Real Property and Business Litigation Report

Volume XI, Issue 8
February 28, 2018
Manuel Farach

Digital Realty Trust, Inc. v. Somers, Case No. 16–1276 (2018).
Individuals who fail to report alleged securities violation to the Securities and Exchange Commission do not fall within the Dodd-Frank Act's definition of "whistleblower" and thus are not protected by the Act's anti-retaliation provisions.

Asset Management Holdings, LLC v. Assets Recovery Center Consolidated Investments, LLC, Case Nos. 2D16-341 and 2D16-3599 (Fla. 2d DCA 2018).
A trial court errs by failing to allow a "setoff" in favor of a party that has breached a contract as such improperly inflates the claimant's damages.

Liork, LLC v. BH 150 Second Avenue, LLC, Case No. 3D16-1881 (Fla. 3d DCA 2018).
Subscription agreements are not subject to lack of mutuality attacks because they are different from ordinary bilateral contracts where one party promises to perform a specific action directly in exchange for the other party performing another specific action. Moreover, the fact that real estate values fluctuate generally supports liquidated damages provisions.

Coconut Grove Acquisition, LLC v. S&C Venture, Case No. 3D17-434 (Fla. 3d DCA 2018).
Failure to make payments to a new servicer, even after the old servicer sent a "goodbye letter" advising the loan had been sold, is not an act of default when the new servicer fails to timely advise mortgagor where to send payments.

Mack v. Repole, Case No. 4D16-3595 (Fla. 4th DCA 2018).
An order enforcing a settlement agreement is final and must be appealed where there is “nothing whatever left for the court to do in the pending action, other than to enforce what the order required of the parties"; a subsequent formal order of dismissal is not necessary to terminate the action.

Clayton v. Poggendorf, Case No. 4D17-488 (Fla. 4th DCA 2018).
An attorney may have apparent authority to receive notices of default under a settlement agreement such to bind his principal.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

February 23, 2018

ASSET MANAGEMENT HOLDINGS, LLC, a/k/a AMH USA, LLC; and THIERRY CASSAGNOL, Appellants, v. ASSETS RECOVERY CENTER INVESTMENTS, LLC; 19-ASSET MANAGEMENT HOLDINGS, LLC; MIA FUNDING, LLC; 17-ASSET MANAGEMENT HOLDING, LLC; 16-ASSET MANAGEMENT HOLDINGS, LLC; 14-TP FUNDING, LLC; 12 ASSET MANAGEMENT HOLDINGS, LLC; 11 ASSET MANAGEMENT HOLDINGS, LLC; 10-ASSET MANAGEMENT HOLDINGS, LLC; 9-COMP LOAN, LLC; 6-MISPROPERTIES, LLC; 5-HOMECOM.LOANS, LLC; 4-TRADERS TRUST, LLC; 21 ASSET MANAGEMENT HOLDINGS, LLC; 3-STUDENT LOAN, LLC; 2 BANKING ONE FUNDING, LLC; 1, M, LLC, 1 M, INC.; JOHN OLSEN; and DANIEL COOSEMANS, Appellees.	)	Case Nos. 2D16-341 2D16-3599 <u>CONSOLIDATED</u>

BY ORDER OF THE COURT:

The plaintiff entities' October 31, 2017, motion for rehearing is denied.

The plaintiff entities' October 31, 2017, motion for clarification is granted to the extent

that the prior opinion dated October 18, 2017, is withdrawn and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ASSET MANAGEMENT HOLDINGS, LLC, a/k/a AMH USA, LLC; and THIERRY CASSAGNOL, Appellants, v. ASSETS RECOVERY CENTER INVESTMENTS, LLC; 19-ASSET MANAGEMENT HOLDINGS, LLC; MIA FUNDING, LLC; 17-ASSET MANAGEMENT HOLDING, LLC; 16-ASSET MANAGEMENT HOLDINGS, LLC; 14-TP FUNDING, LLC; 12 ASSET MANAGEMENT HOLDINGS, LLC; 11 ASSET MANAGEMENT HOLDINGS, LLC; 10-ASSET MANAGEMENT HOLDINGS, LLC; 9-COMP LOAN, LLC; 6-MISPROPERTIES, LLC; 5-HOMECOM.LOANS, LLC; 4-TRADERS TRUST, LLC; 21 ASSET MANAGEMENT HOLDINGS, LLC; 3-STUDENT LOAN, LLC; 2 BANKING ONE FUNDING, LLC; 1, M, LLC, 1 M, INC.; JOHN OLSEN; and DANIEL COOSEMANS, Appellees.	)	Case Nos. 2D16-341 2D16-3599 CONSOLIDATED

Opinion filed February 23, 2018.

Appeals from the Circuit Court for Sarasota County; Stephen L. Dakan, Associate Senior Judge.

John S. Jaffer, Sarasota, and Steele T. Williams of Steele T. Williams, P.A., Sarasota, for Appellants.

Mark A. Levy of Brinkley Morgan, Ft. Lauderdale, for Appellees.

ROTHSTEIN-YOUAKIM, Judge.

Defendants/Counterplaintiffs below, Asset Management Holdings, LLC, a/k/a AMH USA, LLC, and Thierry Cassagnol (collectively, AMH), appeal an amended final judgment awarding damages to Plaintiffs/Counterdefendants below, Assets Recovery Center Investments, LLC, and various other entities (the plaintiff entities), on the plaintiff entities' breach-of-contract claim and dismissing with prejudice all of the plaintiff entities' alternative claims for damages and AMH's counterclaims. We agree with AMH's argument that the trial court erred in denying its motion for an involuntary dismissal because the plaintiff entities failed to prove damages.[1] Accordingly, we reverse the amended final judgment to the extent that it awarded damages to the plaintiff entities, affirm the amended final judgment to the extent that it disposed of the plaintiff entities' alternative claims for damages and AMH's counterclaims, and remand for entry of an involuntary dismissal of the plaintiff entities' breach-of-contract claim.[2]

Background

In 2003, the parties orally agreed that AMH would locate distressed mortgages that holders were typically willing to sell for less than face value, the plaintiff entities would provide the capital to finance the purchase of the distressed mortgages, and AMH would service the loans on behalf of the plaintiff entities. Specifically, they

---

[1]We reject AMH's other arguments without further comment.

[2]In doing so, we do not disturb the trial court's finding that the plaintiff entities own the disputed loans.

agreed that any money that AMH collected when servicing these loans would be applied as follows: first, AMH would reimburse itself for certain hard costs incurred while servicing and collecting the loans; second, the plaintiff entities would be reimbursed for the capital expended to acquire the loans; and third, once the plaintiff entities had been fully reimbursed as to a particular group of loans, the parties would split the remaining proceeds from that group evenly. With the foreclosure crisis looming, however, AMH became indebted to the plaintiff entities, and the parties' business relationship went awry. Consequently, in November 2008, the parties orally agreed that AMH would stop servicing the loans and would transfer all active loan files to the plaintiff entities and that the plaintiff entities would not seek to recover any money that AMH owed them (the walkaway agreement). About six months after AMH transferred the files to the plaintiff entities, however, AMH claimed that it had accidentally included in the transfer approximately 170 loans that were not originally part of the walkaway agreement, and it resumed servicing and collecting payments on these 170 loans (the disputed loans).

The plaintiff entities sued AMH for breach of the walkaway agreement.[3] The trial court bifurcated proceedings by holding a bench trial on all of the parties' substantive claims and counterclaims followed by a separate bench trial on damages. At the conclusion of the first bench trial, the court rejected AMH's assertions that the walkaway agreement was unenforceable and that it owned the disputed loans; found that the plaintiff entities owned the disputed loans and that, pursuant to the walkaway agreement, AMH owed the plaintiff entities any monies that it had collected on the

[3]The plaintiff entities also raised alternative theories of recovery and ancillary claims not relevant to the issues we address on appeal.

disputed loans and was liable for any damages; reserved jurisdiction to determine the amount of damages, if any, due to the plaintiff entities; and dismissed with prejudice the plaintiff entities' remaining claims and AMH's counterclaims.

Before the damages trial, the plaintiff entities filed a written "memorandum regarding damage calculation" in which they requested damages in the amount of all monies that AMH had collected on the disputed loans after the parties had entered into the walkaway agreement. AMH responded, in pertinent part, that an award of damages in the amount of AMH's gross collections would fail to account for the costs that AMH had incurred in collecting and servicing the disputed loans and, as a remedy for breach of contract, would improperly put the plaintiff entities in a better position than they would have been if the walkaway agreement had not been breached.

At the damages hearing, the plaintiff entities relied on their memorandum and asserted that any costs that AMH had incurred in collecting and servicing loans covered by the walkaway agreement had been incurred through AMH's own wrongdoing. AMH responded that under a "breach of contract damage analysis, . . . the Plaintiff entities should not be put into a position better than they would have been, but for the breach" and asserted that the costs that AMH had incurred should be considered as "various setoffs to the overall gross number." AMH offered to establish an appropriate setoff by having Cassagnol testify, in pertinent part, to AMH's costs in servicing the disputed loans, and it noted that, in discovery, the plaintiff entities had acknowledged that fifty dollars per loan per month was a reasonable servicing fee. The plaintiff entities responded by reiterating that AMH should not be entitled to a setoff based on its wrongdoing.

The trial court agreed that AMH was not entitled to a setoff. The court noted that the first trial had addressed whether the walkaway agreement was valid and could be enforced, and it clarified its prior ruling that AMH had breached the walkaway agreement and that the disputed loans belonged to the plaintiff entities. Nonetheless, to preserve the issue for appeal, the court directed AMH to submit a written proffer of the setoff.

