sued "and [did] not confe[r] a right to go into a Federal court where it would not otherwise exist." 78 Cong. Rec. 12008 (1934).

ary mortgage market. Compare 12 U. S. C. §§1717(b)(2)–(6) (Fannie Mae) with §1454(a) (Freddie Mac). Suits involving Freddie Mac may be brought in federal court. See §1452(c) ("to sue and be sued, complain and defend, in any State, Federal, or other court"); §1452(f) (providing that Freddie Mac is a federal agency under 28 U. S. C. §§1345, 1442, that civil actions to which Freddie Mac is a party arise under federal law, and that Freddie Mac may remove cases to federal district court before trial).

Fannie Mae argues there is no good reason to think that Congress gave Freddie Mac fuller access to the federal courts than it has. Leaving aside the clear textual indications suggesting Congress did just that, a plausible reason does exist. In 1970, when Freddie Mac's sue-and-be-sued clause and related jurisdictional provisions were enacted, Freddie Mac was a Government-owned corporation. See Emergency Home Finance Act of 1970, §304(a), 84 Stat. 454. Fannie Mae, on the other hand, had already transitioned into a privately owned corporation. Fannie Mae's argument on this front, moreover, contains a deeper flaw. The doors to federal court remain open to Fannie Mae through diversity and federal-question jurisdiction. Fannie Mae provides no reason to think that in other cases, involving only state-law claims, access to the federal courts gives Freddie Mac an unintended competitive advantage over Fannie Mae that Congress would have wanted to avoid. Indeed, the usual assumption is that state courts are up to the task of adjudicating their own laws. Cf. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 483–484 (1981).

IV

The judgment of the Ninth Circuit is reversed.

It is so ordered.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SEAN M. LUCEY & LUCEY CORPORATION, Appellants, v. 1010 LOGIC, INC., Appellee.	)	Case No. 2D15-5325

Opinion filed January 20, 2017.

Appeal from the Circuit Court for Pinellas County; Thomas H. Minkoff, Judge.

Kathleen S. Lucey, Saint Petersburg, for Appellants.

Jason H. Baruch and Patrick M. Chidnese of Holland and Knight LLP, Tampa, for Appellee.

LUCAS, Judge.

Sean M. Lucey and Lucey Corporation (collectively, "Lucey"), the defendants below, appeal the entry of a final summary judgment entered in favor of 1010 Logic, Inc. in its breach of contract lawsuit. Lucey raises several issues on appeal, but we find merit in only one. The circuit court erroneously entered summary

judgment on one of Lucey's affirmative defenses where 1010 Logic failed to conclusively refute that no disputed issue of material fact existed as to that defense.

The facts of this case stem from a software design and technical support agreement between Lucey and 1010 Logic concerning a project for one of Lucey's customers. Under the terms of the contract,[1] 1010 Logic agreed to provide the services of a software developer, Deepak Krishnamoorthy, to assist with Lucey's technical design and support for Lucey's customer, Belk Stores Services, from January through September 2013. In addition to describing the scope of services to be provided, the contract included qualitative requirements for Mr. Krishnamoorthy's work that would be outlined and later reviewed by one of Belk's employees, Balaji Raman.[2] According to the contract, Mr. Krishnamoorthy's services were to be performed "in accordance with the [a]greement and the service levels, specifications, and timeframes set forth in each [o]rder, and in accordance with performance measurements," and the software code he created was to "be free of defects in workmanship, design, and material." Furthermore, under the contract, Lucey would not be required to pay for any services that did not meet the contract's requirements or the standards imposed by Mr. Raman.

Dissatisfied with Mr. Krishnamoorthy's level of performance, Lucey withheld payment for the final three months of the contract and—apparently at Belk's direction—purported to terminate Mr. Krishnamoorthy's services under the contract in

[1]Both Lucey and 1010 Logic appear to acknowledge that the contractual documents at issue comprised both a general services agreement dated December 18, 2012, and a subsequent statement of work issued from 1010 Logic, pursuant to that agreement. We use the term "contract" in this opinion to refer to both collectively.

[2]The parties mutually agreed upon Mr. Raman's designation under the contract as the "subject matter expert" for Belk's software project.

