Real Property and Business Litigation Report

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Manuel Farach

Tobinick v. Novella, Case No. 16-16210 (11th Cir. 2018).
The "exceptional case" standard for awarding attorney's fees in Patent Act cases as set forth in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. ___, (2014), also applies to Lanham Act cases.

Ashear v. Sklarey, Case No. 3D16-888 (Fla. 3d DCA 2018).
A prevailing party in a tax deed contest is not entitled to an award of prevailing party fees and costs unless the claim arose under the current (not prior) version of Florida Statute section 197.602.

Fincantieri-Cantieri Navali Italiani S.p.A. v. Yuzwa, No. 3D16-1015 (Fla. 3d DCA 2018).
Florida courts do not have long-arm jurisdiction over a lawsuit brought by a Canadian citizen against an Italian shipbuilder for injuries sustained in international waters in the Pacific Ocean on a cruise ship built in Italy, which was owned by a Washington corporation when the injuries occurred.

Nationstar Mortgage, LLC v. Yesenia Silva, Case No. 3D16-1936 (Fla. 3d DCA 2018).
A foreclosing lender is not required to send a new notice of default if the default date in the foreclosure complaint is changed, and substantial compliance with a condition precedent is sufficient unless the party to whom the notice is directed can demonstrate prejudice, e.g., attempts to pay in a mortgage foreclosure context.

Mesnikoff v. FQ Backyard Trading, LLC, No. 3D17-2803 (Fla. 3d DCA 2018).
County courts do not have subject matter jurisdiction to hear ejectment claims.

Citigroup Mortgage Loan Trust Inc. v. Scialabba, Case No. 4D17-401 (Fla. 4th DCA 2018).
Substantial compliance with a condition precedent is sufficient unless the party to whom the notice is directed can demonstrate prejudice, e.g., attempts to pay in a mortgage foreclosure context.

Desai v. Bank Of New York Mellon Trust Company, Case No. 4D17-0890 (Fla. 4th DCA 2018).
Defaults subsequent to a previously accelerated but dismissed foreclosure action allow a lender to foreclose all sums due under the note and mort so long as all subsequent defaults are properly pled.

CSC Serviceworks, Inc. v. Boca Bayou Condominium Association, Inc., Case No. 4D17-0974 (Fla. 4th DCA 2018).

An association disconnecting, but not removing, a prior servicer's laundry equipment from a condominium association laundry room does not constitute an unlawful detainer by the association.

Third District Court of Appeal

State of Florida

Opinion filed March 7, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-888
Lower Tribunal No. 10-43814

Morris A. Ashear,
Appellant,

vs.

Seth Sklarey,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Gisela Cardonne Ely, Judge.

P.A. Bravo, P.A., and Paul Alexander Bravo; Matthew Estevez, P.A., and Matthew Estevez, for appellant.

Michael A. Vandetty, P.A., and Michael A. Vandetty, for appellee.

Before SUAREZ, LAGOA, and SCALES, JJ.

LAGOA, J.

ON MOTION FOR APPELLATE ATTORNEY'S FEES AND COSTS

Appellant, Morris A. Ashear ("Ashear"), seeks appellate attorney's fees and costs pursuant to Florida Rule of Appellate Procedure 9.400 and section 197.602(2), Florida Statutes (2017), in connection with his appeal from a final judgment vacating and setting aside a tax deed in Ashear v. Sklarey, 43 Fla. L. Weekly D181 (Fla. 3d DCA Jan. 17, 2018). We deny the motion.

Appellee, Seth Sklarey ("Sklarey"), owned property located in Coconut Grove, Florida. A tax certificate issued on the property, and a tax deed auction for the property occurred on August 5, 2010. Ashear was the successful bidder, and a tax deed issued to Ashear the following day. On August 12, 2010, Sklarey filed a complaint against Ashear and others, seeking to set aside the tax deed issued to Ashear. The matter proceeded to trial, and the trial court entered final judgment vacating and setting aside the tax deed issued to Ashear. Ashear appealed to this Court, raising the following three issues: (1) whether the trial court's factual findings were supported by the evidence presented at trial; (2) whether "the trial court's erroneous legal conclusion resulted from its application of the wrong legal standard"; and (3) whether the trial court erred in failing to require Sklarey to reimburse Ashear the amount paid for the tax deed and interest from the date the tax deed was issued as required by section 197.602. This Court affirmed the final judgment in part, finding that the trial court's findings of fact were supported by competent, substantial evidence and that the trial court applied the correct legal

standard, and reversed in part, finding that Ashear was entitled to reimbursement from Sklarey. See Ashear, 43 Fla. L. Weekly at D181.

Ashear now seeks appellate attorney's fees and costs under the current version of section 197.602(2), which provides that "[i]n an action to challenge the validity of a tax deed, the prevailing party is entitled to all reasonable litigation expenses, including attorney's fees."[1] We find no entitlement to attorney's fees

[1] Section 197.602, Florida Statutes (2017), states in its entirety:

> (1) If a party successfully challenges the validity of a tax deed in an action at law or equity, but the taxes for which the tax deed was sold were not paid before the tax deed was issued, the party shall pay to the party against whom the judgment or decree is entered:
>
> (a) The amount paid for the tax deed and all taxes paid upon the land, together with 12 percent interest thereon per year from the date of the issuance of the tax deed;
>
> (b) All legal expenses in obtaining the tax deed, including publication of notice and clerk's fees for issuing and recording the tax deed; and
>
> (c) The fair cash value of all maintenance and permanent improvements made upon the land by the holders under the tax deed.
>
> (2) In an action to challenge the validity of a tax deed, the prevailing party is entitled to all reasonable litigation expenses, including attorney's fees.
>
> (3) The court shall determine the amount of the expenses for which a party shall be reimbursed. The tax deed holder or anyone holding under the tax deed has a prior lien on the land for the payment of the expenses that must

and costs as the version of section 197.602 in force at the time the tax sale certificate issued did not contain any provision for an entitlement to attorney's fees to the prevailing party in an action challenging the validity of the tax deed. As the Florida Supreme Court explained in Culmer v. Office Realty Co., 189 So. 52, 54 (Fla. 1939):

> When the tax sale certificates are issued at the tax sales to private purchasers who pay the amounts due as taxes and costs, or when such certificates are issued to, and afterward are duly transferred by, the State to private parties, **the rights of such private purchasers are governed by the law in force at the time the tax sale certificates are issued to them** or to their assignors at the tax sale or at the time the State transfers the certificates to private purchasers.

(emphasis added); see also Holliday v. Wade, 117 F.2d 154, 157 (5th Cir. 1941). Unlike the current version of the statute, the 2010 version of section 197.602 did not provide for an entitlement to attorney's fees to the prevailing party in an action challenging the validity of the tax deed.[2] Subsection (2), providing for entitlement

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be reimbursed to such persons.

[2] In its entirety, the 2010 version of section 197.602 read as follows:

> If, in an action at law or in equity involving the validity of any tax deed, the court holds that the tax deed was invalid at the time of its issuance and that title to the land therein described did not vest in the tax deed holder, then, if the taxes for which the land was sold and upon which the tax deed was issued had not been paid prior to issuance of the deed, the party in whose favor the judgment or decree in the suit is entered shall pay to the

to attorney's fees, was added to section 197.602 in 2011, and became effective on July 1, 2011. Because the tax deed was issued to Ashear on August 6, 2010, the 2010 version of the applicable statute governs. Accordingly, Ashear is not entitled to an award of attorney's fees and costs pursuant to section 197.602, effective at the time the tax sale certificate was issued.

Moreover, even if the current version of section 197.602(2) were applicable here, Ashear would not be entitled to attorney's fees as he is not the prevailing party on appeal. In Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807, 810 (Fla. 1992), the Florida Supreme Court defined the prevailing party for purposes of attorney's fees and costs as "the party prevailing on the significant issues in the litigation." Where appellate litigation ends in a "tie," with each party prevailing in

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> party against whom the judgment or decree is entered the amount paid for the tax deed and all taxes paid upon the land, together with 12-percent interest thereon per year from the date of the issuance of the tax deed and all legal expenses in obtaining the tax deed, including publication of notice and clerk's fees for issuing and recording the tax deed, and also the fair cash value of all permanent improvements made upon the land by the holders under the tax deed. The amount of the expenses and the fair cash value of improvements shall be ascertained and found upon the trial of the action, and the tax deed holder or anyone holding thereunder shall have a prior lien upon the land for the payment of the sums.

§ 197.602, Fla. Stat. (2010).

part and losing in part on the "significant issues," it is appropriate to deny a motion for appellate fees. See Loy v. Loy, 904 So. 2d 482, 484 (Fla. 3d DCA 2005).

Here, Ashear failed to prevail on two separate and significant issues. Specifically, Ashear failed to prevail on the following issues: (1) whether the trial court's findings were contrary to the evidence (both testimony and documents) presented at trial; and (2) whether the trial court's "erroneous legal conclusion resulted from its application of the wrong legal standard" under section 197.122, Florida Statutes (2010), and section 197.472, Florida Statutes (2010). Ashear prevailed on appeal only with regard to his argument that he was entitled to reimbursement for the purchase price of the property along with interest. Because this Court affirmed the trial court's judgment vacating the tax deed, and reversed on only one of the issues raised by Ashear, he cannot be considered the prevailing party on the "significant issues" and is therefore not entitled to attorney's fees on this basis as well. Accordingly, we deny Ashear's motion for appellate attorney's fees and costs.

Motion denied.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CITIGROUP MORTGAGE LOAN TRUST INC.,
Appellant,

v.

JACK SCIALABBA and **SHARON SCIALABBA,**
Appellees.

No. 4D17-401

[March 7, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Thomas H. Barkdull, III, Judge; L.T. Case No. 50-2015-CA-002164-XXXX-MB.

Nancy M. Wallace of Akerman LLP, Tallahassee, William P. Heller of Akerman LLP, Fort Lauderdale, and Eric M. Levine of Akerman LLP, West Palm Beach, for appellant.

Chase E. Jenkins and Matthew D. Bavaro of Loan Lawyers, LLC, Fort Lauderdale, for appellees.

CONNER, J.

Citigroup Mortgage Loan Trust Inc. ("the Bank") appeals the final judgment entered in favor of Jack Scialabba and Sharon Scialabba ("the Borrowers") subsequent to a motion for involuntary dismissal granted at trial after the Bank finished its case in chief. We view the overarching issue in this case to be whether the required notice, as a condition precedent to foreclosure, was mailed to a correct address. We determine that the Bank presented *prima facie* evidence of substantial compliance with the condition precedent, reverse the involuntary dismissal and final judgment, and remand for a new trial.

Background

The Borrowers executed a promissory note and mortgage. The mortgage stated the "Property Address" as "9486 South Military Trail **#15**" (emphasis added). The parties subsequently entered into a loan modification agreement ("the modification agreement"), which stated a

different "Property Address": "9486 S MILITARY TRL **4**, BOYNTON BEACH, FL 33436." (emphasis added)

After the Borrowers defaulted in payment, the Bank mailed to the Borrowers a notice of default, the right to accelerate, and the right to cure ("notice of default") to the "Property Address" stated in the modification agreement. Subsequently, the Bank brought a foreclosure action, generally alleging compliance with all conditions precedent. Attached to the complaint was a copy of the note, mortgage, and modification agreement. The Borrowers answered, specifically denying compliance with the conditions precedent regarding notice of default and additionally raising the notice noncompliance as an affirmative defense. In response to request for admissions, the Borrowers admitted they have received mail addressed to 9486 South Military Trail stating either "#15" or "Unit 4" as part of the address. The Borrowers further admitted that at the time of their responses, "Defendants currently resides [sic] at 9486 South Military Trail Unit 4."

At trial, the Bank presented one witness. During her testimony, the Bank introduced into evidence the subject notice letter and a letter log indicating dates on which the Bank mailed letters to the Borrowers. The witness confirmed the notice of default was mailed to the "Property Address" stated in the modification agreement. Additionally, the trial court admitted into evidence a certified copy of the entire complaint, including the attached copy of the modification agreement. The witness verified that the Borrowers did not cure the default.

After the Bank rested, the Borrowers moved for involuntary dismissal asserting that the Bank failed to prove it satisfied the condition precedent of proper notice. The Borrowers argued that the address on the mortgage was listed as Unit 15, but the notice letter was improperly mailed to Unit 4. The Bank responded that the notice was sent to the proper address designated in the modification agreement. The Bank further responded that, even if the notice was mailed to an incorrect address (which it did not concede), "any deviation from the paragraph 22 language must be material in nature, meaning that it must have prejudiced the [Borrowers] in some way," which was not the case. The Bank also argued that the modification agreement listed the "Property Address" as Unit 4, and the express terms of the modification agreement superseded the original mortgage contract. The trial court found that "notice [wa]s a problem" and granted the motion for involuntary dismissal. After a final judgment was entered, the Bank gave notice of appeal.

Analysis

A trial court's ruling on a motion for involuntary dismissal is reviewed *de novo*. *Deutsche Bank Nat'l Tr. Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012) (citing *Brundage v. Bank of Am.*, 996 So. 2d 877, 881 (Fla. 4th DCA 2008)). Additionally, the appellate court "must view the evidence and all inferences of fact in the light most favorable to the nonmoving party, and can affirm . . . only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Id.* (citing *Brundage*, 996 So. 2d at 881).