In addition to submitting this written proffer of their servicing costs, AMH moved for an involuntary dismissal. AMH reiterated its argument that awarding gross collections as damages would improperly put the plaintiff entities in a better position than they would have been had AMH not breached the walkaway agreement. AMH asserted that because the plaintiff entities had not introduced any evidence of the costs that they necessarily would have incurred in servicing the disputed loans, they had failed to satisfy their burden of proving damages under a lost-profits theory. The plaintiff entities responded that lost profits was not the correct measure of damages and that AMH could properly be denied a setoff based on its wrongful conduct. The plaintiff entities continued to rely solely on their original memorandum; they neither proffered nor requested an opportunity to proffer what costs they would have incurred in servicing the disputed loans absent the breach.

The trial court denied AMH's motion without explanation and, on the same day, entered an amended final judgment. The amended final judgment included the same findings and rulings as the original final judgment, including its finding that the plaintiff entities are the owners of the disputed loans, and awarded the plaintiff entities

all monies that AMH collected on the disputed loans after November 2008. AMH timely appealed.

Analysis

Whether the trial court applied the correct measure of damages on a breach-of-contract claim is a question of law that this court reviews de novo. Del Monte Fresh Produce Co. v. Net Results, Inc., 77 So. 3d 667, 673 (Fla. 3d DCA 2011). If the trial court employed the correct measure of damages, we review the damages award for support by competent, substantial evidence. Id.

On appeal, AMH argues that the trial court erred in denying its motion for an involuntary dismissal because the plaintiff entities did not present sufficient evidence of damages under the correct measure. AMH contends that, to recover on their breach-of-contract claim, the plaintiff entities had to prove lost profits, which required evidence not only of AMH's gross collections but also of the costs the plaintiff entities necessarily would have incurred in servicing and collecting payments on the disputed loans if AMH had not done so in the breach. We agree.

At the damages part of the trial, the trial court stated that it had previously found that the plaintiff entities owned the disputed loans, contrary to AMH's claim to ownership; that the walkaway agreement was enforceable; and that AMH had breached it. Therefore, contrary to the plaintiff entities' suggestion, the court was apparently proceeding solely on the plaintiff entities' breach-of-contract claim; the court did not indicate that it had made or was relying on any other findings that implicated the plaintiff entities' other causes of action. See Rollins, Inc. v. Butland, 951 So. 2d 860, 876 (Fla. 2d DCA 2006) ("The elements of an action for breach of contract are: (1) the existence

of a contract, (2) a breach of the contract, and (3) damages resulting from the breach."). And, therefore, the plaintiff entities had to prove the third element of a breach-of-contract claim: damages resulting from the breach. See Siever v. BWGaskets, Inc., 669 F. Supp. 2d 1286, 1300 (M.D. Fla. 2009) ("Under Florida law, damages are an essential element of an action for breach of contract." (citing Butland, 951 So. 2d at 876)).

The trial court's conclusion that AMH's wrongful conduct precluded a "setoff" misapprehends the purpose of a damages award on a breach-of-contract claim, which "is to restore an injured party to the same position that he would have been in had the other party not breached the contract." Verandah Dev., LLC v. Gualtieri, 201 So. 3d 654, 659 (Fla. 2d DCA 2016) (quoting Lindon v. Dalton Hotel Corp., 49 So. 3d 299, 305 (Fla. 5th DCA 2010)). In so concluding, the court incorrectly focused on punishing AMH for its breach rather than on putting the plaintiff entities in the same position that they would have been but for the breach. See id. As a result, the court incorrectly put the plaintiff entities in a better position than they would have been, see id. ("In restoring the injured party to the 'same position,' he 'is not entitled to be placed, because of that breach, in a position better than that which he would have occupied had the contract been performed.' " (quoting Lindon, 49 So. 3d at 305)), because if AMH had not resumed servicing and collecting the disputed loans, the plaintiff entities would have incurred costs by doing it themselves or by outsourcing it to a third party.

The burden of proving damages rested solely with the plaintiff entities. See Montage Grp., Ltd. v. Athle-Tech Comput. Sys., Inc., 889 So. 2d 180, 195 (Fla. 2d DCA 2004) ("The plaintiff bears the burden of proving an entitlement to lost profits.");

James Crystal Licenses, LLC v. Infinity Radio Inc., 43 So. 3d 68, 75, 80 (Fla. 4th DCA 2010) (reversing lost profits award and remanding for entry of defense judgment because plaintiff introduced evidence of only some fees it would have incurred but failed to deduct general overhead expenses); Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc., 619 So. 2d 6, 8 (Fla. 5th DCA 1993) (holding that plaintiff failed to carry burden of proving costs and expenses that it had to deduct from income when calculating lost profits); Physicians Reference Lab., Inc. v. Daniel Seckinger, M.D. & Assocs., P.A., 501 So. 2d 107, 109 n.1 (Fla. 3d DCA 1987) (rejecting nonbreaching party's argument that breaching party's failure to present evidence warranted affirmance of damages award because nonbreaching party bore burden of proving lost profits). Because they introduced no evidence of the costs they would have incurred in servicing and collecting the disputed loans, they failed to carry that burden, and the trial court should have granted AMH's motion for an involuntary dismissal. See Fla. R. Civ. P. 1.420(b); Allard v. Al-Nayem Int'l, Inc., 59 So. 3d 198, 201 (Fla. 2d DCA 2011) ("Involuntary dismissal is proper where there is inadequate proof at trial on the correct measure of damages."); St. Petersburg Hous. Auth. v. J.R. Dev., 706 So. 2d 1377, 1377 (Fla. 2d DCA 1998) (reversing order granting rehearing, entered after court had originally found that plaintiff failed to introduce sufficient damages of expenses to support lost profits, because "[t]his procedure improperly allows appellee a 'second bite at the apple' at proving damages, an element of proof that should have been proven at trial"); Teca, Inc. v. WM-TAB, Inc., 726 So. 2d 828, 830 (Fla. 4th DCA 1999) (reversing damage award, remanding for entry of defense judgment because plaintiff failed to prove expenses in support of claim of lost profits, and rejecting approach that would

have "allow[ed] a second bite at the apple when there has been no proof at trial concerning the correct measure of damages").

Conclusion

The plaintiff entities failed to introduce evidence essential to their burden of proving lost profits on their breach-of-contract claim. In light of this failure, the trial court erred in denying AMH's motion for an involuntary dismissal. Accordingly, we reverse the amended final judgment only to the extent that it awarded damages to the plaintiff entities on their breach-of-contract claim; affirm the amended final judgment to the extent that it disposed of the plaintiff entities' alternative claims for damages and AMH's counterclaims; and remand for entry of an involuntary dismissal of the plaintiff entities' breach-of-contract claim.

Affirmed in part; reversed in part; remanded with directions.

LaROSE, C.J., and SLEET,[4] J., Concur.

---

[4]Judge Sleet has been substituted for Judge Wallace, who was on the original Asset Management Holdings panel.

Third District Court of Appeal

State of Florida

Opinion filed February 21, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-434
Lower Tribunal No. 12-31154

Coconut Grove Acquisition, LLC, etc.,
Appellant,

vs.

S&C Venture, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Samantha Ruiz-Cohen, Judge.

Akerman LLP, and Kristen M. Fiore (Tallahassee), Michael O. Mena, and Alexandra M. Mora, for appellant.

Legon Fodiman, P.A., and Todd R. Legon and William F. Rhodes, for appellees.

Before ROTHENBERG, C.J., and EMAS and LUCK, JJ.

ROTHENBERG, C.J.

Coconut Grove Acquisition, LLC ("CGA") appeals from a final judgment entered in favor of S&C Venture, etc., ("S&C"), among others, who were the defendants below in this breach of promissory note and foreclosure action. Because we find that the law and the record fully support the trial court's rulings, we affirm.

BACKGROUND

S&C owns commercial property in Miami-Dade County. In September 2007, S&C executed a balloon payment promissory note ("the Note") for more than $7.9 million, secured by a mortgage on its commercial property, to Mercantil CommerceBank, N.A., f/k/a CommerceBank, N.A. ("Mercantil"). The loan provided for a maturity date of August 20, 2012, and included an option of extending the maturity date by five years, until August 20, 2017, if certain requirements were met. S&C maintained an operating account at Mercantil, from which Mercantil withdrew S&C's monthly mortgage payments.

In 2010, after S&C defaulted on the Note, Mercantil and S&C entered into a forbearance agreement, which reaffirmed the original obligations in the loan documents except as specifically modified in the forbearance agreement. Mercantil agreed to forbear on any legal action until the maturity date of the loan so long as, among other things, S&C did not default again. It is undisputed that S&C never missed a payment to Mercantil under the forbearance agreement.

The confusion that spawned this litigation commenced in November 2011, when Mercantil sold the loan to Stabilis Fund II, LLC ("Stabilis"). Although it no longer held the Note and was no longer in privity with S&C, Mercantil sent S&C a letter ("goodbye letter") on November 14, 2011, via overnight mail, informing S&C that Mercantil had sold the mortgage to Stabilis and directing S&C to submit its payments to Stabilis at the address provided in the letter. This letter also informed S&C that the monthly payments would no longer be deducted from the Mercantil operating account and provided a phone number to call if S&C had any questions. Despite these instructions, S&C continued to deposit sufficient funds to cover its monthly payment obligations into the operating account at Mercantil rather than sending the payments directly to Stabilis.