September 2013. 1010 Logic then filed a complaint in the circuit court against Lucey for nonpayment under the contract. In response, Lucey denied breaching the contract and asserted several affirmative defenses, including the defense—albeit somewhat inartfully articulated—that 1010 Logic failed to render substantial performance under the terms of the contract.

1010 Logic filed a motion for partial summary judgment, which the court heard during a pretrial conference. In its motion, 1010 Logic sought summary judgment on its breach of contract claim and all of Lucey's affirmative defenses, and it filed summary judgment evidence, including Messrs. Lucey's and Raman's depositions, prior to the hearing. However, the motion offered only three points that were pertinent to Lucey's substantial performance defense; according to 1010 Logic, (1) Lucey had received full payment from Belk for Mr. Krishnamoorthy's work, (2) Lucey did not terminate Mr. Krishnamoorthy's service until the end of the contract, and (3) Mr. Raman expressed regret for not doing more to supervise Mr. Krishnamoorthy. For its part, Lucey never identified any summary judgment evidence, see Fla. R. Civ. P. 1.510(c), but argued at the hearing that Mr. Raman's deposition refuted 1010 Logic's summary judgment arguments as to Lucey's substantial performance defense.[3] The circuit court granted 1010 Logic's motion and entered a final judgment in its favor, but neither the

[3]Had Lucey complied with rule 1.510(c)'s strictures, Lucey would have had ample material within Mr. Raman's deposition to demonstrate material facts in dispute regarding this defense. In his deposition, Mr. Raman explained that there were several issues in the code Mr. Krishnamoorthy wrote; that Mr. Krishnamoorthy did not properly test the code before its implementation; that Mr. Krishnamoorthy did not meet the "business requirements that were provided to him"; that after the code "went live," additional defects were discovered; and that, had Mr. Raman himself completed the work in the same manner as Mr. Krishnamoorthy, he "would not [expect] to be . . . paid."

order granting summary judgment nor the final judgment specifically addressed any of Lucey's affirmative defenses.

Our court summarized the standard of appellate review for summary judgment rulings on affirmative defenses in Coral Wood Page, Inc. v. GRE Coral Wood, LP, 71 So. 3d 251, 253 (Fla. 2d DCA 2011):

> Summary judgment is proper only where the moving party shows conclusively that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966); Fla. R. Civ. P. 1.510(c). When the nonmoving party has alleged affirmative defenses, the moving party must *conclusively refute the factual bases for the defenses* or establish that they are legally insufficient. Morroni v. Household Fin. Corp. III, 903 So. 2d 311, 312 (Fla. 2d DCA 2005). "The burden of proving the existence of genuine issues of material fact does not shift to the opposing party until the moving party has met its burden of proof." Deutsch v. Global Fin. Servs., LLC, 976 So. 2d 680, 682 (Fla. 2d DCA 2008).

(Emphasis added.) We have stated, repeatedly, that "[i]f the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." Atria Grp., LLC v. One Progress Plaza, II, LLC, 170 So. 3d 884, 886 (Fla. 2d DCA 2015) (quoting Holland v. Verheul, 583 So. 2d 788, 789 (Fla. 2d DCA 1991)); see also LoBello v. State Farm Fla. Ins. Co., 152 So. 3d 595, 598 (Fla. 2d DCA 2014) (same); Murray v. Traxxas Corp., 78 So. 3d 691, 692 (Fla. 2d DCA 2012) (same).

We cannot say that the facts before us offer a "crystallized, conclusive" record that would support summary judgment on Lucey's substantial performance defense. See Hastings v. Demming, 682 So. 2d 1107, 1110 (Fla. 2d DCA 1996). Indeed, in our view, 1010 Logic failed to meet its initial burden of disproving the

sufficiency of Lucey's substantial performance defense. See Rooker v. Ford Motor Co., 100 So. 3d 1229, 1231 (Fla. 2d DCA 2012) ("A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact." (quoting Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979))). 1010 Logic's observations about Lucey's receipt of full payment from its customer, the timing of the contract's termination, and a nonparty's statement about his supervision over 1010 Logic's work—essentially inferential arguments—did not conclusively refute Lucey's defense that 1010 Logic failed to render substantial performance under the terms of the contract. See Coral Wood, 71 So. 3d at 253. As the Third District explained in National Constructors, Inc. v. Ellenberg, 681 So. 2d 791, 794 (Fla. 3d DCA 1996), "[t]he question of whether there has been substantial performance . . . is normally a question of fact for the trier of fact to resolve based on all of the relevant evidence." See also Fed. Nat'l Mortg. Ass'n v. Morton, 196 So. 3d 428, 431 (Fla. 2d DCA 2016) ("[W]hether a party has substantially complied with or performed a contract term remains a question of fact.").