Giving a notice of default is a condition precedent to foreclosure in most residential mortgages. "Where there are conditions precedent to filing the suit, [a] plaintiff must also prove that it has complied with them." *Liberty Home Equity Sols., Inc. v. Raulston*, 206 So. 3d 58, 60 (Fla. 4th DCA 2016) (citing *Blum v. Deutsche Bank Tr. Co.*, 159 So. 3d 920, 920 (Fla. 4th DCA 2015)). However, "a plaintiff need only substantially comply with conditions precedent." *Id.* at 61 (citing *Fed. Nat'l Mortg. Ass'n v. Hawthorne*, 197 So. 3d 1237, 1240 (Fla. 4th DCA 2016)). "Substantial compliance or performance is 'performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee' the benefit of the bargain." *Lopez v. JPMorgan Chase Bank*, 187 So. 3d 343, 345 (Fla. 4th DCA 2016) (quoting *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So. 2d 72, 75 (Fla. 4th DCA 1971)). "Moreover, a breach of a condition precedent does not preclude the enforcement of an otherwise valid contract, absent some prejudice." *Raulston*, 206 So. 3d at 61 (citing *Caraccia v. U.S. Bank, Nat'l Ass'n*, 185 So. 3d 1277, 1280 (Fla. 4th DCA 2016)).

Although the trial court did not explain its reasoning for granting an involuntary dismissal other than saying "I think the notice is a problem," it appears the trial court agreed with the Borrowers' argument that the evidence showed that the notice required by paragraph 22 of the mortgage was sent to the wrong address.

Thus, we view the overarching issue to be decided by this appeal as whether the Bank substantially complied with the condition precedent of mailing the required notice to the Borrowers' correct address. In doing so, we first address two evidentiary issues regarding the modification agreement. The Borrowers contend: (1) the modification agreement was not admitted into evidence at trial, and (2) the trial court viewed the modification agreement as inadmissible hearsay evidence.

The record reflects that a copy of the recorded modification agreement was attached to the complaint. During the trial, the complaint as a trial exhibit first came up while the Bank's witness testified about possession

of the note. When the Bank asked the trial court to admit a certified copy of the complaint with all attachments into evidence, the Borrower raised a hearsay objection. In response, the Bank stated that its purpose for using the complaint was to establish that the Bank had possession of the note at the time the complaint was filed, as verified in the certificate of possession attached to the complaint as Exhibit D. In ruling on the objection, the trial court stated, "I'll receive [the complaint] subject to your objection for whatever evidentiary purpose it may serve. We'll see where that goes." Shortly thereafter, the trial court said, "I'm going to take the entire Complaint. As you well know, I'm taking it for what it is worth. Most of it is hearsay if not all of the Complaint."

Later, during the argument on the motion for involuntary dismissal, the Borrowers contended that the modification agreement was not in evidence. The Bank specifically argued that the modification agreement was an attachment to the complaint which was admitted into evidence in its entirety. In counter-response, the Borrowers argued the modification agreement was hearsay on the issue of whether the Borrowers gave notice that they wanted notices sent to an address other than the "Property Address" listed in the original mortgage. Significantly, the trial court never ruled that it did not consider the modification agreement to be in evidence or that it was inadmissible hearsay as to whether the Borrowers gave notice of a change of address.

From the record on appeal, we conclude the modification agreement was admitted into evidence.[1] If the trial court concluded the "problem" with notice in this case was that the modification agreement was an inadmissible hearsay document, then the trial court erred. The modification agreement, like the note and original mortgage, was a verbal act. *See Holt v. Calchas, LLC*, 155 So. 3d 499, 502 n.2 (Fla. 4th DCA 2015) (concluding that an assignment of mortgage is admissible into evidence as a verbal act); *see also Deutsche Bank Nat'l Tr. Co. v. Alaqua Prop.*, 190 So. 3d 662, 665 (Fla. 5th DCA 2016) (holding that a promissory note "is admissible for its independent legal significance" of establishing a contractual relationship between parties, regardless of the truth of assertions in the document).

Turning to the arguments regarding compliance with the condition precedent of notice of default and of the right to cure, as stated above, the

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[1] We do not address the issue of whether a copy of the modification agreement attached to a certified copy of the complaint met the requirements of Section 90.953, Florida Statutes (2017) (Admissibility of Duplicates). The issue was partially raised in the trial court, but not adequately addressed in the briefs.

original mortgage stated that the "Property Address" is "9486 South Military Trail #**15**." (emphasis added). Paragraph 22 of the mortgage contained the common language in residential mortgages requiring notice of default and the right to cure. Paragraph 15 likewise contained the common language that "[t]he notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender." However, for unexplained reasons, the modification agreement stated the "Property Address" was "9486 S Military Trl **4**," (emphasis added). Significantly, Paragraph 3 of the modification agreement, entitled "The Modification," listed the various provisions of the original mortgage to be modified, but did not mention the "Property Address". Paragraph 4(D) of the modification agreement provided that the "Loan Documents" are "reaffirmed," and Paragraph 4(E) provided that "all terms and provisions of the Loan Documents, except as expressly modified by this Agreement, remain in full force and effect."

The Bank makes two arguments on appeal regarding the address where the required notice was sent: (1) the modification agreement modified the "Property Address," and (2) the address for the property stated in the modification agreement constituted a notice of change of address requested by the Borrowers.

The Borrowers do not squarely address either argument, opting instead to focus on the propriety of the modification agreement as an exhibit. However, if the trial court determined the "problem" with the notice was that the modification agreement was not sufficient evidence of a change in the "Property Address" or a notice of change of address by the Borrowers and dismissed for either reason, we agree with the Bank's argument that involuntary dismissal at the conclusion of the plaintiff's evidence was improper because at that point the trial court was not permitted to weigh the evidence. *See DFRP Note Purchase Partners I, LP v. Bruno*, 196 So. 3d 576, 577 (Fla. 4th DCA 2016) ("On a motion for involuntary dismissal, the trial court may not weigh the evidence, but must view it 'in the light most favorable to [the nonmoving party].'" (quoting *Miller v. Nifakos*, 655 So. 2d 192, 193 (Fla. 4th DCA 1995)); *Perez v. Perez*, 973 So. 2d 1227, 1231 (Fla. 4th DCA 2008) ("An involuntary dismissal is properly entered only where the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case. The trial court may not weigh and judge the credibility of the evidence." (citations omitted)); *see also McCabe v. Hanley*, 886 So. 2d 1053, 1056 (Fla. 4th DCA 2004) ("[A] trial court cannot weigh evidence in ruling on a motion for involuntary dismissal at the close of the plaintiff's case but just deny the motion when a *prima facie* case is made").

Additionally, two recent decisions from this Court lead us to the conclusion that the trial court erred in granting an involuntary dismissal in this case, even though the cases are somewhat factually different.

In *Federal National Mortgage Ass'n v. Hawthorne*, 197 So. 3d 1237 (Fla. 4th DCA 2016), we held that the lender "substantially complied with the mortgage by mailing the default notice to the [borrower's] primary address, which was typewritten underneath the [borrower's] signature on the mortgage." *Id.* at 1238. In *Hawthorne*, the mortgage listed the "property address" as an address in Fort Pierce, Florida. *Id.* However, under the borrower's signature, the mortgage listed the borrower's primary address in New York. *Id.* at 1238–39.

At trial, the lender's witness testified that the lender mailed the notice of default to the borrower's New York address, not to the property address. *Id.* at 1239. There was no evidence that the borrower designated the New York address as his substitute notice address. *Id.* The trial court granted the borrower's motion for involuntary dismissal, reasoning that the lender did not comply with the mortgage's requirement to mail the notice of default to the notice address, which the mortgage defined as the property address. *Id.*

On appeal, the lender asserted that it substantially complied with the mortgage by mailing notice to the borrower's New York address because the mortgage provided that the mortgaged property was a second home, and the primary New York address "was already disclosed on the mortgage instrument." *Id.* at 1239–40. The borrower asserted that the mortgage required strict compliance and the lender therefore failed to comply with the requirement to send notice to the property address. *Id.* at 1240.

We agreed with the lender, reversed, and held that substantial compliance is sufficient, unless there exists some prejudice. *Id.* We reasoned that the address the lender used was a valid address for the borrower; the lender reasonably relied on the address typed under the borrower's signature to ensure that the borrower received notice; the borrower was personally served with the complaint at his New York address, which "confirmed that address's accuracy"; and the lender's failure to mail notice to the property address did not prejudice the borrower. *Id.* at 1240–41.

Similarly, in *Caraccia*, we agreed with the bank that it substantially complied with the notice requirement. 185 So. 3d at 1278. There, the United States Postal Service informed the bank that the borrower "did not reside at the property address and provided the Bank with a new address

at a PO Box." *Id.* at 1280. The bank then sent the notice of default to the PO Box address, rather than to the property address. *Id.* The borrower later sent the bank a letter that listed the borrower's return address as the same PO Box to which the notice letter had previously been sent. *Id.* We affirmed the judgment of foreclosure, reasoning that

> [a]lthough [the borrower] did not personally or directly notify the Bank of this change of address prior to the mailing of the default letter, U.S. Bank reasonably relied on the information from the Postal Service to ensure that [the borrower] actually received the notice. Had the Postal Service's information proven incorrect, this may have been a different case, but [the borrower]'s later correspondence from this address confirmed the accuracy of the address utilized. The failure of U.S. Bank to send the notice to the property address did not prejudice [the borrower], and may have even benefitted him.

Id.

In the instant case, the Bank sent the required notice to the address listed in the modification agreement. We are satisfied that the Bank "reasonably relied on that address . . . to ensure that [the Borrowers] actually received the notice." *See Hawthorne*, 197 So. 3d at 1241; *see also Caraccia*, 185 So. 3d at 1280 (same). Although there is no independent evidence in the record that the Borrowers "personally or directly" notified the Bank of a change of notice address, *see Caraccia*, 185 So. 3d at 1280, the modification agreement provided a different "Property Address" which was sufficient to constitute substantial compliance with the notice requirements.

Even if we concluded that the required notice was mailed to an incorrect address, the Bank correctly points out that the defective notice did not prejudice the Borrowers, as they did not attempt to cure the default. *See Ortiz v. PNC Bank, Nat'l Ass'n*, 188 So. 3d 923, 927 (Fla. 4th DCA 2016) ("We also note that there is no evidence here that [the borrower] was prejudiced by the language variation in the default letter."); *Gorel v. Bank of N.Y. Mellon*, 165 So. 3d 44, 47 (Fla. 5th DCA 2015) ("We agree with Bank that the defective notice did not prejudice [the borrower], as he made no attempt to cure the default."). Thus, we are satisfied the Bank substantially complied with Paragraphs 15 and 22 of the mortgage such that its performance, "'while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee' the benefit of the bargain." *Lopez*, 187 So. 3d at 345 (quoting *Ocean Ridge Dev. Corp.*, 247 So. 2d at 75).

Finally, we address the Borrowers' argument that lack of prejudice, in relation to failure to comply with a condition precedent, is an avoidance that was not pled by the Bank. In support of the argument, the Borrowers cite Florida Rule of Civil Procedure 1.100(a) and *North American Philips Corp. v. Boles*, 405 So. 2d 202 (Fla. 4th DCA 1981).

Florida Rule of Civil Procedure 1.100(a) provides, in part, that "[i]f an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance." The Borrowers argue that lack of prejudice is a matter of avoidance which the Bank failed to assert in a reply to their affirmative defense of failure to comply with a condition precedent. However, two other rule provisions must be considered.

Florida Rule of Civil Procedure 1.110(d) provides a list of affirmative defenses that must be pleaded. The Bank argues that failure to comply with condition precedent is not listed as an affirmative defense, therefore no reply was required. As additional support, the Bank cites to Florida Rule of Civil Procedure 1.120(c), which specifically addresses pleading conditions precedent. Rule 1.120(c) provides, in part, that "[a] denial of performance or occurrence shall be made specifically and with particularity." The Bank contends that because a denial of performance or occurrence of a condition precedent is covered in rule 1.120(c) and is not listed in rule 1.110(d), no plea in avoidance was required. However, the Bank ignores the language of rule 1.110(d) which states, in part, that "[i]n pleading to a preceding pleading a party shall set forth affirmatively . . . *any other matter constituting an avoidance* . . . ." (emphasis added). As we see it, lack of prejudice is an avoidance which should be pleaded. The legal issue of lack of prejudice was specifically asserted in the context that a failure to substantially comply with a condition precedent is not fatal. In other words, similar to an affirmative defense, the legal position asserts that even if proper notice of default is not given, foreclosure should be permitted to proceed. However, for the same reason we determine *Boles* does not control the outcome of this case, the Bank's failure to plead an avoidance does not defeat its arguments on appeal.