It was not until December 2011 that S&C received a letter ("hello letter") from Stabilis's loan servicer, which provided specific payment instructions. The hello letter informed S&C that it would receive a billing statement two weeks prior to a payment due date. However, rather than receiving the promised billing statement, S&C received a default notice from Stabilis on January 11, 2012, informing S&C that the entire loan balance was immediately due and owing because of existing defaults. In the ensuing months, while the parties attempted to resolve their disputes, S&C sent Stabilis all monthly payment due under the terms

of the loan documents, and Stabilis accepted each payment, with the qualification that it was not waiving any preexisting default.

On July 19, 2012, S&C attempted to exercise its right to extend the maturity date of the loan from August 20, 2012 to August 20, 2017, pursuant to the terms of the loan documents and the forbearance agreement. To that end, S&C tendered the required extension fee to Stabilis. Stabilis rejected the tender and informed S&C on August 24, 2012, that the maturity date would not be extended because S&C's loan was in default.

Thereafter, Stabilis filed a two-count complaint against S&C for breaching the Note and for foreclosure on the collateral property. Stabilis argued, among other things, that S&C failed to make its monthly payments in November and December 2011. S&C responded that Stabilis and its agents were responsible for any delay in payments because they caused the confusion that resulted in the delay. S&C also counterclaimed, seeking a declaratory judgment finding that it had properly extended the maturity date of the loan. In December 2014, Stabilis assigned the loan to CGA.

After a non-jury trial in November 2016, the trial court entered a detailed forty-six-page final judgment in favor of S&C, concluding that: (1) CGA failed to prove that S&C breached the note; (2) CGA failed to prove that it is entitled to foreclosure, and it would be inequitable, unjust, and unconscionable to foreclose;

and (3) S&C is entitled to declaratory judgments finding that S&C is not in default, the January 2012 notice of default is invalid, S&C's rights under the loan documents remain valid and enforceable, and S&C properly exercised its option to extend the loan's maturity date to August 20, 2017. Thereafter, the trial court denied CGA's motion for rehearing, and this appeal followed.

ANALYSIS

We review the trial court's construction and interpretation of notes and mortgages de novo; however, we review the trial court's findings of facts to determine if they are supported by competent substantial evidence. Smith v. Reverse Mortg. Sols., Inc., 200 So. 3d 221, 224 (Fla. 3d DCA 2016).

CGA contends on appeal that S&C defaulted because it failed to make its required monthly payments in November and December 2011 despite receiving the goodbye letter from Mercantil before either payment was due, a letter which specifically instructed S&C to pay Stabilis at an address contained therein. We, however, find that based on the place of payment clause contained in the Note, S&C was not required to follow the instructions contained in Mercantil's goodbye letter, and because S&C continued to deposit sufficient funds to cover its payment obligations into its account with Mercantil, S&C was not in default of either the Note or the forbearance agreement.

The following findings by the trial court are supported by competent substantial evidence: (1) in November and December 2011, S&C continued to make payments into the operating account held at Mercantil; (2) sufficient funds existed in the operating account to cover all loan payment obligations that came due during that time; and (3) S&C did not receive the hello letter from Stabilis's loan servicer, which was the first letter from Stabilis to include payment instructions, until after the November and December 2011 payments were due.

The place of payment clause in the Note, which the forbearance agreement does not modify, provides: "This Note is payable **at the place designated hereinabove** or at such other place as the **payee or holder hereof may hereafter designate in writing**." (emphasis added). The plain meaning of this provision is controlling. Bradley v. Sanchez, 943 So. 2d 218, 221 (Fla. 3d DCA 2006) ("Where there is no facial ambiguity in the portion of the subject contract, the provision must be afforded its plain meaning.") (internal quotation and citation omitted). The Note designated that S&C deposit sufficient funds into the operating account S&C opened at Mercantil for that purpose. It is undisputed that since the execution of the forbearance agreement, S&C complied with its contractual obligations by depositing sufficient funds into the operating account at Mercantil, which was the place "designated hereinabove," until another place was designated by "the payee or holder" of the Note.

Although Mercantil attempted to change the place of payment when it sent its goodbye letter to S&C after it sold the loan to Stabilis, Mercantil was no longer the payee or holder of the Note, and it therefore had no authority to change the place of payment. It is neither the fault of S&C nor Mercantil that S&C did not receive new payment instructions from Stabilis, the then-current payee and/or holder of the Note, until after the November and December 2011 payments became due. In fact, if S&C had sent its monthly payments to the address contained in the "goodbye letter," these payments would have been in conflict with the binding place of payment term in the Note. Accordingly, S&C's decision to continue depositing sufficient funds into the operating account to cover its monthly payment obligations was in compliance with its contractual duties.[1]

Lastly, we conclude that the trial court did not err by declaring that S&C properly extended the maturity date of the loan to August 20, 2017. On appeal, CGA contends that one of the conditions precedent for extending the maturity date of the loan was not met. Specifically, CGA contends that the forbearance agreement's required debt service coverage ratio ("DSCR"), which is a measure of

---

[1] The trial court's order included several findings related to the discretion the trial court has to deny foreclosure on equitable grounds. See Amerifirst Fed. Sav. & Loan Ass'n of Miami v. Century 21 Commodore Plaza, Inc., 416 So. 2d 45, 46 (Fla. 3d DCA 1982) ("It is axiomatic that a court of equity may refuse to foreclose a mortgage when an acceleration of the due date makes acceleration unconscionable and foreclosure inequitable and unjust."). However, we decline to address such issues because we find that there is no breach from which foreclosure could follow.

the ability of net income to service a debt, was not met as of the initial maturity date, August 20, 2012. The parties contested the measure of the DSCR vigorously below, and the trial court found that the required DSCR of 1.3:1 was satisfied after hearing detailed testimony from the parties' expert witnesses and evaluating the witnesses' credibility. The trial court's finding is supported by competent substantial evidence, and thus, we will not second guess the trial court on appeal. Bare Necessities, Inc. v. Estrada, 902 So. 2d 184, 185 (Fla. 3d DCA 2005) (noting that "when competent, substantial evidence supports a trial court's ruling, the appellate court will not 'second-guess the trial court'") (citing Bryan v. Butterworth, 692 So. 2d 878, 881 (Fla. 1997)).

CONCLUSION

Because there is competent substantial evidence in the record that supports the trial court's finding that S&C did not fail to make its monthly payments in November and December 2011, we find no error in the trial court's comprehensive order concluding that S&C did not breach the terms of the forbearance agreement or other loan documents, CGA failed to prove that it is entitled to foreclose on S&C's commercial property, and S&C properly extended the maturity date of the loan. We also find the remainder of CGA's arguments to be without merit, and thus, we decline to address them further. Accordingly, we affirm in all respects.

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

DIGITAL REALTY TRUST, INC. *v.* SOMERS

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

No. 16–1276. Argued November 28, 2017—Decided February 21, 2018

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Sarbanes-Oxley applies to all "employees" who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U. S. C. §1514A(a)(1). Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U. S. C. §78u–6(a)(6). A whistleblower so defined is eligible for an award if original information provided to the SEC leads to a successful enforcement action. §78u–6(b)–(g). And he or she is protected from retaliation in three situations, see §78u–6(h)(1)(A)(i)–(iii), including for "making disclosures that are required or protected under" Sarbanes-Oxley or other specified laws, §78u–6(h)(1)(A)(iii). Sarbanes-Oxley's anti-retaliation provision contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. §1514A(b)(1)(A), (2)(D), whereas Dodd-Frank permits a whistleblower to sue an employer directly in federal district court, with a default six-year limitation period, see §78u–6(h)(1)(B)(i), (iii)(I)(aa).

The SEC's regulations implementing the Dodd-Frank provision contain two discrete whistleblower definitions. For purposes of the award program, Rule 21F–2 requires a whistleblower to "provide the Commission with information" relating to possible securities-law violations. 17 CFR §240.21F–2(a)(1). For purposes of the anti-retaliation protections, however, the Rule does not require SEC re-

porting. See §240.21F–2(b)(1)(i)–(ii).

Respondent Paul Somers alleges that petitioner Digital Realty Trust, Inc. (Digital Realty) terminated his employment shortly after he reported to senior management suspected securities-law violations by the company. Somers filed suit, alleging, *inter alia*, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim on the ground that Somers was not a whistleblower under §78u–6(h) because he did not alert the SEC prior to his termination. The District Court denied the motion, and the Ninth Circuit affirmed. The Court of Appeals concluded that §78u–6(h) does not necessitate recourse to the SEC prior to gaining "whistleblower" status, and it accorded deference to the SEC's regulation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held: Dodd-Frank's anti-retaliation provision does not extend to an individual, like Somers, who has not reported a violation of the securities laws to the SEC. Pp. 9–19.

(a) A statute's explicit definition must be followed, even if it varies from a term's ordinary meaning. *Burgess* v. *United States*, 553 U. S. 124, 130. Section 78u–6(a) instructs that the statute's definition of "whistleblower" "shall apply" "[i]n this section," that is, throughout §78u–6. The Court must therefore interpret the term "whistleblower" in §78u–6(h), the anti-retaliation provision, in accordance with that definition.

The whistleblower definition operates in conjunction with the three clauses of §78u–6(h)(1)(A) to spell out the provision's scope. The definition first describes *who* is eligible for protection—namely, a "whistleblower" who provides pertinent information "to the Commission." §78u–6(a)(6). The three clauses then describe what *conduct*, when engaged in by a "whistleblower," is shielded from employment discrimination. An individual who meets both measures may invoke Dodd-Frank's protections. But an individual who falls outside the protected category of "whistleblowers" is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages. This reading is reinforced by another whistleblower-protection provision in Dodd-Frank, see 12 U. S. C. §5567(b), which imposes no requirement that information be conveyed to a government agency. Pp. 9–11.