Accordingly, we must reverse the entry of the final summary judgment as to Lucey's substantial performance affirmative defense. However, we find no error in any of the other rulings Lucey has challenged in this appeal.

Affirmed in part; reversed in part; remanded.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JAMES AND MELANIE NIPPER,

Appellants,

v.

WALTON COUNTY, FLORIDA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Appellee.

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

CASE NO. 1D16-512

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Opinion filed January 17, 2017.

An appeal from the Circuit Court for Walton County.
Thomas R. Santurri, Judge.

Matthew L. Gaetz, II of Keefe, Anchors & Gordon, Fort Walton Beach, for Appellant.

Mark D. Davis and Sidney N. Noyes of the Office of the County Attorney, DeFuniak Springs, for Appellee.

OSTERHAUS, J.

James and Melanie Nipper appeal an order permanently enjoining them from operating a skydiving business on their 290-acre farm in Walton County. After the Nippers won a zoning enforcement case initiated by Walton County before the

county code enforcement board, the County sought and received a permanent injunction in circuit court to halt the business. The Nippers appealed and we now reverse. An injunction is available to enforce local zoning regulations where there is a "clear legal right" to the relief. In this case, the County didn't demonstrate a clear legal right to enjoin the Nippers' skydiving business.

I.

The Nippers own and operate a large farm in Walton County and began supplementing their income in 2008 by operating a skydiving business.[1] The Nippers twice sought permission from the Walton County Planning Department to operate the skydiving business on their property. But they were denied and told by the Director of Planning and Development that it violated the County's zoning code. The County cited the Nippers when they continued operating their business. And in 2015, the County initiated a code enforcement action before the Walton County Code Enforcement Board (CEB). After holding a hearing, the CEB rejected the County's position and concluded that the Nippers' business did not violate the County's zoning code. Walton County didn't appeal.

[1] Before retiring from the military to their farm near Paxton, in north Walton County, Mr. Nipper had a distinguished career as a U.S. Army Paratrooper and member of the elite Golden Knights parachute team from 1981-1997. Ms. Nipper was an Army pilot.

Meanwhile, prior to the CEB's decision, the Nippers sought a declaration in circuit court that they could run their business pursuant to a state law exempting agritourism from local land use regulations. The Nippers' state law claim failed, but Walton County filed a cross-claim in that case for a permanent injunction to stop the skydiving business. After the CEB had ruled for the Nippers in the separate county enforcement action, the circuit court proceeded to grant the injunction sought by Walton County based on the Planning Director's view that the Nippers' business violated the zoning code: "It is clear that Walton County determined that the use of the Plaintiffs' property as a commercial skydiving business violated those uses allowed in a Large Scale Agricultural District which the Plaintiffs' property is located." The circuit court's decision did not give weight to the CEB's prior decision in the enforcement action. The Nippers then appealed the injunction to this court.

II.

We review a trial court's decision to grant an injunction based on a mixed standard. If the injunction rests on factual findings, then a trial court's order must be affirmed absent an abuse of discretion; but if the injunction rests on purely legal matters, then an injunction is reviewed de novo. Smith v. Coal. to Reduce Class Size, 827 So. 2d 959, 961 (Fla. 2002). The parties agree on all the relevant facts here: the Nippers operate a skydiving business at their farm, which the County considers to

violate the zoning code. The central question we address on appeal is whether the County satisfied the legal requirements for receiving an injunction.[2]