We view *Boles* as inapposite to this case. In *Boles*, the plaintiff filed a complaint, and the defendant's answer asserted an affirmative defense that the plaintiff had failed to fulfill certain conditions precedent. 405 So. 2d at 203. The plaintiff filed a reply that denied the affirmative defenses. *Id.* At trial, the plaintiff argued that strict compliance with the conditions precedent was waived, based on conduct by the defendant. *Id.* The defendant objected to the waiver evidence on the grounds that it was irrelevant to the issues framed by the pleadings. *Id.* The trial court

overruled the objection and ultimately entered a verdict for the plaintiff. *Id.*

We reversed and held that the plaintiff was required to plead an avoidance because he introduced testimony that shifted the focus of the trial "to the conduct of the defendant . . . what it had said or done to excuse plaintiff's performance of the conditions precedent." *Id.* (alteration in original). We reasoned that the trial court's focus on the defendant's conduct "was a blind issue which veered into the midst of the trial without warning and without an opportunity to negate." *Id.*

In the instant case it cannot be said that the evidence and argument of lack of prejudice "was a blind issue which veered into the midst of the trial without warning and without an opportunity to negate" because the Borrowers never objected to the evidence or argument, as the defendant did in *Boles*, on grounds that the issue was not framed in the pleadings. In our view, the issue was tried by consent. Fla. R. Civ. P. 1.190(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); *see Federal Home Loan Mortg. Corp. v. Beekman*, 174 So. 3d 472, 475 (Fla. 4th DCA 2015) ("An issue is tried by consent 'when there is no objection to the introduction of evidence on that issue.'"(quoting *Scariti v. Sabillon*, 16 So. 3d 144, 145–46 (Fla. 4th DCA 2009))).

Having determined the trial court improperly granted a motion for involuntary dismissal after the plaintiff finished its case-in-chief, we reverse the involuntary dismissal and final judgment and remand for a new trial.

Reversed and remanded for further proceedings.

WARNER and KUNTZ, JJ., concur.

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Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CSC SERVICEWORKS, INC., a Delaware corporation,
Appellant,

v.

BOCA BAYOU CONDOMINIUM ASSOCIATION, INC., a Florida corporation and **COMMERCIAL LAUNDRIES, INC.,** a Florida corporation,
Appellees.

No. 4D17-0974

[March 7, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case No. 502016CA011456XXXXMBAJ.

Monica Tirado of Reiner & Reiner, P.A., Miami, for appellant.

Lilliana M. Farinas-Sabogal and Howard Perl of Becker & Poliakoff, P.A., Coral Gables, for appellee Boca Bayou Condominium Association, Inc., a Florida corporation.

Rodney W. Bryson II, West Palm Beach, for appellee Commercial Laundries, Inc., a Florida corporation.

DAMOORGIAN, J.

Appellant, CSC Serviceworks, Inc., appeals a final judgment entered in favor of Boca Bayou Condominium Association, Inc. ("the Association") and Commercial Laundries, Inc. ("Commercial") (collectively "the Defendants") in its unlawful detainer lawsuit. For the reasons discussed below, we affirm the final judgment.

By way of background, Appellant, a self-service laundry equipment provider, entered into a seven year written laundry space lease ("the Lease") with the Association in September of 2000. The Lease provided that Appellant would furnish and install commercial washers and dryers in each of the Association's twenty-six laundry rooms. The Lease also included a right of first refusal clause which survived for one year after the

expiration of the Lease. Prior to the expiration of the initial Lease, the parties elected to extend the Lease for an additional seven years. When the extended written Lease expired in October of 2014, Appellant continued to occupy the laundry rooms and pay the Association rent on a month-to-month basis. This arrangement continued for nearly two years before the Association began receiving various complaints from the residents.

In 2016, the Association began to solicit bids for the lease of the laundry rooms. Appellant actively participated in the bidding process; however, the Association ultimately selected Commercial as its new laundry service provider. On August 16, 2016, the Association sent Appellant a letter canceling the Lease and asking when it could expect Appellant to remove its machines. Shortly thereafter, on August 25, 2016, Commercial also contacted Appellant and inquired as to when the machines would be removed. Appellant's representative responded that she would "schedule something." The following day, Commercial emailed the same representative advising that its machines would be arriving on September 21, 2016 and asking that Appellant remove its machines by September 27, 2016. Appellant's representative did not respond to the email. On August 31, 2016, Commercial again contacted Appellant's representative to schedule a definite removal date. The representative responded that she would contact an installation technician about scheduling something and would follow-up after she made some progress. Appellant's representative never followed-up as promised.

During a September 19, 2016 meeting with the Association and Commercial, Appellant's representative informed the parties that Appellant intended to enforce its right of first refusal. That same day, the Association's attorney emailed Appellant advising that the right of refusal had been rejected. When Commercial arrived to install its machines as scheduled on September 27, 2016, Appellant's machines were still connected to the laundry rooms' water and electric hook-ups. With the Association's approval, Commercial disconnected each one of Appellant's machines and moved them aside. At no point in time were Appellant's machines removed from the laundry rooms and none of the machines were damaged. Appellant was never denied access to the unlocked laundry rooms nor to its machines. On October 3, 2016, the Association sent Appellant a pre-suit demand letter advising that if Appellant did not remove its machines from the laundry rooms within fifteen days, the Association would commence a tenant eviction action. Appellant complied and removed its machines before any formal eviction proceeding was commenced.

Appellant thereafter sued the Defendants, alleging causes of actions for breach of the lease agreement, tortious interference, conversion, and unlawful detainer.[1] After Appellant successfully moved to sever its claims and try the unlawful detainer claim separately, the matter proceeded to a jury trial. At the close of evidence, Appellant moved for a directed verdict, arguing that by disconnecting its machines without legal process or Appellant's knowledge and consent, the Defendants undisputedly ousted Appellant of possession of the laundry rooms. The court denied the motion and the jury ultimately rendered a verdict in favor of the Defendants. This appeal follows.

Appellant argues that the court erred in denying its motion for directed verdict because the undisputed evidence at trial established that while Appellant was in possession of the laundry rooms, the Defendants disconnected its machines and, for all intents and purposes, retook possession of the laundry rooms without legal process. For much of the same reason, Appellant also argues that the jury's verdict is not supported by competent substantial evidence. The Defendants counter that the court correctly denied the motion because Appellant's machines were never physically removed from the laundry rooms and the act of "disconnecting" is not equivalent to "dispossessing." We agree with the Defendants.

Section 82.02, Florida Statutes, provides that "[n]o person who enters without consent in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession." § 82.02(1), Fla. Stat. (2017).

> The entry and detainer action is designed to compel the party out of actual possession, whether the real owner and as such entitled to the Ultimate right of possession, or not, to respect the actual Present possession of another, wrongful though it might be, by requiring him, in order to obtain the possession he claims to be his, to resort to legal channels, such as a suit for ejectment, or trespass to try title, or removal of tennant proceedings under Sec. 83.20 et seq.

Floro v. Parker, 205 So. 2d 363, 367 (Fla. 2d DCA 1967) (citations omitted). The salient questions in an unlawful detainer action, therefore, are whether: (1) plaintiff was in peaceful possession of the property; (2) plaintiff was ousted of actual possession of the property; and (3) defendant withheld possession of the property from plaintiff without consent or legal process. *See id.*

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[1] Only the unlawful detainer action is before this Court.

We hold that the Defendants' act of disconnecting the machines and moving them to the other side of the laundry rooms did not have the effect of ousting Appellant of its possession of the laundry rooms as contemplated under the unlawful detainer statute. Any connection rights that Appellant may have had were related to its leasehold interest which, as acknowledged by Appellant, was not at issue in the unlawful detainer action. *See* § 82.05, Fla. Stat. (2017) (providing that "[n]o question of title, but only right of possession and damages, is involved in the action" of unlawful detainer); *Se. Fid. Ins. Co. v. Berman*, 231 So. 2d 249, 251 (Fla. 3d DCA 1970) (reiterating that "[t]he gist of an action for unlawful detainer is the unlawful withholding of possession by the defendant," and holding that an unlawful detainer action "is not the proper remedy where it is obvious to the trial judge that plaintiff is substantially seeking an adjudication of title").

Appellant nonetheless maintains that the holding in *R. Bodden Coin-Op Laundry, Inc. v. Brandychase Condominium Ass'n*, 557 So. 2d 663 (Fla. 2d DCA 1990), which involved a dispute between a laundry service provider and a condo association regarding the possession of laundry rooms, supports reversal in this case. We disagree. Unlike in the instant case, *Bodden* involved a situation where an association *removed* the plaintiff's machines from the laundry rooms, transported them to a warehouse, and refused to release the machines to the plaintiff for a period of time. *Id.* at 664. The holding in *Bodden*, therefore, is not applicable to the facts in this case as Appellant's machines were not removed from the laundry rooms.

Our holding is further supported by the historical context within which the unlawful detainer action originated. As explained by the court in *Floro*, the unlawful detainer action has its origins in an English criminal statute:

> which denounced as a crime the practice of subverting actual possession by the employment of force, even though the possession of the one forcibly displaced was itself wrongful. The reason for the original statute, as well as the later English statutes, was to prevent breaches of the peace which arose when one person would enter upon the land of another and, frequently by sheer physical power, oust the other from peaceful, albeit wrongful, possession.

205 So. 2d at 366. In other words, unlawful detainer actions are, and have always been, about actual physical dispossession of real property, not constructive or useful dispossession.

Accordingly, we hold that the trial court correctly denied the motion for directed verdict because the evidence did not support the plaintiff's claim for unlawful detainer.

Affirmed.

WARNER and MAY, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

TRILOK DESAI,
Appellant,

v.

BANK OF NEW YORK MELLON TRUST COMPANY, ETC.,
Appellee.

No. 4D17-0890

[March 7, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Roger B. Colton, Senior Judge; L.T. Case No. 2015CA006838XXXXMB.

Enrique Nieves III of King, Nieves & Zacks, PLLC, West Palm Beach, for appellant.

Sarah T. Weitz of Weitz & Schwartz, P.A., Fort Lauderdale, for appellee.

KLINGENSMITH, J.

Bank of New York Mellon Trust Company ("BNY") filed a foreclosure action against appellant Trilok Desai after he defaulted on his mortgage payments. Although its first suit was involuntarily dismissed, BNY filed a second one against Desai, and obtained a final judgment of foreclosure. Desai states that this second action was barred by the statute of limitations since it was based on defaults occurring before the dismissal of the prior foreclosure lawsuit. He also asserts that Florida law prohibited BNY from seeking any interest on the loan that accrued while the first foreclosure case was pending. We disagree on both issues, and affirm.

The facts in this case are undisputed. In December 2009, BNY filed its initial foreclosure action and alleged, "There has been a default in the payment of the amounts due under the Note and Mortgage in that the payment due for March 1, 2009, and all subsequent payments have not been made." That suit was dismissed with prejudice in September 2013.

In June 2015, BNY filed the foreclosure action now on appeal, and included in its complaint the claim that "[Desai] has defaulted under the

Note and Mortgage by failing to pay the August 01 [sic], 2010 payment, and all subsequent payments due thereafter."

At trial, Desai moved for involuntary dismissal on the grounds that *Bartram v. U.S. Bank, N.A.*, 211 So. 3d 1009, 1019 (Fla. 2016), required that if a second foreclosure action is filed, then it must be based on a new default date accruing on a date after the dismissal of the prior action. Desai also claimed that *Bartram* prohibited BNY from seeking any interest on the loan that accrued while the first foreclosure action was pending.

BNY responded that it properly re-accelerated the debt and initiated a timely action when it filed its second complaint based on Desai's undisputed August 1, 2010 default, countering that *Bartram* did not require a subsequent action to be based on a default occurring after the dismissal of a prior suit, and did not preclude a mortgagee from recovering amounts that became due while the prior action was pending. The trial court entered final judgment in favor of BNY, and Desai appealed.

"'A legal issue surrounding a statute of limitations question is an issue of law subject to de novo review.'" *Med. Data Sys., Inc. v. Coastal Ins. Grp., Inc.*, 139 So. 3d 394, 396 (Fla. 4th DCA 2014) (quoting *Fox v. Madsen*, 12 So. 3d 1261, 1262 (Fla. 4th DCA 2009)).

Based on the allegations of the second complaint, the filing of the second action in June 2015 was timely. That complaint was limited in scope to defaults starting in August 2010, and not from the date of the initial default in March 2009. BNY pleaded and proved that Desai was in an ongoing state of default from August 2010 to the filing the second complaint. Thus, having limited its recovery only to those defaults occurring within five years of the second lawsuit, BNY's action was not barred by the statute of limitations. *See* § 95.11(2)(c), Fla. Stat. (2015); § 95.031, Fla. Stat. (2015); *Depicciotto v. Nationstar Mortg. LLC*, 225 So. 3d 390, 391 (Fla. 4th DCA 2017) ("Nationstar's foreclosure action was not barred by the statute of limitations where it alleged and proved separate and continuing defaults that fell within the five years preceding the filing of this suit."); *Desylvester v. Bank of N.Y. Mellon*, 219 So. 3d 1016, 1020 (Fla. 2d DCA 2017) (holding the same); *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954, 956 (Fla. 4th DCA 2014) (holding the same).

Desai also suggests that the court's involuntary dismissal of BNY's initial foreclosure action with prejudice precluded the trial court from awarding any amounts that were in default while the initial foreclosure action was pending. We find this argument to be without merit.

The court in *Bartram* held that dismissal of a foreclosure action accelerating payment based on a default does not bar the filing of a subsequent foreclosure action. 211 So. 3d at 1021. A mortgagee has "the right to file a subsequent foreclosure action—and to seek acceleration of *all sums* due under the note—*so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default*." *Id.* (emphasis added).