(b) The Court's understanding is corroborated by Dodd-Frank's purpose and design. The core objective of Dodd-Frank's whistleblower program is to aid the Commission's enforcement efforts by "motivat[ing] people who know of securities law violations to *tell the SEC*." S. Rep. No. 111–176, p. 38 (emphasis added). To that end, Congress provided monetary awards to whistleblowers who furnish actionable

information to the Commission. Congress also complemented the financial incentives for SEC reporting by heightening protection against retaliation. Pp. 11–12.

(c) Somers and the Solicitor General contend that Dodd-Frank's "whistleblower" definition applies only to the statute's award program and not, as the definition plainly states, to its anti-retaliation provision. Their concerns do not support a departure from the statutory text. Pp. 12–18.

(1) They claim that the Court's reading would vitiate the protections of clause (iii) for whistleblowers who make disclosures to persons and entities other than the SEC. See §78u–6(h)(1)(A)(iii). But the plain-text reading of the statute leaves the third clause with substantial meaning by protecting a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. Pp. 13–15.

(2) Nor would the Court's reading jettison protections for auditors, attorneys, and other employees who are required to report information within the company before making external disclosures. Such employees would be shielded *as soon as they also provide relevant information to the Commission*. And Congress may well have considered adequate the safeguards already afforded to such employees by Sarbanes-Oxley. Pp. 15–16.

(3) Applying the "whistleblower" definition as written, Somers and the Solicitor General further protest, will allow "identical misconduct" to "go punished or not based on the happenstance of a separate report" to the SEC. Brief for Respondent 37–38. But it is understandable that the statute's retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve by reporting information about unlawful activity to the SEC. P. 16.

(4) The Solicitor General observes that the statute contains no apparent requirement of a "temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." Brief for United States as *Amicus Curiae* 25. The Court need not dwell on related hypotheticals, which veer far from the case at hand. Pp. 16–18.

(5) Finally, the interpretation adopted here would not undermine clause (ii) of §78u–6(h)(1)(A), which prohibits retaliation against a whistleblower for "initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information conveyed to the SEC by a whistleblower in accordance with the statute. The statute delegates authority to the Commission to establish the "manner" in which a whistleblower may provide information to the SEC. §78u–6(a)(6). Nothing prevents the Commission from enumer-

ating additional means of SEC reporting, including through testimony protected by clause (ii). P. 18.

(d) Because "Congress has directly spoken to the precise question at issue," *Chevron,* 467 U. S., at 842, deference is not accorded to the contrary view advanced by the SEC in Rule 21F–2. Pp. 18–19.

850 F. 3d 1045, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, in which BREYER, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which ALITO and GORSUCH, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–1276

DIGITAL REALTY TRUST, INC., PETITIONER *v.* PAUL SOMERS

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

[February 21, 2018]

JUSTICE GINSBURG delivered the opinion of the Court.

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002, 116 Stat. 745 (Sarbanes-Oxley), and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Most notably, Sarbanes-Oxley applies to all "employees" who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U. S. C. §1514A(a)(1). Dodd-Frank delineates a more circumscribed class; it defines "whistleblower" to mean a person who provides "information relating to a violation of the securities laws to the Commission." 15 U. S. C. §78u–6(a)(6). A whistleblower so defined is eligible for an award if original information he or she provides to the SEC leads to a successful enforcement action. §78u–6(b)–(g). And, most relevant here, a whistleblower is protected from retaliation for, *inter alia*, "making disclosures that are required or protected under" Sarbanes-Oxley, the Securi-

ties Exchange Act of 1934, the criminal anti-retaliation proscription at 18 U. S. C. §1513(e), or any other law subject to the SEC's jurisdiction. 15 U. S. C. §78u–6(h)(1)(A)(iii).

The question presented: Does the anti-retaliation provision of Dodd-Frank extend to an individual who has not reported a violation of the securities laws to the SEC and therefore falls outside the Act's definition of "whistleblower"? Pet. for Cert. (I). We answer that question "No": To sue under Dodd-Frank's anti-retaliation provision, a person must first "provid[e] . . . information relating to a violation of the securities laws to the Commission." §78u–6(a)(6).

I

A

"To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation," Congress enacted Sarbanes-Oxley in 2002. *Lawson* v. *FMR LLC*, 571 U. S. 429, ___ (2014) (slip op., at 1). Most pertinent here, Sarbanes-Oxley created new protections for employees at risk of retaliation for reporting corporate misconduct. See 18 U. S. C. §1514A. Section 1514A prohibits certain companies from discharging or otherwise "discriminat[ing] against an employee in the terms and conditions of employment because" the employee "provid[es] information . . . or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders." §1514A(a)(1). An employee qualifies for protection when he or she provides information or assistance either to a federal regulatory or law enforcement agency, Congress, or any "person with supervisory author-

ity over the employee." §1514A(a)(1)(A)–(C).[1]

To recover under §1514A, an aggrieved employee must exhaust administrative remedies by "filing a complaint with the Secretary of Labor." §1514A(b)(1)(A); see *Lawson*, 571 U. S., at ___–___ (slip op., at 5–6). Congress prescribed a 180-day limitation period for filing such a complaint. §1514A(b)(2)(D). If the agency "does not issue a final decision within 180 days of the filing of [a] complaint, and the [agency's] delay is not due to bad faith on the claimant's part, the claimant may proceed to federal district court for *de novo* review." *Id.*, at ___ (slip op., at 6) (citing §1514A(b)). An employee who prevails in a proceeding under §1514A is "entitled to all relief necessary to make the employee whole," including reinstatement, backpay with interest, and any "special damages sustained as a result of the discrimination," among such damages, litigation costs. §1514A(c).

B

1

At issue in this case is the Dodd-Frank anti-retaliation provision enacted in 2010, eight years after the enactment of Sarbanes-Oxley. Passed in the wake of the 2008 financial crisis, Dodd-Frank aimed to "promote the financial stability of the United States by improving accountability and transparency in the financial system." 124 Stat. 1376.

Dodd-Frank responded to numerous perceived shortcomings in financial regulation. Among them was the SEC's need for additional "power, assistance and money at its disposal" to regulate securities markets. S. Rep. No. 111–176, pp. 36, 37 (2010). To assist the Commission "in

---

[1] Sarbanes-Oxley also prohibits retaliation against an "employee" who "file[s], . . . testif[ies], participate[s] in, or otherwise assist[s] in a proceeding filed or about to be filed . . . relating to an alleged violation of" the same provisions of federal law addressed in 18 U. S. C. §1514A(a)(1). See §1514A(a)(2).

identifying securities law violations," the Act established "a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." *Id.,* at 38. And recognizing that "whistleblowers often face the difficult choice between telling the truth and . . . committing 'career suicide,'" Congress sought to protect whistleblowers from employment discrimination. *Id.,* at 111, 112.

Dodd-Frank implemented these goals by adding a new provision to the Securities Exchange Act of 1934: 15 U. S. C. §78u–6. Section 78u–6 begins by defining a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." §78u–6(a)(6) (emphasis added). That definition, the statute directs, "shall apply" "[i]n this section"—*i.e.,* throughout §78u–6. §78u–6(a).

Section 78u–6 affords covered whistleblowers both incentives and protection. First, the section creates an award program for "whistleblowers who voluntarily provid[e] original information to the Commission that le[ads] to the successful enforcement of [a] covered judicial or administrative action." §78u–6(b)(1). A qualifying whistleblower is entitled to a cash award of 10 to 30 percent of the monetary sanctions collected in the enforcement action. See §78u–6(b)(1)(A)–(B).

Second, §78u–6(h) prohibits an employer from discharging, harassing, or otherwise discriminating against a "whistleblower" "because of any lawful act done by the whistleblower" in three situations: first, "in providing information to the Commission in accordance with [§78u–6]," §78u–6(h)(1)(A)(i); second, "in initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information provided to the SEC in accordance with §78u–6, §78u–6(h)(1)(A)(ii); and third, "in making disclosures that are required or protected under"

either Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation prohibition at 18 U. S. C. §1513(e),[2] or "any other law, rule, or regulation subject to the jurisdiction of the Commission," §78u–6(h)(1)(A)(iii). Clause (iii), by cross-referencing Sarbanes-Oxley and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC. For example, the clause shields an employee's reports of wrongdoing to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes-Oxley. See *supra,* at 2–3.[3]

The recovery procedures under the anti-retaliation provisions of Dodd-Frank and Sarbanes-Oxley differ in critical respects. First, unlike Sarbanes-Oxley, which contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. §1514A(b)(1)(A), (2)(D), Dodd-Frank permits a whistleblower to sue a current or former employer directly

---

[2] Section 1513(e) provides: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both."

[3] Section 78u–6(h)(1)(A) reads in full:

"No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with this section;

"(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

"(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U. S. C. §7201 et seq.), this chapter, including section 78j–l(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."

in federal district court, with a default limitation period of six years, see §78u–6(h)(1)(B)(i), (iii)(I)(aa). Second, Dodd-Frank instructs a court to award to a prevailing plaintiff double backpay with interest, see §78u–6(h)(1)(C)(ii), while Sarbanes-Oxley limits recovery to actual backpay with interest, see 18 U. S. C. §1514A(c)(2)(B). Like Sarbanes-Oxley, however, Dodd-Frank authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. Compare §78u–6(h)(1)(C)(i), (iii), with 18 U. S. C. §1514A(c)(2)(A), (C).[4]

2

Congress authorized the SEC "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [§78u–6] consistent with the purposes of this section." §78u–6(j). Pursuant to this authority, the SEC published a notice of proposed rulemaking to "Implemen[t] the Whistleblower Provisions" of Dodd-Frank. 75 Fed. Reg. 70488 (2010). Proposed Rule 21F–2(a) defined a "whistleblower," for purposes of both the award and anti-retaliation provisions of §78u–6, as one or more individuals who "provide the Commission with information relating to a potential violation of the securities laws." *Id.,* at 70519 (proposed 17 CFR §240.21F–2(a)). The proposed rule, the agency noted, "tracks the statutory definition of a 'whistleblower'" by requiring information reporting to the SEC itself. 75 Fed. Reg. 70489.