"The authority of a county to seek injunctive relief to enforce its zoning code cannot go beyond its basic power to regulate the use of land." Henry v. Bd. of Cnty. Comm'rs of Putnam Cnty., 509 So. 2d 1221, 1223 (Fla. 5th DCA 1987). To obtain an injunction against someone who is violating the zoning code, a county must show (1) a clear legal right to the relief, (2) inadequacy of a legal remedy, and (3) irreparable injury if the relief isn't granted. See E. Fed. Corp. v. State Office Supply Co., Inc., 646 So. 2d 737, 741 (Fla. 1st DCA 1994). The resolution of this appeal squarely depends on the first prong of the test because "where the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed." Ware v. Polk County, 918 So. 2d 977, 979 (Fla. 2d DCA 2005) (citing Metro. Dade County v. O'Brien, 660 So. 2d 364, 365 (Fla. 3d DCA 1995)). To win the injunction here, Walton County had to show a "clear legal right" to enjoin the Nippers from running the skydiving business at their farm.

A county demonstrates a clear legal right to injunctive relief by showing that a party has violated a law, code, or ordinance. Ware, 918 So. 2d at 980. But here it

[2] We reject Appellants' argument that the circuit court lacked jurisdiction to enter the judgment below. See § 162.21(8), Fla. Stat.; Walton Cnty. Ord. 9.05.04(B).

isn't clear that the Nippers' skydiving operation violated Walton County's zoning code. In fact, the CEB vindicated the Nippers' business in the code enforcement action previously brought by Walton County. Walton County's Land Development Code sets forth the CEB's "jurisdiction to hear and decide alleged violations of all codes and ordinances in force in the County including . . . [the] Land development code." Walton Cnty. Land Dev. Code § 9.05.04(A) (2010) (emphasis added). At the 2015 CEB hearing, the parties fully debated the Nippers' case and their interpretations of the zoning code related to the commercial skydiving operation at the Nippers' property. The County failed to prove the alleged zoning violation before the CEB, which decided that the Nippers' operation didn't violate the code:

> The Board finds that the activities conducted on the subject property by the Respondents [do] not violate the LDC as alleged by Walton County. . . . The Board imposes no penalties and requires no corrective action by the respondent.

The County did not appeal the CEB's decision.[3] And, now, the Nippers' victory before the CEB undermines the County's claim of a "clear legal right" to enjoin the Nippers' business.[4]

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[3] The County claims here that the CEB only addressed whether the Nippers could run a commercial airport at their farm, not whether they could operate a skydiving business. But the CEB hearing transcript and final order doesn't support this claim. In fact, the County's Planning Director testified explicitly at the CEB hearing that "the issue at hand tonight is a skydiving operation. . . . [W]hen I say airport and skydiving, I think they're almost the same as far as the land development code."

[4] In the wake of a code enforcement process finding no violation and assessing no penalty, we are mindful that Florida's landowners possess explicit due process

After the CEB had vindicated the Nippers' ability to run their business, the circuit court's order enjoined it. The circuit court's subsequent order disregarded the CEB outcome and deferred instead to the Planning Director's views, as though his opinion alone established the County's "clear legal right" to prohibit the Nippers' business. This wasn't correct. The Planning Director's views do not override a final enforcement decision by the CEB, which has "jurisdiction to . . . decide alleged violations." The Land Development Code gave the CEB authority to decide the issue once the Planning Director initiated the case there. And, at that point, the circuit court's order could not simply rely on the Planning Director's views to make the County's case for the injunction. Cf. Kirby v. City of Archer, 790 So. 2d 1214, 1215 (Fla. 1st DCA 2001) (preventing a party who lost before the CEB from bringing a separate circuit court action).

What is more, the language of Walton County's zoning code itself is ambiguous and doesn't establish the County's case for the injunction. If the zoning code clearly prohibited the Nippers' skydiving operation, we could easily affirm. See Ware, 918 So. 2d at 979-80 (finding a clear legal right to relief where a property owner ignored a county ordinance that obviously applied against him). But,

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rights, guaranteed by Article I, section 9, of the Florida Constitution, with respect to their property. See, e.g., Dep't of Cmty. Affairs v. Moorman, 664 So. 2d 930, 933 (Fla. 1995) (stating that "article I, section 9 guarantee[s] the right to enjoy property. Within limits, that right can include decisions regarding the improvement of property.").