Likewise, the doctrines of res judicata and collateral estoppel did not prevent BNY from filing a second foreclosure complaint and relitigating those issues despite the involuntary dismissal with prejudice of its prior action where the case was not decided on the merits. *See Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007–08 (Fla. 2004) (concluding that "the doctrine of res judicata does not necessarily bar successive foreclosure suits," and explaining that while "a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue"); *Aronowitz v. Home Diagnostics, Inc.*, 174 So. 3d 1062, 1066 (Fla. 4th DCA 2015) (stating that for collateral estoppel to apply, the specific issue must have been actually litigated and decided in a prior suit).

BNY's second complaint alleged, and it was not contested, that Desai was in a continuing state of default. Therefore, the note and mortgage remained enforceable by a foreclosure based on any default occurring within the statute of limitations. *See Bartram*, 211 So. 3d at 1012; *Depicciotto*, 225 So. 3d at 391-92; *Kebreau v. Bayview Loan Serv., LLC*, 225 So. 3d 255, 256 (Fla. 4th DCA 2017) (holding that a suit may proceed where alleged defaults fell within the five-year limitations period). *Cf. Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012, 1013 (Fla. 3d DCA 2016) (reversing foreclosure judgment where plaintiff asserted the same payment default date and basis for acceleration in a prior and subsequent complaint, a date over five years preceding the commencement of the latter case); *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957, 959 (Fla. 5th DCA 2015) (ruling the trial court erred by failing to dismiss a foreclosure action where counsel stipulated to a default date outside of the statute of limitations).

Other cases arising in our sister courts have held similarly. In *Wells Fargo Bank, NA v. BH-NV Invs. 1, LLC*, 230 So. 3d 60, 61 (Fla. 3d DCA 2017), a trustee filed a foreclosure action in June 2009 based on a borrower's default in December 2008 and on all subsequent payments. In April 2011, the trial court dismissed that foreclosure action. *Id.* More than four years later in July 2015, the trustee filed a second foreclosure

action based on the borrower's default in August 2010 and all subsequent missed payments during the pendency of the prior suit. *Id.* The Third District reversed the trial court's summary judgment in favor of the borrower, and held that, based on *Bartram*, the lender could properly file its later suit. *Id.* at 62; *see also Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of N.Y. Mellon*, 198 So. 3d 1140, 1142 (Fla. 2d DCA 2016) (holding that a complaint alleging a continuing state of default "was sufficient to establish that foreclosure could be based on any of the missed payments since the initial breach"), *rev. dismissed*, 228 So. 3d 72 (Fla. 2017).

We affirm the trial court's final judgment of foreclosure.

Affirmed.

CIKLIN and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Third District Court of Appeal

State of Florida

Opinion filed March 7, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1015
Lower Tribunal No. 14-3780

Fincantieri-Cantieri Navali Italiani S.p.A.,
Appellant,

vs.

Anthony Yuzwa,
Appellee.

An appeal from a non-final order from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Fowler White Burnett, P.A. and Allan R. Kelley and Helaine S. Goodner; Sheppard, Mullin, Richter & Hampton LLP and Martin D. Katz, pro hac vice (Los Angeles, CA), for appellant.

Loughren, Doyle & Reising, P.A. and Richard B. Doyle, Jr. (Ft. Lauderdale); Banning LLP and William L. Banning, pro hac vice (Rancho Santa Fe, CA), for appellee.

Before SUAREZ, LAGOA, and SALTER, JJ.

SUAREZ, J.

In this case, we are asked to determine whether Florida courts have personal jurisdiction over an Italian shipbuilder based on injuries a Canadian citizen sustained

on a cruise ship built in Italy, and owned by a Washington corporation, while the ship was in international waters in the Pacific Ocean. The trial court determined that it had both general and specific personal jurisdiction. We reverse because the foreign shipbuilder's contacts with Florida are not so continuous and systematic as to render it essentially at home in this State nor is there an adequate connection between Florida and the underlying claims.

BACKGROUND

Fincantieri-Cantieri Navali Italiani S.p.A. ("Fincantieri"), Appellant/Defendant below, is an Italian shipbuilding company. Anthony Yuzwa ("Yuzwa"), Appellee/Plaintiff below, is a Canadian citizen who was injured while working as a performer aboard a Fincantieri-built cruise ship—the MS *Oosterdam*. Fincantieri built the *Oosterdam* in Italy pursuant to a contract, signed in London and governed by English law, with HAL Antillen N.V. ("HAL"), a Netherlands Antilles corporation and subsidiary of the Miami-based Carnival Corporation ("Carnival"). The *Oosterdam* is owned by Holland America Line, a Carnival subsidiary headquartered in Seattle, Washington.

On February 14, 2011, Yuzwa, who worked aboard the *Oosterdam* as a professional dancer, was injured during a rehearsal when a stage lift crushed his foot. This occurred while the ship was off the coast of Mexico in the Pacific Ocean, having embarked from its home port in San Diego, California the day before. Yuzwa sued

Fincantieri, and other defendants, in both California and Florida. However, following jurisdictional discovery in California, Yuzwa dismissed Fincantieri from that case, maintaining the instant action in Florida against Fincantieri and one other defendant (Harbour Marine Systems, Inc.).[1]

Yuzwa's operative Complaint asserts claims for negligence, strict products liability, and breach of express and implied warranty. Fincantieri moved to dismiss for lack of personal jurisdiction and *forum non conveniens*[2] and attached sworn proof contesting Yuzwa's jurisdictional allegations. Yuzwa filed an opposition with supporting declarations, the deposition of a senior Fincantieri executive, and various other exhibits. Following a non-evidentiary hearing, the trial court denied Fincantieri's motion to dismiss. This timely appeal follows.

ANALYSIS

We review the trial court's order denying Fincantieri's motion to dismiss for lack of personal jurisdiction *de novo*. See, e.g., Wendt v. Horowitz, 822 So. 2d 1252, 1256 (Fla. 2002). Our jurisdictional analysis is governed by Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989), which requires both a statutory and constitutional inquiry to determine whether Florida courts may exercise personal jurisdiction over a nonresident defendant. First, the plaintiff must allege sufficient

[1] Harbour Marine is not a party to this appeal.
[2] Because we find jurisdiction is lacking, we do not address *forum non conveniens*.

jurisdictional facts to bring the action within the ambit of Florida's long-arm statute: section 48.193, Florida Statutes (2017). Id. at 502. Second, the nonresident defendant must have sufficient "minimum contacts" to satisfy constitutional due process requirements. Id.; see also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.").

Unlike long-arm statutes in other states, Florida's statutory requirements are not coextensive with federal due process requirements. See Internet Sols. Corp. v. Marshall, 39 So. 3d 1201, 1207 (Fla. 2010) (explaining that Florida's long-arm statute "bestows broad jurisdiction" whereas "United States Supreme Court precedent interpreting the Due Process Clause . . . imposes a more restrictive requirement."); cf Modern Principles of Personal Jurisdiction, 4A Fed. Prac. & Proc. Civ. § 1069 (4th ed.) ("[B]ecause a majority of states (and Puerto Rico) have enacted jurisdictional statutes that either have expressly incorporated the due process standard or have been interpreted to extend to the limits of due process, this analysis frequently is collapsed by the federal court into a one-step inquiry: does the assertion of personal jurisdiction satisfy the requirements of due process?").

A key component of the Venetian Salami analysis is its allocation of the burden of proof. Initially, the plaintiff bears the burden of pleading sufficient

jurisdictional facts to fall within the long-arm statute. Venetian Salami, 554 So. 2d at 502. "If the allegations in the complaint sufficiently establish long-arm jurisdiction, then the burden shifts to the defendant to contest the jurisdictional allegations in the complaint, or to claim that the federal minimum contacts requirement is not met, by way of affidavit or other similar sworn proof.[3]" Belz Investco Ltd. P'ship v. Groupo Immobiliano Cababie, S.A., 721 So. 2d 787, 789 (Fla. 3d DCA 1998) (citing Venetian Salami, 554 So. 2d at 502; Field v. Koufas, 701 So. 2d 612 (Fla. 2d DCA 1997)). "If properly contested, the burden then returns to the plaintiff to refute the evidence submitted by the defendant, also by affidavit or similar sworn proof." Id. If the parties' sworn proof is in conflict, "the trial court must conduct a limited evidentiary hearing to resolve the factual dispute." Id.[4]

Both the long-arm statute and federal due process distinguish between two types of personal jurisdiction: general and specific. General jurisdiction is based purely on a defendant's contacts with the forum state, regardless of where the cause of action arises. In order for a state to exercise such extensive jurisdiction, a

[3] Much of Fincantieri's sworn proof takes the form of declarations. See Def. Control USA, Inc. v. Atlantis Consultants Ltd. Corp., 4 So. 3d 694, 699 (Fla. 3d DCA 2009) (holding that declarations can be used in lieu of affidavits to establish jurisdictional facts).

[4] The trial court's analysis deviated from Venetian Salami. Instead of shifting the burden back to the Plaintiff once Fincantieri had submitted its sworn proof contesting the jurisdictional allegations in the Complaint, the court determined that it "must consider the pleadings and affidavits in the light most favorable to the plaintiff."

defendant's contacts must be sufficiently "substantial and not isolated" and "continuous and systematic." See § 48.193(2), Fla. Stat. (2017); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) ("Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation." (footnote omitted)). Specific jurisdiction does not require the same level of contacts; instead, jurisdiction is based on the cause of action arising out of a defendant's certain minimum contacts with the state. See § 48.193(1)(a), Fla. Stat. (2017); Helicopteros, 466 U.S. at 414 ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction."). Because the trial court incorrectly found that Fincantieri was subject to both general and specific jurisdiction, we address each category in turn.

General Jurisdiction

Florida's long-arm statute provides a basis for asserting general personal jurisdiction pursuant to section 48.193(2):

> (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the

> jurisdiction of the courts of this state, whether or not the claim arises from that activity.

The trial court determined that Fincantieri was subject to general jurisdiction based on the following contacts with Florida: (1) Fincantieri's long-standing "partnership" with Carnival, spanning over 25 years; (2) numerous contracts with Carnival, resulting in the construction of around 60 cruise ships and amounting to 90% of the cruise ships built under Fincantieri's Merchant Ships Business Unit; (3) over 25 billion dollars in revenue for building ships for Carnival; (4) a Florida office and Area Manager to solicit cruise ship business and serve Florida clients; and (5) frequent meetings and communications with Carnival related to the building of cruise ships.

It is undisputed that Fincantieri has a substantial business relationship with Carnival; however, we conclude that some of the trial court's findings are overstated. For instance, the trial court found that there was a "partnership" between Carnival and Fincantieri based on the deposition testimony of a Fincantieri representative who referred to the relationship with Carnival as "more of a partnership[.]" But there is no evidence in the record that Carnival and Fincantieri have ever formed a legal partnership. See 8B Fla. Jur. 2d Business Relationships § 541 ("A partnership is only established when both parties contribute to the capital or labor of the business, have a mutuality of interest in both profits and losses, and agree to share in the assets and liabilities of the business."). And although Fincantieri has a single employee in

Florida—the "Area Manager"—the sworn proof below conclusively shows that he simply serves as a liaison, directing any ship owner inquiries to the correct person or office in Italy. Finally, testimony from Fincantieri's Senior Executive Vice President of the Merchant Ships Business Unit establishes that meetings with Carnival are "very, very usually done in Italy" because that is where Fincantieri has all its organization, structure, technical development, and shipyards.

Notwithstanding the trial court's misstatements of the evidentiary record, Fincantieri does appear to be engaged in "substantial and not isolated activity within this state" under the plain meaning of the long-arm statute due to years of shipbuilding for Carnival. However, we find that Fincantieri's contacts with Florida are nevertheless insufficient to satisfy the more restrictive due process requirements for general jurisdiction.

In International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), the United States Supreme Court held that in order to subject a foreign corporation to personal jurisdiction, due process requires certain "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The Court further explained that "there have been some instances in which the *continuous* corporate operations within a state were thought so *substantial* and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Id. at 318 (emphasis

added). This eventually came to be known as general jurisdiction. Over time, the Supreme Court has refined its approach to general jurisdiction and provided more guidance as to the "continuous and substantial" contacts necessary to satisfy due process.

An early "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum" is the Supreme Court's 1952 decision in Perkins v. Benguet Consol. Min. Co., 342 U.S. 437 (1952). Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 928 (2011) (quoting Donahue v. Far Eastern Air Transport Corp., 652 F.2d 1032, 1037 (C.A.D.C.1981)). In Perkins, the Court ruled that Ohio could exercise general jurisdiction over a Philippine mining corporation because Ohio was the company's temporary principle place of business while the Japanese were occupying the Philippine Islands during World War II. 342 U.S. at 447. Although the company had halted mining operations due to the Japanese occupation, the company's president and principle stockholder maintained an office in Ohio where he carried out "a continuous and systematic supervision of the necessarily limited wartime activities of the company." Id. at 448.