In promulgating the final Rule, however, the agency changed course. Rule 21F–2, in finished form, contains two discrete "whistleblower" definitions. See 17 CFR §240.21F–2(a)–(b) (2017). For purposes of the award program, the Rule states that "[y]ou are a whistleblower if

[4] Unlike Dodd-Frank, Sarbanes-Oxley explicitly entitles a prevailing employee to "all relief necessary to make the employee whole," including "compensation for any special damages sustained as a result of the discrimination." 18 U. S. C. §1514A(c)(1), (2)(C).

. . . you *provide the Commission* with information . . . relat[ing] to a possible violation of the Federal securities laws." §240.21F–2(a)(1) (emphasis added). The information must be provided to the SEC through its website or by mailing or faxing a specified form to the SEC Office of the Whistleblower. See *ibid.*; §240.21F–9(a)(1)–(2).

"For purposes of the anti-retaliation protections," however, the Rule states that "[y]ou are a whistleblower if . . . [y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation" and "[y]ou provide that information in a manner described in" clauses (i) through (iii) of §78u–6(h)(1)(A). 17 CFR §240.21F–2(b)(1)(i)–(ii). "The anti-retaliation protections apply," the Rule emphasizes, "whether or not you satisfy the requirements, procedures and conditions to qualify for an award." §240.21F–2(b)(1)(iii). An individual may therefore gain anti-retaliation protection as a "whistleblower" under Rule 21F–2 without providing information to the SEC, so long as he or she provides information in a manner shielded by one of the anti-retaliation provision's three clauses. For example, a report to a company supervisor would qualify if the report garners protection under the Sarbanes-Oxley anti-retaliation provision.[5]

C

Petitioner Digital Realty Trust, Inc. (Digital Realty) is a real estate investment trust that owns, acquires, and develops data centers. See Brief for Petitioner 3. Digital Realty employed respondent Paul Somers as a Vice President from 2010 to 2014. See 119 F. Supp. 3d 1088, 1092 (ND Cal. 2015). Somers alleges that Digital Realty terminated him shortly after he reported to senior management suspected securities-law violations by the company. See

[5] In 2015, the SEC issued an interpretive rule reiterating that anti-retaliation protection is not contingent on a whistleblower's provision of information to the Commission. See 80 Fed. Reg. 47829 (2015).

ibid. Although nothing impeded him from alerting the SEC prior to his termination, he did not do so. See Tr. of Oral Arg. 45. Nor did he file an administrative complaint within 180 days of his termination, rendering him ineligible for relief under Sarbanes-Oxley. See *ibid.*; 18 U. S. C. §1514A(b)(2)(D).

Somers brought suit in the United States District Court for the Northern District of California alleging, *inter alia*, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim, arguing that "Somers does not qualify as a 'whistleblower' under [§78u–6(h)] because he did not report any alleged law violations to the SEC." 119 F. Supp. 3d, at 1094. The District Court denied the motion. Rule 21F–2, the court observed, does not necessitate recourse to the SEC prior to gaining "whistleblower" status under Dodd-Frank. See *id.,* at 1095–1096. Finding the statutory scheme ambiguous, the court accorded deference to the SEC's Rule under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See 119 F. Supp. 3d, at 1096–1106.

On interlocutory appeal, a divided panel of the Court of Appeals for the Ninth Circuit affirmed. 850 F. 3d 1045 (2017). The majority acknowledged that Dodd-Frank's definitional provision describes a "whistleblower" as an individual who provides information to the SEC itself. *Id.,* at 1049. But applying that definition to the anti-retaliation provision, the majority reasoned, would narrow the third clause of §78u–6(h)(1)(A) "to the point of absurdity": The statute would protect employees only if they "reported possible securities violations both internally and to the SEC." *Ibid.* Such dual reporting, the majority believed, was unlikely to occur. *Ibid.* Therefore, the majority concluded, the statute should be read to protect employees who make disclosures privileged by clause (iii) of §78u–6(h)(1)(A), whether or not those employees also provide information to the SEC. *Id.,* at 1050. In any

event, the majority held, the SEC's resolution of any statutory ambiguity warranted deference. *Ibid.* Judge Owens dissented. In his view, the statutory definition of whistleblower was clear, left no room for interpretation, and plainly governed. *Id.,* at 1051.

Two other Courts of Appeals have weighed in on the question before us. The Court of Appeals for the Fifth Circuit has held that employees must provide information to the SEC to avail themselves of Dodd-Frank's anti-retaliation safeguard. See *Asadi* v. *G. E. Energy (USA), L. L. C.*, 720 F. 3d 620, 630 (2013). A divided panel of the Court of Appeals for the Second Circuit reached the opposite conclusion, over a dissent by Judge Jacobs. See *Berman* v. *NEO@OGILVY LLC*, 801 F. 3d 145, 155 (2013). We granted certiorari to resolve this conflict, 582 U. S. ___ (2017), and now reverse the Ninth Circuit's judgment.

II

"When a statute includes an explicit definition, we must follow that definition," even if it varies from a term's ordinary meaning. *Burgess* v. *United States*, 553 U. S. 124, 130 (2008) (internal quotation marks omitted). This principle resolves the question before us.

A

Our charge in this review proceeding is to determine the meaning of "whistleblower" in §78u–6(h), Dodd-Frank's anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A "whistleblower" is "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." §78u–6(a)(6) (emphasis added). Leaving no doubt as to the definition's reach, the statute instructs that the "definitio[n] shall apply" "[i]n this section," that is, throughout §78u–6. §78u–6(a)(6).

The whistleblower definition operates in conjunction

with the three clauses of §78u–6(h)(1)(A) to spell out the provision's scope. The definition first describes *who* is eligible for protection—namely, a whistleblower who provides pertinent information "to the Commission." §78u–6(a)(6). The three clauses of §78u–6(h)(1)(A) then describe what *conduct*, when engaged in by a whistleblower, is shielded from employment discrimination. See §78u–6(h)(1)(A)(i)–(iii). An individual who meets both measures may invoke Dodd-Frank's protections. But an individual who falls outside the protected category of "whistleblowers" is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages.

Reinforcing our reading, another whistleblower-protection provision in Dodd-Frank imposes no requirement that information be conveyed to a government agency. Title 10 of the statute, which created the Consumer Financial Protection Bureau (CFPB), prohibits discrimination against a "covered employee" who, among other things, "provide[s] . . . information to [his or her] employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to" a violation of a law subject to the CFPB's jurisdiction. 12 U. S. C. §5567(a)(1). To qualify as a "covered employee," an individual need not provide information to the CFPB, or any other entity. See §5567(b) ("covered employee" means "any individual performing tasks related to the offering or provision of a consumer financial product or service").

"[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 573 U. S. ___, ___ (2014) (slip op., at 6) (internal quotation marks and alteration omitted). Congress placed a government-reporting requirement in §78u–6(h), but not elsewhere in the same

statute. Courts are not at liberty to dispense with the condition—tell the SEC—Congress imposed.

B

Dodd-Frank's purpose and design corroborate our comprehension of §78u–6(h)'s reporting requirement. The "core objective" of Dodd-Frank's robust whistleblower program, as Somers acknowledges, Tr. of Oral Arg. 45, is "to motivate people who know of securities law violations to *tell the SEC*," S. Rep. No. 111–176, at 38 (emphasis added). By enlisting whistleblowers to "assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws," Congress undertook to improve SEC enforcement and facilitate the Commission's "recover[y] [of] money for victims of financial fraud." *Id.,* at 110. To that end, §78u–6 provides substantial monetary rewards to whistleblowers who furnish actionable information to the SEC. See §78u–6(b).

Financial inducements alone, Congress recognized, may be insufficient to encourage certain employees, fearful of employer retaliation, to come forward with evidence of wrongdoing. Congress therefore complemented the Dodd-Frank monetary incentives for SEC reporting by heightening protection against retaliation. While Sarbanes-Oxley contains an administrative-exhaustion requirement, a 180-day administrative complaint-filing deadline, and a remedial scheme limited to actual damages, Dodd-Frank provides for immediate access to federal court, a generous statute of limitations (at least six years), and the opportunity to recover double backpay. See *supra,* at 5–6. Dodd-Frank's award program and anti-retaliation provision thus work synchronously to motivate individuals with knowledge of illegal activity to "tell the SEC." S. Rep. No. 111–176, at 38.

When enacting Sarbanes-Oxley's whistleblower regime, in comparison, Congress had a more far-reaching objec-

tive: It sought to disturb the "corporate code of silence" that "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Lawson*, 571 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). Accordingly, the Sarbanes-Oxley anti-retaliation provision covers employees who report fraud not only to the SEC, but also to any other federal agency, Congress, or an internal supervisor. See 18 U. S. C. §1514A(a)(1).