here, the text of the zoning code doesn't clearly prohibit skydiving. Walton County Comprehensive Plan Policy L-1.4.1(B)5 allows the following commercial activities on designated Large Scale Agricultural areas of Walton County like the Nippers' farm:

> (B) **Uses allowed**: Land uses supportive of, and functionally related to, agricultural . . . activities; . . .
>
> * * *
>
> 5. Supporting agriculture, aquacultural, and silviculture commercial uses shall be limited to the following: Farm equipment sales and repair, kennels and veterinary services, sale of agricultural chemicals and supplies, rural neighborhood general or grocery store, feed sales, blacksmith and wood working shops, processing, storage, or sale of agricultural products; *outdoor recreational activities* <u>*such as*</u> *hunting or fishing camps, bait and tackle shops, shooting ranges, and golf courses*; travel trailer parks or campgrounds connected to outdoor recreational uses, riding or boarding stables; cemeteries, communications facilities, small engine repair, and welding shops.

(Emphasis added). This provision doesn't specifically include (or exclude) skydiving on its list of permissible land uses. Rather, the "outdoor recreational activities such as" clause indicates that skydiving may be permissible. No one denies that skydiving is an outdoor recreational activity. And the code gives the Nippers the right to use their land for commercial "outdoor recreational activities such as . . . golf courses." Golf courses allow for outdoor fun, but aren't used for agricultural, aquacultural, or silvicultural purposes—golfers cannot hit six-irons very well from fairways of corn stalks, hayfields, or peanut and pine tree rows; nor are golf-ball-

dodging fish and plants mass-harvested from the water hazards of golf courses. So the fact that skydiving isn't inherently agricultural, aquacultural, or silvicultural isn't a disqualifier. In fact, nothing textually, or argued by the County, seems to set skydiving apart from the list of permissible outdoor activities. One board member's question to the Planning Director at the CEB hearing sums up the interpretive challenge here pretty well: "What I don't understand Mr. Dyess, is what you base [your] opinion on? . . . What exactly makes [skydiving] different from an activity like golf balls flying through the air?" In response, the Planning Director provided no textual basis for prohibiting skydiving. He said simply: "In my opinion, I do not feel that that [the] skydiving operation . . . fit within those uses that are prescribed." We likewise see nothing compelling in the text of the code that advances the County's claim of a "clear legal right" to enjoin the Nippers' skydiving business.

III.

We thus reverse the judgment entered below because the County did not show a clear legal right to the injunctive relief granted by the circuit court.

REVERSED and REMANDED.

B.L. THOMAS and RAY, JJ., CONCUR.

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

SAND LAKE HILLS HOMEOWNERS
ASSOCIATION, INC.,

Appellant,

v. Case No. 5D16-21

JEFFREY C. BUSCH, SUSAN D. BUSCH
AND DAVID F. ALLAN, ET AL.,

Appellees.

_____/

Opinion filed January 20, 2017

Appeal from the Circuit Court
for Orange County,
Lisa T. Munyon, Judge.

John Bengier, of Meier, Bonner, Muszynski,
O'Dell & Harvey, P.A., Longwood,
for Appellant.

Frederic B. O'Neal, Windermere,
for Appellees, Jeffrey C. Busch and Susan
D. Busch.

No Appearance for other Appellees.

ORFINGER, J.

Appellant, Sand Lake Hills Homeowners Association, Inc., appeals a final judgment awarding attorney's fees to Jeffrey C. Busch and Susan D. Busch, pursuant to

sections 57.105(7) and 712.08, Florida Statutes (2015). We affirm in part and reverse in part.

In the 1970s and 1980s, an area loosely known as Sand Lake Hills was developed in sections, with each section having its own separately recorded covenants and restrictions. The Busches' home is located in Section Three of the Sand Lake Hills community. The original covenants and restrictions applicable to Sand Lake Hills Section Three were recorded in 1978. Under the original covenants and restrictions, Appellant was a voluntary homeowners' association where some homeowners voluntarily contributed to the upkeep and maintenance of the community, while others did not. Because membership was voluntary, Appellant is not a statutory homeowners' association. See § 720.301(7), Fla. Stat. (2000) (defining homeowners' association as "Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel").