In Helicopteros, a case arising out of a helicopter crash in Peru, the Court held that general jurisdiction over a Colombian corporation was improper because its contacts with Texas—a contract negotiation session, accepting checks drawn on a

Texas bank, purchasing 80% of its helicopter fleet along with parts and accessories, and sending personnel to Texas for training—were not sufficiently "continuous and systematic." 466 U.S. at 416. Although the Columbian corporation made regular purchases in Texas for substantial sums, the Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." Id. at 418.

More recently, the Supreme Court has decided two cases that raise the bar even higher for general jurisdiction. In Goodyear, the Court held that North Carolina courts lacked general jurisdiction over foreign tire manufacturers in a case arising out of a bus accident in France. 564 U.S. at 919. Although some of the foreign manufacturers' tires were sold in North Carolina, the Court explained that the "[f]low of a manufacturer's products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction . . . [b]ut ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." Id. at 927. More importantly, a unanimous Supreme Court held that in order to be subject to general jurisdiction, a foreign corporation's contacts with the forum State must be "so 'continuous and systematic' as to render [it] essentially at home in the forum State." Id. at 919.

Similarly, in Daimler AG v. Bauman, 134 S. Ct. 746 (2014), the Court relied on the "at home" requirement in Goodyear to determine that California courts lacked general jurisdiction over Daimler, a German automobile manufacturer, for claims arising out of Argentina's "Dirty War." The Court held that even if the substantial California contacts of Daimler's American subsidiary, Mercedez-Benz USA, were attributable to Daimler, general jurisdiction would not be proper because California was not Daimler's place of incorporation or principle place of business; in other words, Daimler was not "at home" in California. Id. at 760-61.

Based on this understanding of the constitutional due process requirements, we conclude that Fincantieri is not subject to general jurisdiction in Florida because its contacts are not sufficiently "continuous and systematic" as to render it "at home" in this State. In comparing this case to the "textbook" example in Perkins, we observe that although Fincantieri does have an office in Miami, the unrefuted sworn proof below was that the purpose of this office, with its single employee, is to serve as a point of contact for ship owners and direct any inquiries to the correct person or office in Italy. Unlike the office in Perkins, Fincantieri's Miami office is not involved in any of the company's actual operations. Indeed, all of Fincantieri's executive officers and directors reside in Italy. Moreover, the vast majority of Fincantieri's 7,000 plus employees are based in the company's offices and shipyards in Italy.

In both Goodyear and Daimler, the Supreme Court explained that with respect to a corporation, "the paradigm forum for the exercise of general jurisdiction . . . [is] the place of incorporation and principal place of business . . . ." Daimler, 134 S. Ct. at 760 (quoting Goodyear, 564 U.S. 735). Here, it is undisputed that Fincantieri is an Italian corporation, and its principal place of business is Italy. While it is true that general jurisdiction is not necessarily limited to those two "paradigm forums," we decline to "look beyond the exemplar bases *Goodyear* identified," such as Perkins, "and approve the exercise of general jurisdiction" based on the magnitude of Fincantieri's business activities in Florida. See Daimler, 134 S. Ct. at 761 (declining to go beyond the paradigm forums and approve the exercise of general jurisdiction wherever a corporation "engages in a substantial, continuous, and systematic course of business").

Yuzwa points us to a single unpublished opinion in support of his argument that general jurisdiction exists in this case. See Barriere v. Cap Juluca, No. 12-23510-CIV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014). In Barriere, the United States District Court for the Southern District of Florida determined that it had general jurisdiction over Cap Juluca, an Anguillan resort, based on its "substantial and not isolated activity in Florida[,]" which included the maintenance and operation of a Miami sales office; a Miami agent who managed Cap Juluca's assets; and a

Florida-based agent that promoted, managed, operated, and provided reservation services for Cap Juluca. Id. at *8.

We are not persuaded that Barriere is applicable here. As an initial matter, we note that Cap Juluca did not include any sworn proof with its motion to dismiss, so the allegations in the complaint remained unrebutted. Id. Further, unlike the office in Barriere, Fincantieri's Miami liaison office is not a sales office, and there is no evidence that Fincantieri's assets are managed by a Florida-based agent. Finally, the reasoning in Barriere was recently called into question in McCullough v. Royal Caribbean Cruises, Ltd., 268 F. Supp. 3d 1336, 1349 (S.D. Fla. 2017) ("Thus, this Court disagrees with the ruling in *Barriere*, as it is inconsistent with *Daimler*.").

Because Fincantieri's contacts with Florida were not sufficiently "continuous and systematic" as to render it "at home" in this State, we hold that it is not subject to general jurisdiction. We now turn to the second category of personal jurisdiction: specific jurisdiction.

Specific Jurisdiction

Section 48.193(1)(a) lists several specific acts that could subject a nonresident defendant to personal jurisdiction in Florida, provided that the plaintiff's cause of action "arises from" the specified acts.

> (1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her

> personal representative to the jurisdiction of the courts of this state **for any cause of action arising from any of the following acts**:

(emphasis added). Yuzwa alleges that Fincantieri is subject to specific jurisdiction in Florida based on the following two acts:

> 1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
> 2. Committing a tortious act within this state.

§ 48.193(1)(a), Fla. Stat.

As to the first act, —"[o]perating, conducting, engaging in, or carrying on a business . . . in this state"—it is undisputed that Fincantieri does business in Florida. But the relevant inquiry here is whether Yuzwa's cause of action *arises from* Fincantieri's business in Florida. See Moo Young v. Air Canada, 445 So. 2d 1102, 1104 (Fla. 4th DCA 1984) ("The fact that a non-resident does business in Florida is not enough to obtain jurisdiction over it. In addition, there must be some connection between the cause of action pleaded and the business operations conducted in Florida."). This is known as the "connexity" requirement. Id. The trial court, based on an expansive interpretation of this requirement, found that there was a sufficient connection between Yuzwa's claims and Fincantieri's business in Florida. We disagree.

The trial court relied on several cases in support of its holding that "'connexity' is found where a defendant is engaging in business activities related to

the types of products or activities that caused a plaintiff harm." While it is true that the injury need not occur in Florida, and the product that caused the injury need not be sold in Florida, we are reluctant to find that the connexity requirement has been satisfied where *both* the injury and the sale of the product occurred outside of the State, as is the case here. Indeed, in all of the cases the trial court uses for support, there is a clear connection to Florida. See Davis v. Pyrofax Gas Corp., 492 So. 2d 1044, 1044 (Fla. 1986) (finding that a nonresident manufacturer or wholesaler could be sued in Florida where a space heater sold in Michigan, but also marketed and sold in Florida, caused injury in Florida); Canron Corp. v. Holt, 444 So. 2d 529, 530 (Fla. 1st DCA 1984) (finding jurisdiction over a New York corporation, with its principal place of business in South Carolina, where the corporation sold and shipped equipment to Florida that later caused injury in Georgia); Kravitz v. Gebrueder Pletscher Druckgusswaremfabrik, 442 So. 2d 985, 987 (Fla. 3d DCA 1983) (finding jurisdiction over a foreign bicycle rack manufacturer where the rack was purchased in Illinois, but identical racks were also sold in Florida, and the injury occurred in Florida); Shoei Safety Helmet Corp. v. Conlee, 409 So. 2d 39 (Fla. 4th DCA 1981) (finding jurisdiction over a Japanese helmet manufacturer where the helmet was sold indirectly in Florida, and the injury also occurred in Florida).

Here, there is no apparent connection between Yuzwa's claims and Fincantieri's business in Florida. The *Oosterdam* was not constructed in Florida; it

was not purchased in Florida; it is not owned by a Florida entity, it did not embark from a Florida port; and the injury, to a non-Florida resident, occurred thousands of miles away from Florida in the Pacific Ocean. The only connection Yuzwa identifies is that similar cruise ships have been sold in Florida. We hold that this is far too remote to satisfy the connexity requirement under both the long-arm statute and the Due Process Clause. See Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., 137 S. Ct. 1773, 1781 (2017) (explaining that "a defendant's relationship with a. . . third party, standing alone, is an insufficient basis for jurisdiction"); Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1223–24 (11th Cir. 2009) ("A finding that such a tenuous relationship . . . somehow satisfied the relatedness requirement would not only contravene the fairness principles that permeate the jurisdictional due process analysis, but would also interpret the requirement so broadly as to render it virtually meaningless.").

Finally, we address the second act upon which specific jurisdiction is based—"[c]ommitting a tortious act within this state." § 48.193(1)(a)(2), Fla. Stat. Here again, it is not apparent how Florida is remotely connected to the underlying claims. Moreover, the plain language of the statute requires that the actual tortious act be committed within the state. Yuzwa alleges that Fincantieri negligently designed the *Oosterdam's* stage and lifts in Florida. But this allegation is contradicted by the unrebutted sworn proof below, which establishes that Fincantieri designed the

Oosterdam in Italy and purchased a "turnkey" stage from HMS, S.A., a French company. Yuzwa also argues that "Fincantieri, through its agent, HMS, negligently serviced, maintained and/or repaired the stage in Florida at least once during the warranty period." While it is true that Fincantieri inspected the *Oosterdam* once in Florida in 2004, the unrebutted sworn proof below was that "the inspection and maintenance of the entertainment areas and stage would have been undertaken by HMS, which Fincantieri neither directed nor controlled." Consequently, we do not find an adequate connection between Florida and either of the two specified acts upon which specific jurisdiction was based.

CONCLUSION

Because Fincantieri's contacts with Florida do not render it "at home" here, and there are insufficient connections between this state and the underlying claims, we reverse, holding that the circuit court lacked both general and specific personal jurisdiction over Fincantieri.

Reversed.

Third District Court of Appeal

State of Florida

Opinion filed March 07, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2803
Lower Tribunal No. 16-438

Norman Mesnikoff,
Petitioner,

vs.

FQ Backyard Trading, LLC,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Appellate Division, Sarah Zabel, Valerie R. Manno Schurr, and Monica Gordo, Judges.

Arthur J. Morburger, for petitioner.

Chase Law, LLC, and Kenneth E. Chase (Washington, DC), for respondent.

Before ROTHENBERG, C.J., and SALTER and LOGUE, JJ.

ROTHENBERG, C.J.

The petitioner, Norman Mesnikoff ("Mesnikoff"), seeks second-tier

certiorari review of the circuit court appellate division's per curiam affirmance of a final judgment of eviction entered in favor of the respondent, FQ Backyard Trading, LLC ("Backyard Trading"). Because we conclude that the county court lacked subject matter jurisdiction to enter the final judgment of eviction, we grant the petition and quash the decision entered by the circuit court appellate division.

I. Factual and Procedural History

Mesnikoff and his girlfriend, Doris Dubler, began to live together in December 1989, after Dubler purchased a condominium titled solely in her name. On June 28, 2002, Dubler executed the Doris Dubler Revocable Trust ("revocable trust"), which provides that if Dubler is survived by Mesnikoff, the trustee shall pay off the existing mortgage on the condominium and permit Mesnikoff to reside in the condominium for the rest of his life so long as he pays the real estate taxes and maintenance.

On February 24, 2010, without Mesnikoff's knowledge, Dubler executed the First Amendment to the Doris Dubler Revocable Trust ("amended revocable trust"), which eliminated the above referenced provision, but added several provisions affecting Mesnikoff. First, the amended revocable trust provides that if Dubler is survived by Mesnikoff, the trustee shall pay Mesnikoff $25,000 from a specific brokerage account. Second, if the trust estate contains the condominium at the time of Dubler's death, the trustee shall sell the condominium as soon as

practicable, and the proceeds from the sale shall be distributed to Dubler's then-living children in equal shares, per stirpes. Lastly, if Mesnikoff still resides in the condominium at the time of Dubler's death, Mesnikoff may occupy the condominium until the condominium is sold, provided that he pays the real estate taxes and the maintenance costs of the condominium.

Following Dubler's death in March 2016, Mesnikoff was notified that the successor co-trustees of the revocable trust, Steven Kugler and Shelley Shader (Dubler's children), were selling the condominium and that Mesnikoff would have to vacate the condominium upon its sale. On July 18, 2016, Kugler and Shader, individually and as co-trustees of the revocable trust, sold the condominium to Backyard Trading for $245,000.

After the condominium was sold to Backyard Trading, Mesnikoff refused to vacate the condominium, and Backyard Trading initiated the underlying action in county court against Mesnikoff. Backyard Trading filed a "Complaint for Possession of Real Property and Ejectment from Real Estate," which provided, in part, as follows: "NOW COMES Plaintiff [Backyard Trading] and hereby files this complaint for possession of real property and to eject the wrongful possessor of real property, Defendant Norman Mesnikoff . . . **under Florida Statute 66.021**."[1] (emphasis added). Backyard Trading requested that the county court

[1] Chapter 66 of the Florida Statutes pertains solely to actions for ejectment.

enter a judgment "ejecting [Mesnikoff] from the [condominium] and restoring possession" of the condominium to Backyard Trading. Importantly, the complaint made absolutely no reference to a tenancy; a rental agreement; or Chapter 83, Part II, Florida Statutes (2016), which is known as the Florida Residential Landlord and Tenant Act ("the Act").