C

In sum, Dodd-Frank's text and purpose leave no doubt that the term "whistleblower" in §78u–6(h) carries the meaning set forth in the section's definitional provision. The disposition of this case is therefore evident: Somers did not provide information "to the Commission" before his termination, §78u–6(a)(6), so he did not qualify as a "whistleblower" at the time of the alleged retaliation. He is therefore ineligible to seek relief under §78u–6(h).

III

Somers and the Solicitor General tender a different view of Dodd-Frank's compass. The whistleblower definition, as they see it, applies only to the statute's award program, not to its anti-retaliation provision, and thus not, as the definition plainly states, throughout "this section," §78u–6(a). See Brief for Respondent 30; Brief for United States as *Amicus Curiae* 10–11. For purposes of the anti-retaliation provision alone, they urge us to construe the term "whistleblower" in its "ordinary sense," *i.e.,* without any SEC-reporting requirement. Brief for Respondent 18.

Doing so, Somers and the Solicitor General contend, would align with our precedent, specifically *Lawson* v. *Suwannee Fruit & S. S. Co.*, 336 U. S. 198 (1949), and *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___ (2014). In those decisions, we declined to apply a statutory defini-

tion that ostensibly governed where doing so would have been "incompatible with . . . Congress' regulatory scheme," *id.*, at ___ (slip op., at 18) (internal quotation marks omitted), or would have "destroy[ed] one of the [statute's] major purposes," *Suwannee Fruit*, 336 U. S., at 201.

This case is of a piece, Somers and the Solicitor General maintain. Applying the statutory definition here, they variously charge, would "create obvious incongruities," Brief for United States as *Amicus Curiae* 19 (internal quotation marks omitted), "produce anomalous results," *id.,* at 22, "vitiate much of the [statute's] protection," *id.,* at 20 (internal quotation marks omitted), and, as the Court of Appeals put it, narrow clause (iii) of §78u–6(h)(1)(A) "to the point of absurdity," Brief for Respondent 35 (quoting 850 F. 3d, at 1049). We next address these concerns and explain why they do not lead us to depart from the statutory text.

A

It would gut "much of the protection afforded by" the third clause of §78u–6(h)(1)(a), Somers and the Solicitor General urge most strenuously, to apply the whistleblower definition to the anti-retaliation provision. Brief for United States as *Amicus Curiae* 20 (internal quotation marks omitted); Brief for Respondent 28–29. As earlier noted, see *supra,* at 4–5, clause (iii) prohibits retaliation against a "whistleblower" for "making disclosures" to various persons and entities, including *but not limited to* the SEC, to the extent those disclosures are "required or protected under" various laws other than Dodd-Frank. §78u–6(h)(1)(A)(iii). Applying the statutory definition of whistleblower, however, would limit clause (iii)'s protection to "only those individuals who report to the Commission." Brief for United States as *Amicus Curiae* 22.

The plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alter-

native proffered by Somers and the Solicitor General. But we do not agree that this consequence "vitiate[s]" clause (iii)'s protection, *id.*, at 20 (internal quotation marks omitted), or ranks as "absur[d]," Brief for Respondent 35 (internal quotation marks omitted).[6] In fact, our reading leaves the third clause with "substantial meaning." Brief for Petitioner 32.

With the statutory definition incorporated, clause (iii) protects a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC. In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee "because of" the SEC reporting. §78u–6(h)(1)(A). Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

While the Solicitor General asserts that limiting the protections of clause (iii) to dual reporters would "shrink to insignificance the [clause's] ban on retaliation," Brief for United States as *Amicus Curiae* 22 (internal quotation marks omitted), he offers scant evidence to support that assertion. Tugging in the opposite direction, he reports that approximately 80 percent of the whistleblowers who received awards in 2016 "reported internally before report-

---

[6] The Solicitor General, unlike Somers, acknowledges that it would not be absurd to apply the "whistleblower" definition to the anti-retaliation provision. Tr. of Oral Arg. 52.

ing to the Commission." *Id.,* at 23. And Digital Realty cites real-world examples of dual reporters seeking Dodd-Frank or Sarbanes-Oxley recovery for alleged retaliation. See Brief for Petitioner 33, and n. 4 (collecting cases). Overlooked by Somers and the Solicitor General, in dual-reporting cases, retaliation not prompted by SEC disclosures (and thus unaddressed by clause (i)) is likely commonplace: The SEC is required to protect the identity of whistleblowers, see §78u–6(h)(2)(A), so employers will often be unaware that an employee has reported to the Commission. In any event, even if the number of individuals qualifying for protection under clause (iii) is relatively limited, "[i]t is our function to give the statute the effect its language suggests, however modest that may be." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 270 (2010).

B

Somers and the Solicitor General express concern that our reading would jettison protection for auditors, attorneys, and other employees subject to internal-reporting requirements. See Brief for Respondent 35; Brief for United States as *Amicus Curiae* 21. Sarbanes-Oxley, for example, requires auditors and attorneys to report certain information within the company before making disclosures externally. See 15 U. S. C. §§78j–1(b), 7245; 17 CFR §205.3. If the whistleblower definition applies, Somers and the Solicitor General fear, these professionals will be "le[ft] . . . vulnerable to discharge or other retaliatory action for complying with" their internal-reporting obligations. Brief for United States as *Amicus Curiae* 22 (internal quotation marks omitted).

Our reading shields employees in these circumstances, however, *as soon as they also provide relevant information to the Commission.* True, such employees will remain ineligible for Dodd-Frank's protection until they tell the

SEC, but this result is consistent with Congress' aim to encourage SEC disclosures. See S. Rep. No. 111–176, at 38; *supra,* at 3–4, 11. Somers worries that lawyers and auditors will face retaliation quickly, before they have a chance to report to the SEC. Brief for Respondent 35–36. But he offers nothing to show that Congress had this concern in mind when it enacted §78u–6(h). Indeed, Congress may well have considered adequate the safeguards already afforded by Sarbanes-Oxley, protections specifically designed to shield lawyers, accountants, and similar professionals. See *Lawson*, 571 U. S., at ___ (slip op., at 17).

C

Applying the whistleblower definition as written, Somers and the Solicitor General further protest, will create "an incredibly unusual statutory scheme": "[I]dentical misconduct"—*i.e.,* retaliating against an employee for internal reporting—will "go punished or not based on the happenstance of a separate report" to the SEC, of which the wrongdoer may "not even be aware." Brief for Respondent 37–38. See also Brief for United States as *Amicus Curiae* 24. The upshot, the Solicitor General warns, "would [be] substantially diminish[ed] Dodd-Fran[k] deterrent effect." *Ibid.*

Overlooked in this protest is Dodd-Frank's core objective: to prompt reporting to the SEC. *Supra,* at 3–4, 11. In view of that precise aim, it is understandable that the statute's retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve, *i.e.,* they have placed information about unlawful activity before the Commission to aid its enforcement efforts.

D

Pointing to another purported anomaly attending the

reading we adopt today, the Solicitor General observes that neither the whistleblower definition nor §78u–6(h) contains any requirement of a "temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." Brief for United States as *Amicus Curiae* 25. It is therefore possible, the Solicitor General posits, that "an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under [§78u–6(h)] if he had reported an insider-trading violation by his previous employer to the Commission in 2012." *Ibid.* For its part, Digital Realty agrees that this scenario could arise, but does not see it as a cause for concern: "Congress," it states, "could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures." Reply Brief 11.

We need not dwell on the situation hypothesized by the Solicitor General, for it veers far from the case before us. We note, however, that the interpretation offered by Somers and the Solicitor General—*i.e.,* ignoring the statutory definition when construing the anti-retaliation provision—raises an even thornier question about the law's scope. Their view, which would not require an employee to provide information relating to a securities-law violation to the SEC, could afford Dodd-Frank protection to an employee who reports information bearing no relationship whatever to the securities laws. That prospect could be imagined based on the broad array of federal statutes and regulations cross-referenced by clause (iii) of the anti-retaliation provision. *E.g.,* 18 U. S. C. §1513(e) (criminalizing retaliation for "providing to a law enforcement officer any truthful information relating to the commission . . . of *any Federal offense*" (emphasis added)); see *supra,* at 5, and n. 2. For example, an employee fired for reporting a

coworker's drug dealing to the Federal Bureau of Investigation might be protected. Brief for Petitioner 38. It would make scant sense, however, to rank an FBI drug-trafficking informant a whistleblower under Dodd-Frank, a law concerned only with encouraging the reporting of "*securities* law violations." S. Rep. No. 111–176, at 38 (emphasis added).

E

Finally, the interpretation we adopt, the Solicitor General adds, would undermine not just clause (iii) of §78u–6(h)(1)(A), but clause (ii) as well. Clause (ii) prohibits retaliation against a whistleblower for "initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information conveyed to the SEC by a whistleblower in accordance with the statute. §78u–6(h)(1)(A)(ii). If the whistleblower definition is applied to §78u–6(h), the Solicitor General states, "an employer could fire an employee for giving . . . testimony [to the SEC] if the employee had not previously reported to the Commission online or through the specified written form"—*i.e.,* the methods currently prescribed by Rule 21F–9 for a whistleblower to provide information to the Commission. Brief for United States as *Amicus Curiae* 20–21 (citing 17 CFR §240.21F–9(a)(1)–(2)).

But the statute expressly delegates authority to the SEC to establish the "manner" in which information may be provided to the Commission by a whistleblower. See §78u–6(a)(6). Nothing in today's opinion prevents the agency from enumerating additional means of SEC reporting—including through testimony protected by clause (ii).