In 2004, Appellant recorded a "Notice Of Reassertion Of Covenants And Restrictions Pursuant To Chapter 712, Florida Statutes" in the public records of Orange County, Florida ("MRTA Preservation Notice") in an effort to preserve the covenants and restrictions applicable to Sand Lake Hills Section Three.[1] Appellant also prepared an

[1] Under the Marketable Record Titles Act ("MRTA"), any person with an interest in land may preserve that interest by filing a notice with the clerk of the circuit court. The notice must be filed during the thirty-year period following the effective date of the root of title. § 712.05, Fla. Stat. (2004).

Amended and Restated Declaration of Covenants and Restrictions Of Sand Lake Hills ("ARD"), in an effort to convert the voluntary homeowners' association to a statutory homeowners' association with mandatory assessments. Appellant, through its Board of Directors, asked the individual homeowners to execute a "Joinder and Consent" agreeing to the ARD with the new declarations. After approval by more than fifty percent of the Section Three homeowners, Appellant recorded the ARD in the public records.

The Busches did not consent to the ARD. Nonetheless, Appellant informed the Busches that since a majority of the Section Three property owners had adopted the ARD, it was "legally binding on all property owners of Sand Lake Hills, Section 3," and the "current assessment for calendar year 2008 [of] $100.00" was required to be paid. The Busches objected, and filed a complaint for slander of title, declaratory relief, and injunctive relief in Orange County Case No. 2008-CA-012464 (the "ARD case"). In a separately filed lawsuit in Orange County Case No. 2010-CA-011262, the Busches challenged Appellant's authority to file the 2004 MRTA Preservation Notice (the "MRTA case"). Ultimately, the trial court found that Appellant did not have the authority to file the 2004 MRTA Preservation Notice. The trial court also ruled the ARD ineffective as to the Busches, and therefore, it did not affect their title. Those rulings are unchallenged on appeal.

The dispute then turned to attorney's fees, the subject of this appeal. The court granted the Busches' fee motion against Appellant, concluding that the ARD provided for the recovery of attorney's fees in any action to enforce compliance with its provisions and that the reciprocal provisions of section 57.105(7), Florida Statutes (2015), entitled the Busches to recover their reasonable fees against Appellant on count II of the ARD case.

The court also awarded attorney's fees pursuant to section 712.08 in the MRTA case, finding that the 2004 MRTA Preservation Notice, which Appellant filed, was a false or fictitious claim.

1. The ARD Case and Section 57.105(7), Florida Statutes.

"It is well-settled that attorney['s] fees can derive only from either a statutory basis or an agreement between the parties." Trytek v. Gale Indus., Inc., 3 So. 3d 1194, 1198 (Fla. 2009) (citing State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993)). When entitlement to attorney's fees is based on a provision in a contract, an appellate court reviews the matter de novo. Gibbs Constr. Co. v. S.L. Page Corp., 755 So. 2d 787, 790 (Fla. 2d DCA 2000). But, a stranger to the contract cannot recover attorney's fees based on the contract. See HFC Collection Ctr., Inc. v. Alexander, 190 So. 3d 1114, 1116-17 (Fla. 5th DCA 2016).

Here, the trial court found that the ARD was ineffective as to the Busches and did not encumber their property. "[W]here a motion for attorney's fees is based on a prevailing-party provision of a document, the fact that a contract never existed precludes an award of attorney's fees." David v. Richman, 568 So. 2d 922, 924 (Fla. 1990). Because the trial court found that no contract existed between Appellant and the Busches, the Busches were not entitled to attorney's fees under the fee provision of the ARD. Thus, we reverse the order awarding attorney's fees to the Busches and against Appellant pursuant to the ARD and section 57.105(7).

2. The MRTA Case

The court awarded attorney's fees pursuant to section 712.08 in the MRTA case, concluding that the MRTA Preservation Notice was a false or fictitious claim. Appellant

argues that this was error because (1) it is not a homeowners' association within the meaning of chapter 712 and (2) it did not intentionally file a false or fictitious claim within the meaning of section 712.08.