In response, Mesnikoff filed an answer and asserted several affirmative defenses. Mesnikoff explained that he initially did not know that the condominium was titled solely in Dubler's name, and from the date the condominium was purchased, he and Dubler opened a joint bank account to pay for all expenses associated with the condominium, including the mortgage, real estate taxes, insurance, maintenance, assessments, and improvements. Mesnikoff's federal pension and social security payments and Dubler's social security payment were deposited into the joint bank account. Mesnikoff also explained that after he learned that his name did not appear on the deed, Dubler promised him that he could live in the condominium for the rest of his life pursuant to the terms of the revocable trust. Mesnikoff became aware of the amended revocable trust following Dubler's death, and he asserted that Dubler's children fraudulently induced Dubler into changing the terms of the revocable trust. Based on these assertions, Mesnikoff claimed, in part, that Backyard Trading has unclean hands because its attorney had advance knowledge that Mesnikoff had been living in the

condominium for twenty-seven years and was claiming that he had an equitable lien and ownership interest in the condominium, and that Mesnikoff had requested that the sale not take place or, in the alternative, that the sale proceeds be held in escrow until Mesnikoff's equitable lien rights had been resolved.

Following Mesnikoff's answer and affirmative defenses, Backyard Trading moved for summary judgment. In its motion, despite the absence of any allegations in its complaint concerning a residential tenancy, Backyard Trading stated that Mesnikoff is a "**tenant** who refuses to vacate the premises." (emphasis added).

During the hearing, the county court correctly recognized its lack of jurisdiction to adjudicate Backyard Trading's action for ejectment filed under section 66.021. See § 26.012(2)(f), Fla. Stat. (2016) (providing that circuit courts have "exclusive original jurisdiction" in "actions for ejectment"). When addressing the county court's concern relating to subject matter jurisdiction, Backyard Trading's counsel announced that he was dismissing the ejectment action and was proceeding solely on a claim for "possession," arguing that the instant case involves "a landlord-tenant issue."[2] The county court continued to question whether it had subject matter jurisdiction, and it then reserved ruling and

[2] The trial court entered a memo of disposition reflecting that Backyard Trading dismissed its ejectment count and was going forward only as to its count for "possession."

encouraged the parties to come to an agreement.

After the parties failed to enter into a settlement, the county court entered an order granting Backyard Trading's motion for summary judgment. Thereafter, the county court entered a final judgment in favor of Backyard Trading on what the county court called a "Complaint for Eviction," which entitled Backyard Trading to recover possession of the condominium from Mesnikoff.

Mesnikoff then appealed the judgment of eviction entered by the county court to the circuit court appellate division, arguing that the county court lacked subject matter jurisdiction. The circuit court, sitting in its appellate capacity, entered a per curiam affirmance. Mesnikoff's second-tier petition for certiorari review followed.[3]

II. Analysis

"The standard governing the disposition of a petition for second-tier certiorari in a district court is narrow: '[T]he district court must determine whether

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[3] Although the circuit court, sitting in its appellate capacity, issued a per curiam affirmance in the present case, Mesnikoff was not precluded from seeking second-tier certiorari review in this Court. See Auerbach v. City of Miami, 929 So. 2d 693, 694-95 (Fla. 3d DCA 2006) (exercising jurisdiction to review a circuit court appellate division per curiam affirmance where "[f]ailing to do so . . . would . . . [result in] an unjustified approval of the obvious failure of the circuit court to apply the correct law and the resulting 'miscarriage of justice' which occurred below") (citations omitted and footnote omitted); Rich v. Fisher, 655 So. 2d 1149, 1150 (Fla. 4th DCA 1995) (noting that "[c]ounty court litigants . . . are not precluded from seeking review in the district court of appeal when the circuit court affirms without opinion").

the decision of the circuit court . . . is a departure from the essential requirements of law resulting in a miscarriage of justice.'" State, Dep't of Highway Safety & Motor Vehicles v. Fernandez, 114 So. 3d 266, 269-70 (Fla. 3d DCA 2013) (quoting Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 725 (Fla. 2012)). The circuit court's decision departs from the essential requirements of law where the circuit court fails to afford procedural due process or fails to apply the correct law. Nader, 87 So. 3d at 722-23 (quoting Haines City Cmty. Dev. v. Heggs, 658 So.2d 523, 530-31 (Fla. 1995)). In the instant case, Mesnikoff does not argue that the circuit court appellate division did not afford him procedural due process. Therefore, the sole issue before this Court is whether the circuit court failed to apply the correct law, resulting in a miscarriage of justice.

In his petition for second-tier certiorari review, Mesnikoff argues that the county court lacked subject matter jurisdiction, and therefore, the circuit court failed to apply the correct law when affirming the final judgment entered by the county court. We agree, and therefore, we grant the petition and quash the circuit court's appellate decision.

During the summary judgment hearing, Backyard Trading realized that the county court did not have subject matter jurisdiction to adjudicate its action for ejectment. Backyard Trading then led the trial court astray by characterizing its complaint as a two-count complaint—(1) ejectment under section 66.021, and (2)

possession—and by announcing that it was voluntarily dismissing the ejectment action and proceeding solely under its count for "possession." In making this argument, although Backyard Trading's complaint does not indicate in any fashion that Mesnikoff was a tenant under the Act, Backyard Trading informed the trial court that the case involved a "landlord-tenant issue." Thereafter, the trial court entered a final judgment on what the county court called Backyard Trading's "Complaint for Eviction."

Our review of the complaint clearly indicates that Backyard Trading pled only one count—ejectment under section 66.021. Specifically, Backyard Trading requested that the county court enter a judgment "ejecting [Mesnikoff] from the [condominium] and restoring possession" of the condominium to Backyard Trading. Therefore, once Backyard Trading voluntarily dismissed its sole count for ejectment, the trial court lacked subject matter as there were no remaining claims to adjudicate.[4] As the county court lacked subject matter jurisdiction, the decision of the circuit court, sitting in its appellate capacity, affirming the county court's judgment of eviction constitutes a departure from the essential requirements of law resulting in a miscarriage of justice. See Stel-Den of Am., Inc. v. Roof Structures, Inc., 438 So. 2d 882, 884 (Fla. 4th DCA 1983) (holding

[4] Even if Backyard Trading had not voluntarily dismissed its action for ejectment, the trial court would have nonetheless lacked subject matter jurisdiction because, as stated early, circuit courts have "exclusive original jurisdiction" in "actions for ejectment." § 26.012(2)(f).

that a court's "incorrect decision on subject matter jurisdiction . . . constitutes a departure from the essential requirements of law, sufficient to justify invocation of [second-tier] certiorari jurisdiction"). Accordingly, we grant Mesnikoff's second-tier certiorari petition and quash the per curiam affirmance issued by the circuit court appellate division.

Even if Backyard Trading did attempt to include in its complaint a second count for possession under section 83.59(1) of the Act, which it did not, we would nonetheless conclude that the county court lacked subject matter jurisdiction to enter a final judgment for eviction and possession because a landlord-tenant relationship did not exist. And as previously stated, a court's "incorrect decision on subject matter jurisdiction . . . constitutes a departure from the essential requirements of law, sufficient to justify invocation of [second-tier] certiorari jurisdiction." Stel-Den of Am., 438 So. 2d at 884.

The Act "applies to the rental of a dwelling unit." § 83.41, Fla. Stat. (2016). Although we agree that Backyard Trading is a "landlord" under the Act, § 83.43(3), Fla. Stat. (2016) (defining "landlord" as "the **owner** or lessor of a dwelling unit") (emphasis added), Mesnikoff is not a "tenant" under the Act because there was no rental agreement. See § 83.43(4), Florida Statutes (2016) (defining "tenant" as "any person entitled to occupy a dwelling unit under a rental agreement"); see also Toledo v. Escamilla, 962 So. 2d 1028, 1030 (Fla. 3d DCA

2007) (holding that, because the party occupying the dwelling unit "is not a 'tenant' as defined by the Act, the county court lacked subject matter jurisdiction"). Thus, section 83.59(1) of the Act does not apply.

In addition, we note that, based on his answer and affirmative defenses, which clearly indicated that Mesnikoff was not in possession of the condominium as a "tenant" and was claiming an equitable lien and ownership interest in the condominium, ejectment, not eviction, was the proper remedy. See Toledo, 962 So. 2d at 1030 ("We also find that when [the party in possession of the dwelling unit] asserted in her answer that she was not a tenant and that she had an equitable interest in the property, ejectment, not eviction, was the proper remedy, and the matter should have been transferred to the circuit court [because] [t]he circuit court has 'exclusive original jurisdiction' over ejectment actions"); see also Ward v. Estate of Ward, 1 So. 3d 238, 239 (Fla. 1st DCA 2008) (concluding that "the circuit court departed from the essential requirements of law in affirming the county court's exercise of jurisdiction" in a complaint for eviction where the defendants in the eviction action "asserted a claim to an equitable interest in the property they inhabited, which should have been resolved by the circuit court," noting that "circuit courts have exclusive original jurisdiction in ejectment actions"). Accordingly, we would have also granted Mesnikoff's second-tier certiorari petition for these separate reasons.

Petition granted; decision of circuit court appellate division quashed.

Third District Court of Appeal

State of Florida

Opinion filed March 7, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1936
Lower Tribunal No. 14-7465

Nationstar Mortgage, LLC,
Appellant,

vs.

Nelson Silva and Yesenia Silva,
Appellees.

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

Akerman LLP, Nancy M. Wallace (Tallahassee), William P. Heller and Marc J. Gottlieb (Fort Lauderdale), and Eric M. Levine (West Palm Beach), for appellant.

Corona Law Firm, P.A., Ricardo Corona, and Ricardo M. Corona, for appellees.

Before SUAREZ, SALTER and LUCK, JJ.

LUCK, J.

Nationstar Mortgage, LLC appeals the trial court's involuntary dismissal in favor of borrowers Nelson and Yesenia Silva entered after Nationstar's case-in-chief on its residential foreclosure complaint. The trial court granted involuntary dismissal because Nationstar's default letter did not comply with paragraph twenty-two of the mortgage. Because we conclude the default letter complied with the mortgage, we reverse the involuntary dismissal and remand for further proceedings.

Factual Background and Procedural History

The Silvas stopped paying the mortgage on their Miami-Dade home in February 2009. Nationstar sent a letter to the Silvas on April 6, 2009 letting them know about the default, the amount they owed, and how to cure it. Still, the Silvas did not pay their mortgage, and hadn't paid by the time of the bench trial.

Nationstar, on March 21, 2014, filed a foreclosure complaint against the Silvas. The complaint alleged that the Silvas defaulted on the promissory note by failing to pay their mortgage on February 1, 2009. The Silvas moved to dismiss the complaint because the foreclosure was barred by the five-year statute of limitations. The trial court dismissed the complaint, but allowed an amendment by interlineation "to allege a default date within 5 years of filing the complaint." This order was entered on September 17, 2014. Nationstar filed a notice of amendment by interlineation on October 3, 2014, amending the complaint to read:

"Defendant(s) has defaulted under the Note and Mortgage by failing to pay the payment due March 21, 2009, and all subsequent payments."

The bench trial was held on February 3, 2016. Only one witness testified: Ilosh Azarsepandan, a representative for Nationstar. Nationstar introduced evidence that it sent the default letter on April 6, 2009, and the Silvas had not made payments since the February 1, 2009 default.

At the close of Nationstar's case, the Silvas moved for involuntary dismissal arguing that the complaint failed to state a cause of action because the default letter did not correspond to the default date in the amended complaint, March 21, 2009. The trial court requested memoranda of law on whether Nationstar was required to provide a new notice of default for the March 21, 2009 date it claimed the Silvas defaulted on the loan. The parties briefed the issue of "whether [Nationstar] was required to send the [Silvas] a second breach letter due to the change in the default date in the Complaint." The trial court entered a final order on the Silva's motion dismissing the case. This appeal followed.

Standard of Review

We review an order of involuntary dismissal de novo. See Wells v. Sacks, 180 So. 3d 1223 (Fla. 3d DCA 2015). A motion for involuntary dismissal should be granted only "when there is no reasonable evidence upon which a [fact finder] could legally predicate a verdict in favor of the non-moving party." Tylinski v.

Klein Auto., Inc., 90 So. 3d 870, 873 (Fla. 3d DCA 2012); see also Deutsche Bank Nat. Trust Co. v. Huber, 137 So. 3d 562, 563-64 (Fla. 4th DCA 2014) ("When an appellate court reviews the grant of a motion for involuntary dismissal, it must view the evidence and all inferences of fact in a light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." (quotation omitted)).

Discussion

Nationstar contends that its April 6, 2009 default notice was sufficient under paragraph twenty-two of the mortgage, and the trial court erred by involuntarily dismissing the case. The Silvas respond that: (1) Nationstar was required to send a new default letter once it changed the default date in the complaint; and (2) the complaint did not allege, and Nationstar did not prove at trial, that the default was within the five-year statute of limitations.

1. The Default Letter

Paragraph 22 of the mortgage provides that:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to the Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in

> acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to reassert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.

"[A] mortgagee's default notice is sufficient if it substantially complies with the mortgage's default notice provision" – i.e. paragraph 22. Wells Fargo Bank, N.A. v. Hernandez & Silva Enterprises, Inc., 193 So. 3d 67, 67-68 (Fla. 3d DCA 2016). "Paragraph twenty-two is designed to ensure that a borrower receives essential information concerning his or her default, how to cure it, and his or her rights with respect to it. It is not a technical trap designed to forestall a lender from prosecuting an otherwise proper foreclosure action because a borrower, after the fact, decides that the letter might have been better worded." Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 19 (Fla. 2d DCA 2015).