IV

For the foregoing reasons, we find the statute's definition of "whistleblower" clear and conclusive. Because "Congress has directly spoken to the precise question at

issue," *Chevron*, 467 U. S., at 842, we do not accord deference to the contrary view advanced by the SEC in Rule 21F–2. See 17 CFR §240.21F–2(b)(1); *supra,* at 6–7. The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term. See *Burgess*, 553 U. S., at 130.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–1276

DIGITAL REALTY TRUST, INC., PETITIONER *v.* PAUL SOMERS

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

[February 21, 2018]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion in full. I write separately only to note my disagreement with the suggestion in my colleague's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute.

Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.

Committee reports, like the Senate Report the Court discusses here, see *ante,* at 3–4, 11–12, 16–18, are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning. See *Garcia* v. *United States*, 469 U. S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'" (quoting *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969))). Bills presented to Congress for consideration are generally accompanied by a committee report. Such re-

ports are typically circulated at least two days before a bill is to be considered on the floor and provide Members of Congress and their staffs with information about "a bill's context, purposes, policy implications, and details," along with information on its supporters and opponents. R. Katzmann, Judging Statutes 20, and n. 62 (2014) (citing A. LaRue, Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, S. Doc. No. 107–1, p. 17 (2001)). These materials "have long been important means of informing the whole chamber about proposed legislation," Katzmann, Judging Statutes, at 19, a point Members themselves have emphasized over the years.* It is thus no surprise that legislative staffers view committee and conference reports as the most reliable type of legislative history. See Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 977 (2013).

Legislative history can be particularly helpful when a

---

*See, *e.g.,* Hearings on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 65–66 (1986) (Sen. Charles E. Grassley) ("[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent"); Mikva, Reading and Writing Statutes, 28 S. Tex. L. Rev. 181, 184 (1986) ("The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute"); Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response? 93 Mich. L. Rev. 1, 28 (1994) (compiling the views of former Members on "the central importance of committee reports to their own understanding of statutory text"). In fact, some Members "are more likely to vote . . . based on a reading of the legislative history than on a reading of the statute itself." Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 968 (2013).

statute is ambiguous or deals with especially complex matters. But even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text. See, *e.g., Tapia* v. *United States*, 564 U. S. 319, 331–332 (2011); *Carr* v. *United States*, 560 U. S. 438, 457–458 (2010). Moreover, confirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government. See Katzmann, Judging Statutes, at 35–36.

For these reasons, I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.

SUPREME COURT OF THE UNITED STATES

No. 16–1276

DIGITAL REALTY TRUST, INC., PETITIONER *v.* PAUL SOMERS

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

[February 21, 2018]

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, concurring in part and concurring in the judgment.

I join the Court's opinion only to the extent it relies on the text of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. The question in this case is whether the term "whistleblower" in Dodd-Frank's antiretaliation provision, 15 U. S. C. §78u–6(h)(1), includes a person who does not report information to the Securities and Exchange Commission. The answer is in the definitions section of the statute, which states that the term "whistleblower" means a person who provides "information relating to a violation of the securities laws to the Commission." §78u–6(a)(6). As the Court observes, this statutory definition "resolves the question before us." *Ante*, at 9. The Court goes on, however, to discuss the supposed "purpose" of the statute, which it primarily derives from a single Senate Report. See *ante*, at 3–4, 11–12, 16–18. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended."* *Lawson* v.

* For what it is worth, I seriously doubt that a committee report is a

---

"particularly reliable source" for discerning "Congress' intended meaning." *Ante*, at 1 (SOTOMAYOR, J., concurring). The following exchange on the Senate floor is telling:

"Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

"Mr. DOLE. Did I write the committee report?

"Mr. ARMSTRONG. Yes.

"Mr. DOLE. No; the Senator from Kansas did not write the committee report.

"Mr. ARMSTRONG. Did any Senator write the committee report?

"Mr. DOLE. I have to check.

"Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

"Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. . . .

"Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

"Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.

"Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

"Mr. DOLE. No.

"Mr. ARMSTRONG. . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate. . . . If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report. . . . [L]et me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute." *Hirschey* v. *FERC*, 777 F. 2d 1, 7–8, n. 1 (CADC 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. 16918–16919 (1982)). See also Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 317–318 (2017) (describing his experience as a Senate staffer who drafted legislative history "like being a teenager at home while your parents are away for the weekend: there was no supervision. I was able to write more or less what I pleased. . . . [M]ost members of Congress . . . have no idea at all about what is in the legislative history for a particular bill").

FMR LLC, 571 U. S. 429, ___ (2014) (Scalia, J., concurring in part and concurring in judgment) (slip op., at 1). And "it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute." *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980). For these reasons, I am unable to join the portions of the Court's opinion that venture beyond the statutory text.

Third District Court of Appeal

State of Florida

Opinion filed February 21, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1881
Lower Tribunal No. 15-9465

Liork, LLC and Keren Ben Shimon,
Appellants,

vs.

BH 150 Second Avenue, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Militzok & Levy, P.A. (Hollywood); Richard J. Lee (Hollywood), for appellants.

Jonathan A. Heller; Jay M. Levy, for appellee.

Before SUAREZ, SCALES and LUCK, JJ.

LUCK, J.

This case is about the enforceability of a subscription agreement between an investor and the company she invested in. The investor sought a declaratory judgment that the subscription agreement she signed was unenforceable because there was a lack of mutuality, and the liquidated damages clause calling for her to surrender her initial payments was an improper penalty provision. The trial court granted the investment company's motion for summary judgment, declaring the agreement was enforceable. We agree, and affirm.

Factual Background and Procedural History

In 2013, BH 150 Second Avenue, LLC, made an offering seeking accredited[1] investors to join in a business venture. The objective of the venture was to purchase a commercial building in downtown Miami and convert it into an office and retail condominium of approximately 100 units. The offering was intended as an alternative to obtaining institutional or bank financing for the project. The offering included a proposed operating agreement for the new business and a subscription agreement to be signed by each investor. Prior to making the offering, BH 150 contracted with the owners of the building it sought to purchase. The purchase price was $17.5 million and BH 150 paid a $1.1 million non-refundable deposit on the contract. The subscription agreement to be signed by the investors recited the existence of the contract and anticipated the transaction would close on

[1] An accredited investor was defined as an individual with a net worth exceeding $1 million, excluding the individual's primary residence.

or about November 1, 2013, although it allowed for an extension of one hundred twenty days if the renovations being performed were not completed in a timely fashion.

On August 9, 2013, Keren Ben Shimon executed a subscription agreement where she agreed to pay $565,000 at execution, $1,130,000 thirty days after execution, and the remaining $3,955,000 thirty days prior to the noticed closing date on the purchase of the building.[2] Upon completion of the project, Ben Shimon would be deeded title to four of the building's condominium units. Ben Shimon made three payments under the agreement totaling $3,295,000.

On December 2, 2013, BH 150 notified Ben Shimon and the other investors that the closing on the purchase of the building was anticipated to occur on January 15, 2014. Ben Shimon was told that in accordance with the terms of her agreement the final payment of $2,469,154.04 needed to be made on or before December 16, 2013. Ben Shimon was unable to make the payment and asked for additional time. Ben Shimon was advised that another investor was willing to advance Ben Shimon the amount required to avoid default, but Ben Shimon did not accept this loan. BH 150 sent a default letter to Ben Shimon on December 19, 2013. Eventually, the developer of the office building chipped in the money needed to make up for the

[2] After she signed the subscription agreement, Ben Shimon assigned her interest in the subscription to her company, Liork, LLC, although she remained responsible for performing under the agreement.

shortfall created by Ben Shimon's default, and BH 150 closed on the purchase of the building on February 28, 2014.

In the wake of the default, Ben Shimon brought this declaratory relief action seeking to: (1) declare the subscription agreement void for lack of mutuality; (2) declare the liquidation damages clause unenforceable as a penalty; and (3) obtain a return of her initial payments BH 150 retained as a result of the default. The parties filed cross-motions for summary judgment, and after a hearing, the trial court denied Ben Shimon's motions and granted BH 150's motions. Ben Shimon appeals from the final summary judgment in favor of BH 150.

Standard of Review

Where, as here, based on undisputed facts, the trial court grants one party's cross-motion for summary judgment on a declaratory judgment action, our review is de novo. Lee Cty. Elec. Coop., Inc. v. City of Cape Coral, 159 So. 3d 126, 127 (Fla. 2d DCA 2014) ("In the declaratory judgment proceeding, the City and LCEC filed cross-motions for summary judgment. The circuit court determined that the facts were undisputed, and it ruled in the City's favor based on the franchise agreement between the parties and on section 337.403(1), Florida Statutes (2005). Our review of the summary judgment is de novo.").

Discussion

Ben Shimon contends the trial court erred in granting summary judgment for BH 150 because (1) the subscription agreement lacked mutuality of obligations; and (2) it had an unenforceable penalty clause. We will address each issue separately.

1. Lack of mutuality.

Ben Shimon claims the subscription agreement is void for lack of mutuality because BH 150 retained two rights which in essence allowed it to perform or not at its sole discretion. The two retained rights are contained in the following language from the subscription agreement:

> Subscriber understands and agrees that this Subscription may be rejected by the Company at any time in its sole discretion. . . . If the Subscription is rejected, all funds received from the Subscriber will be returned, without interest, by the Company, and, thereafter, this Agreement shall be of no further force or effect. Additionally, if the Company accepts the Subscription, but the Company does not purchase the Property for any reason or no reason at all, all funds received from the Subscriber will be returned, without interest, to Subscriber and this Agreement will be of no further force or effect. . . .