A statute that awards attorney's fees is in derogation of the common law rule that each party pay its own attorney's fees and must be strictly construed. See Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003). The question before us is a matter of statutory interpretation, which we review de novo. E.g., Borden v. East–European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). Legislative intent is the polestar that guides our analysis regarding statutory interpretation. E.g., Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 367 (Fla. 2013); Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003); Patel v. State, 141 So. 3d 1239, 1243 (Fla. 5th DCA 2014). To discern legislative intent, our analysis begins with the statute's plain language. E.g., Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 198 (Fla. 2007); Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004); State v. Dugan, 685 So. 2d 1210, 1212 (Fla. 1996); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005). The statute's plain and ordinary meaning must control unless this leads to an unreasonable result or a result clearly contrary to legislative intent. Id.

The Florida Legislature enacted MRTA to simplify and facilitate land transactions. See Blanton v. City of Pinellas Park, 887 So. 2d 1224, 1227 (Fla. 2004). Section 712.05(1), Florida Statutes (2015), provides, in part: "[A] homeowners' association

desiring to preserve any covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a written notice . . . ." Section 712.06, Florida Statutes (2015), sets forth the contents of the notice and must be carefully followed because pursuant to section 712.08, a person who files a false notice is liable to the owner for costs, attorney's fees, and damages sustained by the owner:

> **Filing false claim**.- *No person* shall use the privilege of filing notices hereunder *for the purpose of asserting false or fictitious claims to land*; and in any action relating thereto if the court *shall find* that *any person has filed a false or fictitious claim*, the court may award to the prevailing party all costs incurred by her or him in such action, including a reasonable attorney's fee, and *in addition* thereto may *award to the prevailing party all damages that she or he may have sustained as a result of the filing of such notice of claim*.

§ 712.08, Fla. Stat. (2015) (emphasis added).

Thus, section 712.08 prohibits false filings by any "person." It is irrelevant that Appellant was not a homeowners' association as defined in section 720.301 or a homeowners' association entitled to enforce use restrictions. As a corporation, Appellant is a "person" under the statute. See § 1.01(3), Fla. Stat. (2015) ("The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.").

Second, and contrary to Appellant's argument, section 712.08 does not require the filer to intentionally or knowingly file the false or fictitious claim. Rather, the statute's plain language provides: "[I]f the court shall find that any person has filed a false or fictitious claim, the court may award to the prevailing party all costs incurred by her or him in such action, including a reasonable attorney's fee . . . ." § 712.08, Fla. Stat. (2015).

The statute does not define "false" or "fictitious." Thus, we turn to a dictionary to ascertain the plain and ordinary meaning of these terms. See L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) ("[A] court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term."). "False" ordinarily means "not real or genuine," "not true or accurate; especially: deliberately untrue : done or said to fool or deceive someone," or "based on mistaken ideas." *False,* Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/false (last visited Dec. 27, 2016). "Fictitious" customarily means "not true or real." *Fictitious*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/fictitious (last visited Dec. 27, 2016). Since "false" or "fictitious" includes "mistaken ideas," as well as "not real or genuine" and "not true or real" claims, section 712.08 provides a remedy in the trial court's discretion when a claim is filed against another's property and that claim is later determined to be untrue. It does not require deliberate untruthfulness. Melissa Scaletta, *Marketable Record Title Act & Uniform Title Standards*, *in* Fla. Real Prop. Title Examination & Ins. § 2:13 (Fla. Bar 7th ed., 2012) ("Anyone who files a false claim is liable to the owner for costs, attorneys' fees, and damages sustained by the owner. F.S. 712.08."). If the Legislature intended the trial court to find that the person *intentionally* filed a false or fictitious claim, it could have easily required such a finding, as the North Carolina legislature did in its similarly worded statute. Cf. N.C. Gen. Stat. § 47B-6 (2015) ("No person shall use the privilege of registering notices hereunder for the purpose of asserting false or fictitious claims to real property; and in any action relating thereto if the court shall find that *any person has intentionally registered a false or fictitious claim*, the court may award to the prevailing party all costs incurred by him in such action, including

a reasonable attorney's fee . . . .") (emphasis added). To read the word "intentionally" into the statute would make section 712.08 a penal statute, rather than a remedial statute that provides a remedy to a person who expends attorney's fees to clear the title of a "false or fictitious claim" on his, her, or its real property. See Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981) ("A remedial statute is 'designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.' It is also defined as '(a) statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before.'" (quoting Black's Law Dictionary (5th ed. 1979))).