The evidence from the bench trial showed that the April 6, 2009 default letter complied with paragraph twenty-two of the mortgage, and even if it didn't, the Silvas were not prejudiced by the discrepancy in the default date. Paragraph twenty-two provided that if the default was not cured – and the evidence was clear that it was not – Nationstar could accelerate "without further demand" and foreclose on the home. The default letter notified the Silvas that they did not make

their February 2009 mortgage payment, and by April they owed $6,245.68. Even so, the Silvas did not cure the default as required by the mortgage. As long as the default was not cured, and the Silvas did not pay, Nationstar was not required to send another default letter before accelerating the mortgage and proceeding with the foreclosure. See Milam, 177 So. 3d at 18 n. 4 (explaining that "[i]t does not follow that a borrower's continuing and uninterrupted failure to make monthly payments – as existed in this case – requires a new paragraph twenty-two notice letter for each instance in which the borrower fails to pay.").

Even if the default letter did not comply with paragraph twenty-two, "[a]bsent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract." Gorel v. Bank of New York Mellon, 165 So. 3d 44, 47 (Fla. 5th DCA 2015). In Gorel, the "Bank's default letter set a cure date twenty-nine days later, not thirty or more as required" by the terms of the mortgage. Id. The district court rejected the borrowers' defective-default-letter claim because "the defective notice did not prejudice Mr. Gorel, as he made no attempt to cure the default." Id. Here, too, the discrepancy in the date between the amended complaint and the default letter did not prejudice the Silvas because they made no attempt to cure the default from March 21, 2009 until trial. Without evidence they were prejudiced by the wrong date, the trial

court erred in granting involuntary dismissal based on the discrepancy between the amended complaint and the default letter.

2. Statute of limitations

The Silvas' claim that the default date in the complaint was outside the statute of limitations has already been rejected by the court. In Dhanasar v. JPMorgan Chase Bank, N.A., 201 So. 3d 825 (Fla. 3d DCA 2016), we explained that the foreclosure complaint "survived the asserted statute of limitations bar" because "the Bank's complaint specifically alleged that [the borrower] had failed to pay the April 2008 payment and all subsequent payments, and the action was filed within five years of a default payment." Id. at 826 (emphasis in original); see also Bartram v. U.S. Bank Nat'l Assoc., 211 So. 3d 1009, 1019 (Fla. 2016) ("[W]ith each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage"). Here, as in Dhanasar, Nationstar alleged the Silvas missed the March 21, 2009 payment and all subsequent payments. Nationstar also presented evidence at the bench trial that the Silvas had not made any payments since before February 2009. By alleging and proving that the Silvas missed all payments since March 21, 2009, Nationstar established that the Silvas defaulted on the mortgage within five years of the statute of limitations.

Conclusion

Viewing all inferences and evidence in the light most favorable to Nationstar, the trial court erred in granting involuntary dismissal in favor of the Silvas. We vacate the judgment for the Silvas, and reverse and remand for further proceedings.

Reversed and remanded with instructions.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16210

D.C. Docket No. 9:14-cv-80781-RLR

EDWARD LEWIS TOBINICK, MD,
a medical corporation
d.b.a. The Institute of Neurological Recovery,
INR PLLC,
a Florida professional limited liability company
d.b.a. The Institute of Neurological Recovery,
M.D. EDWARD TOBINICK,
an individual,

Plaintiffs - Appellants,

THE INSTITUTE OF NEUROLOGICAL RECOVERY,

Plaintiff,

versus

M.D. STEVEN NOVELLA,
an individual,

Defendant - Appellee,

YALE UNIVERSITY, et al.,

Defendants.

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

(March 8, 2018)

Before MARTIN, JORDAN, and GINSBURG,[*] Circuit Judges.

MARTIN, Circuit Judge:

Dr. Edward Tobinick appeals the District Court's award of attorney's fees to Dr. Steven Novella. Dr. Tobinick argues both that the District Court's decision to award attorney's fees and the amount of fees it awarded were made in error. This case presents an issue of first impression for our circuit. That is, whether the "exceptional case" standard for awarding attorney's fees in Patent Act cases, as articulated by the Supreme Court's recent decision in Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. ___, 134 S. Ct. 1749 (2014), also applies to Lanham Act cases. After careful review, and with the benefit of oral argument, we conclude that it does. We also conclude the District Court did not abuse its discretion in choosing to award attorney's fees, or in the fee amount it calculated. We affirm.

I. BACKGROUND

[*] Honorable Douglas H. Ginsburg, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

This is not the first time our Court has considered the dispute between Dr. Tobinick and Dr. Novella. Last year, this Court affirmed the District Court's decision in their dispute on the merits. Tobinick v. Novella, 848 F.3d 935, 939 (11th Cir. 2017). Now, we are asked to review the District Court's decision to award attorney's fees to Dr. Novella. We present only a brief overview of the facts and procedural history.

Dr. Tobinick is an internist and dermatologist who patented a treatment that includes injecting the drug etanercept near the spine. Id. at 940. Dr. Tobinick claimed this treatment works for spinal pain, neurological dysfunction, and Alzheimer's disease. Id. In 2013, Dr. Novella, a neurologist at Yale New Haven Hospital, wrote a blog post criticizing Dr. Tobinick's treatment as unsupported by medical evidence. Id. The following year, Dr. Tobinick and his affiliated clinics responded by suing Dr. Novella, Yale University, the Society for Science-Based Medicine ("Society"), and SGU Productions, LLC for (1) false advertising under the Lanham Act, and (2) unfair competition, trade libel, libel per se, and tortious interference with business relationships, all under state law.

The ensuing pre-trial litigation disposed of many claims and defendants, much of it before Dr. Novella filed an answer to the Tobinick complaint. Id. at 941–42. Then, the District Court granted summary judgment for the Society, ruling, among other things, that Dr. Novella's blog posts did not qualify as

commercial speech as required under the Lanham Act. On May 15, 2015, the Society moved for fees and costs under the Lanham Act. The Society argued that the dispute qualified as an exceptional case warranting fees under Burger King v. Pilgrim's Pride Corp., 15 F.3d 166 (11th Cir. 1994), because Dr. Tobinick's Lanham Act claim was without merit and he had pursued it in bad faith. In Burger King, this Court said that an exceptional case under the Lanham Act was one "where the infringing party acts in a malicious, fraudulent, deliberate or willful manner." Id. at 168 (quotations omitted). Ultimately, the District Court denied the Society's motion for fees, determining that Dr. Tobinick had not pursued his Lanham Act claim maliciously or fraudulently so as to make it an exceptional case worthy of fees under Burger King.

As for Dr. Tobinick's state law claims against him, Dr. Novella filed a special motion to strike under the California anti-SLAPP statute.[1] The motion sought dismissal of the California state law claims brought by Dr. Tobinick's California clinic as well as an award of costs and fees. The District Court granted Dr. Novella's motion to strike. In doing so, the court noted that "[a]s a prevailing defendant, Novella is entitled to recover his attorney's fees and costs under the anti-SLAPP statute" and directed Dr. Novella to file a separate motion for fees and

[1] "California law provides for the pre-trial dismissal of certain actions, known as Strategic Lawsuits Against Public Participation, or SLAPPs, that masquerade as ordinary lawsuits but are intended to deter ordinary people from exercising their political or legal rights or to punish them for doing so." Makaeff v. Trump Univ., LLC, 715 F.3d 254, 261 (9th Cir. 2013) (quotations omitted).

costs. By this point, the District Court had already granted summary judgment for the Society on the Lanham Act claim.

Dr. Novella then answered Dr. Tobinick's complaint and moved for summary judgment on the remaining Lanham Act claim. Dr. Tobinick moved to vacate the District Court's anti-SLAPP order, arguing that Dr. Novella had won that claim by fraud. Dr. Tobinick also moved for sanctions, saying Dr. Novella lied in his deposition. The District Court denied both of Dr. Tobinick's motions. The court also granted summary judgment for Dr. Novella because Dr. Novella's blog posts did not constitute commercial speech.

Next, Dr. Novella filed a motion seeking attorney's fees and costs. To begin, he asked for fees under the California anti-SLAPP statute. Dr. Novella said he had been charged $52,694.55 in fees and costs for preparation of the anti-SLAPP motion and reply. Indeed, he said he could rightfully have been charged $73,993.55 "but was provided a partial contingency fee discount out of respect for the fundamental First Amendment issues at hand." He also set out that he "accrued $9,147.50 in fees for defending the anti-SLAPP motion against a baseless motion for reconsideration," which would have been $10,995.00 but for the fee discount. He also sought $31,980.50 for fees associated with bringing the omnibus motion for fees. Finally, in this regard, Dr. Novella asked that a fee multiplier be applied "in recognition of the novelty and complexity of the issues, the level of expertise of

counsel, the contingency nature of a portion of the fees, and in recognition of the state public policy of discouraging meritless lawsuits." In total (with the multiplier), Dr. Novella requested $169,435.00 in costs and fees relating to the anti-SLAPP motion, although he provided the court with some alternative award amounts that were smaller.

Second, Dr. Novella asked for fees under the Lanham Act. He argued that Dr. Tobinick's lawsuit qualified as an exceptional case under the standard set out in Burger King and Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc., 253 F.3d 1332 (11th Cir. 2001). Although that court had already decided that a different defendant, the Society, was not eligible for fees under the Lanham Act, Dr. Novella argued that the case had become exceptional because Dr. Tobinick excessively multiplied the proceedings even after he lost his motion for summary judgment to the Society. Dr. Novella noted, "[i]n the six and a half months following the summary judgment to the Society . . . there were 131 new docket entries, the bulk of which arose from Plaintiffs' continued meritless prosecution of the Lanham Act claims." Dr. Novella sought $289,802.75 in fees relating to the Lanham Act claims. Although Dr. Novella advocated for the entire amount, he also broke down fees incurred before and after the ruling on the Society's motion for summary judgment: $66,204.00 before, and $223,598.75 after.

Third, Dr. Novella sought sanctions under 28 U.S.C. § 1927 against Dr. Tobinick's attorneys "for unreasonably and vexatiously multiplying the proceedings." He asked that Dr. Tobinick's attorneys be held jointly responsible for all fees and costs incurred after the District Court's summary judgment ruling for the Society.

In total Dr. Novella requested $624,639.99. Dr. Tobinick opposed the motion for fees, arguing it should be denied because Dr. Novella: (1) had violated Local Rule 7.3 by not providing a draft motion within 30 days of the District Court's final judgment; (2) had not supported his motion with credible evidence of the appropriate fee amounts; (3) had not shown bad faith on the part of Dr. Tobinick, so as to warrant fees under the Lanham Act or sanctions under 28 U.S.C. § 1927; and (4) because the awarding of anti-SLAPP statute fees violated the Erie[2] doctrine.

Dr. Tobinick submitted expert testimony supporting his argument that many of the fee entries submitted by Dr. Novella were not compensable because they were based on double-counting or nonrelevant work. The expert suggested that the appropriate fee award for the anti-SLAPP motion was $36,186. The Tobinick expert opined that no fees should be awarded under the Lanham Act because it was not an exceptional case. While the expert noted that similar double-counting

[2] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

problems were likely present in the request for Lanham Act fees, he did not offer any line-item objections to the Lanham Act fees or propose an alternative award amount.

The District Court exercised its discretion not to deny Dr. Novella's fee request for violating local rules. In an order dated December 23, 2015, the court wrote: "Given the prior orders addressing fee issues . . . as well as the history of this litigation, the Court finds Plaintiffs were not prejudiced by the failure to strictly comply with the rule, to the extent it applies to the fees Defendant requests."

On May 3, 2016, Dr. Novella filed a notice of supplemental authority, citing to Baker v. DeShong, 821 F.3d 620 (5th Cir. 2016). In DeShong, the Fifth Circuit relied on the Supreme Court's decision in Octane Fitness to say that exceptional cases under the Lanham Act should not be limited to cases of bad faith, but should also include cases "where (1) in considering both governing law and the facts of the case, the case stands out from others with respect to the substantive strength of a party's litigating position; or (2) the unsuccessful party has litigated the case in an 'unreasonable manner.'" Id. at 625 (quoting Octane Fitness, 134 S. Ct. at 1756). "Under this standard," Dr. Novella argued, "the exceptional nature of the case is readily apparent." Dr. Tobinick gave no response to the supplemental authority.

The District Court granted part of the attorney's fees and costs Dr. Novella sought under the anti-SLAPP statute and the Lanham Act, but denied his motion for sanctions under 28 U.S.C. § 1927. The court noted it had already ruled that Dr. Novella was entitled to fees under the anti-SLAPP statute, such that Dr. Tobinick's argument that anti-SLAPP fees should not be awarded at all was an attempt to relitigate an already decided matter. On the specific anti-SLAPP fee request, the court agreed with Dr. Tobinick that Dr. Novella had submitted time records with duplicative and unrelated entries. The court also determined the case was not complex enough to warrant a fee multiplier under California law. The court therefore reduced the award from Dr. Novella's requested $169,435 to $36,186 for anti-SLAPP-related fees. This was the exact amount Dr. Tobinick's expert had suggested.