Ben Shimon reads this language as authorizing BH 150 to terminate her subscription at any time and, more importantly, to back out from the purchase of the building for any reason, thus rendering its promises under the agreement completely illusory. Ben Shimon correctly argues that a bilateral contract where one party retains the right to fulfill or decline to fulfill its contractual obligation is unenforceable because it is based on an illusory promise. See, e.g., Flagship Resort

Dev. Corp. v. Interval Int'l, Inc., 28 So. 3d 915, 921 (Fla. 3d DCA 2010) ("[I]n a bilateral contract a promise that permits the promisor to fulfill or decline to fulfill its contractual obligations at its option is not binding on the promisor and renders the promise incapable of enforcement by the promisee."). This rule, however, applies to bilateral contracts where one party promises to perform a specific action directly in exchange for the other party performing another specific action, like a sale and purchase agreement. That is not the type of agreement at issue in this case.

Ben Shimon entered into an agreement subscribing to a business venture, not a direct purchase and sale agreement to acquire title to certain condominium units. Ben Shimon, a sophisticated investor, was to receive an interest in the venture, after being apprised of the risk factors involved in the business. In fact, in connection with her subscription, Ben Shimon was provided with a document listing twenty-three separate risks associated with the venture, including:

> The Subscriber has been cautioned that an investment in the Company is speculative and involves significant risks, and that it is probably not possible to foresee and describe all of the business, economic and financial risks factors which may affect the Company. The Subscriber acknowledges that he has been advised to seek independent professional advice in order to carefully analyze the risks and merits of an investment in the Company.

Subscriptions capitalized the business venture which entailed acquisition of an office building and remodeling and converting it into a condominium. In lieu of

return of their cash investment and any profit earned by the venture, the investors were to receive title to condominium units.

Like any investor in an uncertain business enterprise, the subscribers assumed the risk that for whatever reason, including the inability to acquire title to the property, the enterprise may fail and the investment may be lost. This fact distinguishes the cases cited by Ben Shimon in support of her lack of mutuality argument. For example, Ben Shimon cites to Office Pavilion South Florida, Inc. v. Asal Products, Inc., 849 So. 2d 367 (Fla. 4th DCA 2003), a case involving a dispute between an office goods supplier and a manufacturer of office chairs – a direct seller to buyer transaction, and Allington Towers North, Inc. v. Rubin, 400 So. 2d 86 (Fla. 4th DCA 1981), involving a garden variety purchase and sale contract to convey title to real estate. Unlike these cases, BH 150 promised and delivered to all subscribers, including Ben Shimon, the right to participate in the business venture. Ultimately, the business was successful and those members who fully performed their side of the bargain were rewarded with title to condominium units as a return on their investment. Ben Shimon was not so rewarded only because she did not perform as required under the agreement.

A careful reading of the subscription agreement as a whole also negates Ben Shimon's contention that BH 150 reserved to itself the ability to cancel her subscription at any time at its sole discretion. The language of the agreement Ben

Shimon relies on is found in paragraph 4, entitled "Acceptance of Subscription." The first sentence of that paragraph uses the word "reject," rather than "terminate." The sentence is immediately followed by an explanation of what should occur either upon acceptance or rejection of the subscription. Acceptance will be evidenced by a return of the fully signed subscription agreement to the investor, while a refund of any funds received from the investor will follow a rejection. The provision thus refers to BH 150's right to accept or reject Ben Shimon's request to join the business venture. It does not, as Ben Shimon asserts, give BH 150 the unfettered right to terminate Ben Shimon's subscription after her membership in the venture was accepted. The undisputed record shows that BH 150 signed and provided the signed subscription agreement to Ben Shimon, thereby obligating itself to perform under the contract. From this point forward, BH 150 had the right to terminate Ben Shimon's subscription only on grounds expressly stated in the agreement, including failure to pay the full amount of the subscription once the investor received notice of the closing date.

When considering the agreement as a whole, the parties agreed to mutual promises – Ben Shimon agreed to pay a certain amount of money, and in exchange, was to receive an interest in the business venture. Thus, the trial court correctly refused to void the subscription agreement on the ground that it lacked consideration.

2. Penalty clause.

Ben Shimon contends the liquidated damages provision of the subscription agreement should be stricken because it constitutes an impermissible penalty clause. The Florida Supreme Court has adopted this "test as to when a liquidated damages provision will be upheld and not stricken as a penalty clause. First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages." Lefemine v. Baron, 573 So. 2d 326, 328 (Fla. 1991) Again, when properly considered as an agreement to subscribe to a business venture to acquire and convert a building into condominiums, rather than the mere purchase of condominium units, the liquidated damages meets both prongs of this test.

As to the not-readily-ascertainable prong, the Florida Supreme Court has explained that because of fluctuations in the real estate market, damages for the loss of a real estate opportunity cannot be readily ascertained at the time the contract is signed such that it would defeat a liquidated damages clause. See Hutchison v. Tompkins, 259 So. 2d 129, 132 (Fla. 1972) ("The land sale market in Florida fluctuates from year to year and season to season, and it is generally

impossible to say at the time a contract for sale is drawn what vendor's loss (if any) will be should the contract be breached by purchaser's failure to close. Accordingly . . . we conclude that the damages which the parties could expect as a result of a breach were not readily ascertainable as of the time the contract was drawn up . . . ."); Bradley v. Sanchez, 943 So. 2d 218, 222 (Fla. 3d DCA 2006) ("The Florida Supreme Court has ruled that liquidated damages are appropriate damages in a contract for sale of real estate in Florida, and they are not to be considered a penalty. Such damages are not readily ascertainable as of the time the contract is drawn." (quotation omitted)). So it was for the subscription agreement in this case, which contemplated an investment in an office building that BH 150 was buying.

As to the grossly-disproportionate prong, Ben Shimon's failure to pay her share of money due for closing jeopardized the entire investment opportunity, not just the purchase of the four units earmarked for Ben Shimon. Her $3,295,000 damages amount is measured against the potential loss of the investment – the office building – which was in excess of $22 million. The approximate 14.97 percent of liquidated damages to the total purchase price of the office building was not grossly disproportionate. See, e.g., Johnson v. Wortzel, 517 So. 2d 42 (Fla. 3d DCA 1987) (18.2%); Dade Nat'l Dev. Corp. v. Southeast Inv. of Palm Beach Cty., 471 So. 2d 113 (Fla. 4th DCA 1985) (18%); Hooper v. Breneman, 417 So. 2d 315

(Fla. 5th DCA 1982) (13.3%).

Conclusion

In conclusion, the subscription agreement was neither unenforceable because of lack of mutuality of obligations, nor for an impermissible penalty clause. Accordingly, we agree with the trial court's interpretation of the parties' agreement and affirm the judgment entered below.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOY MACK,
Appellant,

v.

PHILIP REPOLE and **PHYLLIS REPOLE,**
Appellees.

No. 4D16-3595

[February 21, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Marina Garcia Wood, Judge; L.T. Case No. 08-21118.

Henry G. Gyden of the Gyden Law Group, Tampa, for appellant.

William S. Isenberg of the Law Offices of William S. Isenberg, Fort Lauderdale, for appellees.

TAYLOR, J.

Appellant Joy Mack, the defendant and counter-plaintiff below, appeals a final order dismissing her case for lack of prosecution. Our review of the record, however, shows that appellant is actually attempting to use this appeal as a vehicle for challenging the trial court's earlier final orders enforcing a settlement agreement and denying appellant's motion for relief under Florida Rule of Civil Procedure 1.540. Because appellant either failed to timely appeal or otherwise failed to prosecute appeals of those final orders, our court does not have jurisdiction to review those orders in this appeal. We therefore dismiss this appeal for lack of jurisdiction and find that the trial court's dismissal of this case below for lack of prosecution was superfluous.

As an Illinois appellate court has explained, "[w]hen a party has failed to take a timely appeal from an order that is final for purposes of appeal, the appellate court is without jurisdiction to consider the propriety of that earlier final order in an appeal from a subsequent order, even in the same case." *Busey Bank v. Salyards*, 711 N.E.2d 10, 14 (Ill. App. Ct. 1999). Stated another way, the entry of a subsequent final order does not confer jurisdiction on this court to review an earlier final order that was not timely

appealed. Accordingly, our court's jurisdiction to review the trial court's earlier orders concerning the settlement agreement depends on whether those orders were final.

An order enforcing a settlement agreement is final and appealable where there is "nothing whatever left for the court to do in the pending action, other than to enforce what the order required of the parties." *Travelers Indem. Co. v. Walker*, 401 So. 2d 1147, 1149 (Fla. 3d DCA 1981). A subsequent formal order of dismissal is not necessary to terminate the action. *Id.*

Likewise, an order denying a motion for relief from judgment is final in nature. *Francisco v. Victoria Marine Shipping, Inc.*, 486 So. 2d 1386, 1391 (Fla. 3d DCA 1986).

Here, appellant's October 24, 2016 Notice of Appeal does not confer jurisdiction on our court to review any of the following orders, which we deem to be final orders: (1) the September 24, 2012 order enforcing the settlement agreement; (2) the February 28, 2013 order denying appellant's rule 1.540 motion to vacate; and (3) the February 28, 2013 order granting appellees' motion to compel enforcement of the settlement agreement. Because appellant either failed to timely appeal or otherwise failed to prosecute appeals of those final orders, we do not have jurisdiction to review those orders in the instant appeal.[1]

We further find that the trial court's dismissal for lack of prosecution was superfluous. By the time of the trial court's dismissal, the parties had complied with the settlement agreement and the case was concluded.

Dismissed.

FORST and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

---

[1] Although appellant previously appealed the September 24, 2012 order and one of the February 28, 2013 orders, those appeals were dismissed either for failure to pay the filing fee or for lack of prosecution.