For these reasons, we affirm that portion of the order awarding the Busches attorney's fees and costs in the MRTA case as well as costs in the ARD case. However, we reverse only that portion of the order awarding attorney's fees to the Busches and against Appellant in the ARD case.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

COHEN, C.J., and HODGES, R.W., Associate Judge, concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LINDA SCHUMACHER,
Appellant,

v.

REBACK REALTY, INC., a Florida Corporation,
Appellee.

No. 4D16-0755

[January 18, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Judge; L.T. Case No. 502015CA004094XXXXMBAI.

E. Cole Fitzgerald, III and James A. Burnham of Fitzgerald, Mayans & Cook, P.A., West Palm Beach, for appellant.

Lawrence Duffy of Lawrence Duffy, P.A., Palm Beach Gardens, for appellee.

DAMOORGIAN, J.

Linda Schumacher ("Agent") appeals the summary final judgment entered in favor of Reback Realty, Inc. ("Broker") in her breach of contract action. For the reasons discussed below, we reverse the summary final judgment and remand for further proceedings consistent with this opinion.

The following facts are undisputed. In 2013, Agent entered into an independent contractor agreement (the "Agreement") with Broker. The Agreement provided that commissions would be generally split 80/20, with 80% going to Agent and 20% going to Broker. The Agreement further provided that in the event "two or more AGENTS participate in rendering a brokerage service to the public, or claim to have done so, BROKER will determine, in BROKER's sole and absolute discretion, the amount of fees due AGENT(S)."

In 2014, Agent, along with another individual working on behalf of Broker, was involved in a real estate transaction which produced a $100,000 commission. Pursuant to the Agreement, Agent requested her

$80,000 share of the commission. Broker refused and Agent sued for breach of contract. In its answer, Broker denied that Agent was entitled to the full $80,000 commission fee because two or more "agents" participated in the transaction. Therefore, pursuant to the "two or more agents" provision, Broker had the sole and absolute discretion in determining the amount of commission fees due to each agent. Aside from alleging that a second "agent" was involved in the transaction, Broker attached no evidence showing that the other individual was in fact an agent.

Broker eventually moved for summary judgment on the same grounds as alleged in the answer. Broker's summary judgment evidence consisted of the following: (1) a copy of the Agreement; (2) the transcript from Agent's deposition; and (3) an affidavit from Broker's representative attesting that the Agreement was in effect at all times material to the litigation. Broker again attached no evidence showing that the other individual involved in the transaction was in fact an agent. Following a brief summary judgment hearing, the trial court entered summary final judgment in favor of Broker. The court's decision was based on its finding that because two or more "agents" were involved in the transaction, Broker could not be in breach of contract for refusing to pay Agent the full $80,000 commission fee. This appeal follows.

"We review a trial court's order on a motion for summary judgment de novo." *Hibbs Grove Plantation Homeowners Ass'n, v. Aviv*, 193 So. 3d 977, 979 (Fla. 4th DCA 2016). It is well established that "[a] trial court may enter summary judgment only when there are no genuine issues of material fact *conclusively shown from the record* and the movant is entitled to judgment as a matter of law." *Reeves v. N. Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002) (emphasis added). Furthermore, "[a]ll doubts and inferences must be resolved against the moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available." *Id.*

In the present case, Agent's breach of contract claim against Broker hinged on the issue of whether another "agent" participated in the transaction. By alleging that Broker breached the Agreement by refusing to pay her the full $80,000 commission fee, Agent impliedly took the position that she was the sole acting agent in the transaction and therefore entitled to the full commission fee. Broker, in turn, denied Agent's allegation that she was entitled to the full commission fee because "more than one agent was involved in producing a result on behalf" of Broker. Therefore, whether the other individual involved in the transaction qualified as an "agent" was a disputed issue of material fact in the case. It

was incumbent on Broker, as the moving party, to produce summary judgment evidence demonstrating that two or more "agents" in fact participated in the transaction. As Broker failed to do so, the trial court erred in entering summary final judgment as a genuine issue of material fact remained.

Reversed and remanded.

GERBER and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.