On the Lanham Act fee request, the court decided that this was an exceptional case warranting a fee award. In reaching this decision, the court relied on the new exceptional case standard set out in Octane Fitness. The court stated: "Although the Eleventh Circuit has not yet considered the effect of Octane Fitness on its Lanham Act 'exceptional case' jurisprudence, district courts in this circuit and other circuit courts have consistently held that a showing of subjective bad faith or fraud is no longer required." The court noted that it had twice before ruled against the plaintiffs on the issue of commercial speech, although in different

procedural postures. The court observed that even after these rulings, "Plaintiffs repeatedly sought to multiply the proceedings by adding new parties and claims," moving for sanctions, and accusing Dr. Novella of perjury. The court concluded: "Based on the totality of the record, particularly the Court's repeated rulings that the speech at issue was not commercial speech and Plaintiffs' belated attempts to inject new issues into the proceedings by making unsupported allegations of perjury, the Court finds this case to be an 'exceptional' one meriting an award of fees under the Lanham Act." The award was for the full amount requested by Dr. Novella, but only as to those expenses incurred after the order granting summary judgment for the Society. The amount was $223,598.75. The court noted that Dr. Tobinick did not make any specific objections to the Lanham Act fees calculation.

The court declined to award sanctions under 28 U.S.C. § 1927, writing that "despite the Court's conclusion that Plaintiffs' conduct justifies an award of fees against them, the Court is unwilling to find that Plaintiffs' counsel's conduct is tantamount to bad faith."

On September 20, 2016, a final judgment of fees was issued, awarding a total of $259,784.75 ($36,186.00 for fees relating to the anti-SLAPP statute and $223,598.75 for fees relating to the Lanham Act). This appeal, seeking review of the fee award, followed.

II. STANDARD OF REVIEW

We review de novo questions of law. Loggerhead Turtle v. Cty. Council of Volusia Cty., 307 F.3d 1318, 1322 (11th Cir. 2002). We review a district court's decision to award fees and the amount of fees to award for abuse of discretion. See Tire Kingdom, 253 F.3d at 1335. "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." United States v. Toll, 804 F.3d 1344, 1353 (11th Cir. 2015) (quotation omitted).

III. ATTORNEY'S FEES UNDER THE LANHAM ACT

A. LEGAL STANDARD

"The Lanham Act creates a cause of action for unfair competition through misleading advertising or labeling." POM Wonderful LLC v. Coca-Cola Co., 573 U.S. ___, 134 S. Ct. 2228, 2234 (2014). As a threshold matter, a plaintiff claiming false advertising must show the defendant engaged "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). The Lanham Act also provides for an award of attorney's fees for prevailing parties under certain circumstances. Specifically, the Act states: "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." Id. § 1117(a).

The Eleventh Circuit has traditionally interpreted the Lanham Act's exceptional case standard to allow for the award of fees "only in exceptional

circumstances and on evidence of fraud or bad faith." Safeway Stores, Inc. v. Safeway Disc. Drugs, Inc., 675 F.2d 1160, 1169 (11th Cir. 1982). This Court later stated that "[w]hile Congress has not further defined 'exceptional,' the legislative history of the [Lanham] Act suggests that exceptional cases are those where the infringing party acts in a malicious, fraudulent, deliberate, or willful manner." Burger King, 15 F.3d at 168 (quotations omitted). Even if a court determines a case qualifies as exceptional, the ultimate decision whether or not to award attorney's fees "remains within the discretion of the trial court." Id.

The Patent Act's attorney's fee provision is identical to that in the Lanham Act. See 35 U.S.C. § 285 ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."). The Federal Circuit had read this provision to only apply in cases "when there has been some material inappropriate conduct," or when the litigation is both "brought in subjective bad faith" and "objectively baseless." Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378, 1381 (Fed. Cir. 2005). The Federal Circuit had also required that "the characterization of the case as exceptional must be established by clear and convincing evidence. Id. at 1382.

In Octane Fitness, the Supreme Court ruled that the Federal Circuit's interpretation of the Patent Act's attorney's fees provision was inconsistent with the statutory text. 134 S. Ct. at 1752–53. The Supreme Court said the Federal

Circuit's standard was "unduly rigid, and it impermissibly encumber[ed] the statutory grant of discretion to district courts." Id. at 1755. The Court based this decision entirely on the text of the Patent Act: "Our analysis begins and ends with the text of § 285. . . . The text is patently clear. It imposes one and only one constraint on district courts' discretion to award attorney's fees in patent litigation: The power is reserved for 'exceptional' cases." Id. at 1755–56. And the Court read "exceptional case" to mean "simply one that stands out from others with respect to the substantive strength of the party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." Id. at 1756. Whether a particular case stands out from the others was to be left to the discretion of district courts, considering the totality of the circumstances. Id.

The Supreme Court also rejected the Federal Circuit's "clear and convincing" standard. Id. at 1758. The Court said nothing in the statute required a heightened burden of proof, that it hadn't interpreted comparable fee-shifting provisions to require as much, and that "patent-infringement litigation has always been governed by a preponderance of the evidence standard." Id.

In this case, we are asked to consider whether the exceptional case standard from the Patent Act, as defined in Octane Fitness, also applies to cases brought under the Lanham Act. Every circuit to have considered the issue has said that it

does. See Romag Fasteners, Inc. v. Fossil, Inc., 866 F.3d 1330, 1334 (Fed. Cir. 2017); SunEarth, Inc. v. Sun Earth Solar Power Co., 839 F.3d 1179, 1181 (9th Cir. 2016) (en banc) (per curiam); Baker v. DeShong, 821 F.3d 620, 622 (5th Cir. 2016); Slep-Tone Entm't Corp. v. Karaoke Kandy Store, Inc., 782 F.3d 313, 317–18 (6th Cir. 2015); Georgia-Pacific Consumer Prods. LP v. von Drehle Corp., 781 F.3d 710, 721 (4th Cir. 2015); Fair Wind Sailing, Inc. v. Dempster, 764 F.3d 303, 314–15 (3d Cir. 2014).

We think this result correct. The language in the two provisions is identical. Compare 15 U.S.C. § 1117(a), with 35 U.S.C. § 285. Beyond that, courts generally "have looked to the interpretation of the patent statute for guidance in interpreting" the attorney's fees provision in the Lanham Act. Fair Wind Sailing, 764 F.3d at 315 (quotation omitted and alteration adopted). And Octane Fitness did gesture toward the Lanham Act, although fleetingly. In its discussion of the common meaning of "exceptional," the Court referenced a D.C. Circuit opinion written by then-Judge Ruth Bader Ginsburg and joined by then-Judge Scalia that "interpret[ed] the term 'exceptional' in the Lanham Act's identical fee-shifting provision, 15 U.S.C. § 1117(a) to mean 'uncommon' or 'not run-of-the-mill.'" Octane, 134 S. Ct. at 1756 (citing Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest., 771 F.2d 521, 526 (D.C. Cir. 1985)).

"We are bound to follow a prior precedent or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision." Chambers v. Thompson, 150 F.3d 1324, 1326 (11th Cir. 1998). In light of the broad language of Octane Fitness and the unanimous voice of other circuits to have considered this question, we recognize our past precedent as having been abrogated. We conclude that to be an "exceptional case" under the Lanham Act requires only that a case "stands out from others," either based on the strength of the litigating positions or the manner in which the case was litigated. Octane Fitness, 135 S. Ct. at 1756.

Dr. Tobinick seems to argue that even if the Octane Fitness standard is the right one for the future, it was not correct to apply it in his case. He says it is not fair for the District Court to apply the Octane Fitness standard to Dr. Novella's motion for fees when the stricter, pre-Octane Fitness standard applied to the Society's motion for fees. Dr. Tobinick offers no legal authority for this argument. Our review of the pleadings indicates that the Society did not ask the District Court to apply the Octane Fitness standard in considering its motion for fees, while Dr. Novella did. He filed a notice of supplemental authority describing the developing legal standard on this issue. Dr. Tobinick gave no response. The District Court did not err in applying the Octane Fitness standard.

B. APPLICATION OF THE OCTANE FITNESS STANDARD

Having decided the District Court used the correct standard, we now review its application of that standard. Under Octane Fitness, the District Court determined that the case was exceptional because it had ruled against Dr. Tobinick in three separate orders, and "[p]laintiffs repeatedly failed to produce new arguments or evidence to distinguish the Court's prior rulings." The court also noted "after the Court had twice ruled against Plaintiffs on the commercial speech issue, and more than eleven months after the litigation began, Plaintiffs repeatedly sought to multiply the proceedings by adding new parties and claims." The court acknowledged it had previously denied the Society's motion for fees, but said the case was now in a "very different procedural posture." It concluded that "[b]ased on the totality of the record, particularly the Court's repeated ruling that the speech at issue was not commercial speech and Plaintiffs' belated attempts to inject new issues into the proceedings by making unsupported allegations of perjury, the Court finds this case to be an 'exceptional' one meriting an award of fees under the Lanham Act."

This was not an abuse of discretion. The District Court identified a number of elements of this case that made it "not run-of-the-mill." See Octane, 134 S. Ct. at 1756 (quotation omitted). Especially compelling is the District Court's finding that Dr. Tobinick responded to a number of adverse decisions by accelerating the pace of his filings, repeatedly seeking to add parties and claims and bringing what

the court viewed as baseless motions for sanctions and accusations of perjury. As Dr. Novella points out:

> The [Society] summary judgment order was docket entry 157, and the order on the Fee Motion was docket entry 333. The case started on June 9, 2014. After nine months, and after every defendant other than Dr. Novella was dismissed, the case more than doubled in size by the time of the Fee Motion order.

On these facts, the District Court did not abuse its discretion in finding this was an exceptional case.

In making this decision, we do not place much weight on the fact that Dr. Tobinick continued litigating his case even in the face of a number of adverse rulings on whether Dr. Novella's blog posts qualified as "commercial speech." At the time, the question of what constituted commercial speech was an open question in this circuit. This Court resolved the question by way of a published decision after oral argument on the merits of this dispute. See Tobinick, 848 F.3d at 952. A case will not qualify as exceptional under the Lanham Act merely because one side has zealously pursued or defended its claim, especially on an issue with no directly controlling precedent. Even so, we conclude that the District Court was well within its discretion to find Dr. Tobinick's manner of litigating his suit made it an exceptional case supporting an attorney's fees award under the Lanham Act.

IV. ATTORNEY'S FEES UNDER THE ANTI-SLAPP STATUTE

Dr. Tobinick also argues that the District Court erred in awarding fees under the California anti-SLAPP statute. He argues, briefly, that the anti-SLAPP statute violates the Erie doctrine and various constitutional amendments and rules of civil procedure. However, we already affirmed the District Court's decision on the merits to grant Dr. Novella's special motion to strike under the California anti-SLAPP statute. See Tobinick, 848 F.3d at 943–47. And under that statute, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Code Civ. Proc. § 425.16(c)(1). Dr. Tobinick implies the District Court should have refused to award anti-SLAPP fees on equitable grounds. Even assuming the District Court could have done so, see Pfeiffer Venice Props. v Bernard, 123 Cal. Rptr. 2d 647, 650 (Cal. Ct. App. 2002) (explaining that "the award of attorney fees to a defendant who successfully brings a special motion to strike is not discretionary but mandatory"), it did not abuse its discretion in awarding attorney's fees relating to Dr. Novella's anti-SLAPP statute motion.

V. THE FEE AWARD CALCULATION

Dr. Tobinick also raises a number of arguments relating to the District Court's calculation of the fee award. In general, he provides a litany of reasons why the evidence of fees provided by Dr. Novella was so unreliable that the

District Court abused its discretion in accepting it. Among other things, Dr. Tobinick argues that the District Court had no discretion to calculate a fee award without seeing Dr. Novella's fee contract and that the information provided by Dr. Novella's attorneys relating to hours and hourly rates was not credible. But there was no requirement that Dr. Novella file his fee contract with the court. And we cannot say that the District Court abused its discretion in weighing the credibility of the evidence put before it. We are mindful that where Dr. Tobinick made line-item objections to the fee request, the District Court accepted those objections. The District Court did not abuse its discretion in reaching the amount that it did.

As a procedural matter, Dr. Tobinick also argues that the District Court erred in not conducting a hearing on the fee award and in accepting Dr. Novella's motion for fees even though it violated local rules. But again here there is no error. While Dr. Novella did request a status conference on fees-related issues, Dr. Tobinick never requested the hearing on fees he now says the District Court was required to provide. The District Court did not abuse its discretion in instead relying on the extensive written record before it. See Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988). And Dr. Tobinick has not shown that the District Court abused its discretion in allowing Dr. Novella to file an omnibus motion for fees without adhering to some of the procedural requirements under local rules. We "give[] great deference to a district court's interpretations of its

local rules." Clark v. Hous. Auth. of Alma, 971 F.2d 723, 727 (11th Cir. 1992). Here, the District Court determined, to the extent the local rules even applied to Dr. Novella's omnibus motion for fees, any failure to adhere to them did not prejudice Dr. Tobinick. This was not error.

VI. CONCLUSION

We affirm the District Court's fee award to Dr. Novella in its entirety.

AFFIRMED.