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Manuel Farach

Baker v. Economic Research Services, Inc., Case No. 1D16-4139 (Fla. 1st DCA 2018).
A forum selection clause survives termination of the contract which contains the clause.

Mullen v. Bal Harbour Village, Case No. 3d17-1144 (Fla. 3d DCA 2018).
A development order may not, according to the dictates of Florida Statute section 163.167(8)(a), be subject to the will of the voters through referenda and must instead be reviewed under a quasi-judicial process.

Central Carillon Beach Condominium Association, Inc. v. Garcia, Case Nos. 3D17-1198 & 3D17-1197 (Fla. 3d DCA 2018).
While individual members of associations may object to their ad valorem assessments as a class, each individual taxpayer within the association must be an individual defendant in a suit brought by the property appraiser that objects to a decision of the Valuation Adjustment Board.

Whynes v. American Security Insurance Company and Wells Fargo Bank, N.A., Case Nos. 4D16-2862 and 4D16-3668 (Fla. 4th DCA 2018).
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Waverly 1 and 2, LLC v. Waverly At Las Olas Condominium Association, Inc., Case No. 4D16-2866 (Fla. 4th DCA 2017).
On rehearing, the Fourth District re-affirms that language in a condominium declaration that "[a]nything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units" means that the landscaping requirements of section 9.1 of the condominium declaration does not apply to commercial unit owners.

Stein v. BBX Capital Corp., Case No. 4D16-4309 (Fla. 4th DCA 2018).
Absent specific allegations of fraud or material misrepresentations in the appraisal or sale process, an aggrieved shareholder is limited to her appraisal rights under Florida Statute section 607.1302 when a company sells its shares.

Rouffe v. Citimortgage, Inc., Case No. 4D16-3583 (Fla. 4th DCA 2018).
A third party to the note and mortgage may contest the amounts due in a foreclosure action but may not contest liability under the note and mortgage.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-4139

MARY BAKER and JANET THORNTON,

Appellants,

v.

ECONOMIC RESEARCH SERVICES, INC.,

Appellee.

On appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

March 22, 2018

PER CURIAM.

Economic Research Services, Inc., (ERS) sued former employees Mary Baker and Janet Thornton. Baker and Thornton moved to dismiss, arguing they were sued in the wrong venue. The trial court denied their motion, and Baker and Thornton appeal. We reverse because of an agreement that venue for certain claims would lie only in Delaware.

I.

Baker and Thornton once worked for ERS. In 2015, they resigned and started working for an ERS competitor, Berkley Research Group, LLC (BRG). Soon after, ERS sued Baker,

Thornton, and BRG in Leon County Circuit Court, alleging that the three engaged in "predatory acts" designed to harm ERS's Tallahassee office. The complaint asserted both contract and tort claims. It alleged Baker and Thornton violated non-compete provisions and restrictive covenants contained in the parties' written agreements. There were three agreements at issue: a 2007 Members Agreement, a 2011 Stockholder Agreement, and a 2015 compensation plan.[1] The 2007 and 2011 agreements had forum-selection clauses, but ERS argued those clauses were no longer in force and that their enforcement would be "unjust, unreasonable and violative of the express terms of the agreements."

The defendants moved to dismiss. They contended the claims against Baker and Thornton based on the 2007 and 2011 agreements failed because the 2015 compensation plan superseded those agreements, rendering them void. Alternatively, the defendants contended that if the 2007 and 2011 agreements remained in force, the forum-selection clauses precluded litigation in Florida. In response, ERS presented three arguments. First, ERS argued the forum-selection clauses had not survived the termination of the agreements. Second, ERS claimed that the venue issue was not yet ripe because if the 2015 compensation plan controlled (as the defendants alleged), it superseded the 2007 and 2011 agreements altogether, including their forum-selection clauses. Finally, ERS argued that its complaint raised claims unrelated to the 2007 and 2011 agreements, meaning the forum-selection clauses would not apply even if they remained in force.

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[1] ERS was not a signatory to either the 2007 or 2011 agreement. The 2007 agreement lists the contracting company as CorpSource Finance Holdings, LLC, and the 2011 agreement lists SourceHOV Holdings, Inc. The amended complaint alleged that SourceHOV acquired CorpSource, and that ERS was a subsidiary of SourceHOV. Regardless, both sides have relied on the agreements as though ERS were a signatory: ERS by suing for breach, and Baker and Thornton by seeking to enforce the venue provisions. Neither side has raised ERS's nonsignatory status as an issue, and we will not address it.

The trial court issued a short order denying the motion to dismiss. The court said it accepted all the complaint's allegations as true, but it offered no discussion of the forum-selection clause issue. Baker and Thornton appeal.

II.

Contracting parties have the right to select the forum for prospective disputes. *Land O'Sun Mgmt. Corp. v. Commerce & Industr. Ins. Co.*, 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) (citing *Mgmt. Comput. Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 631 (Fla. 1st DCA 1999)). And courts must enforce forum-selection agreements unless they are "shown to be unreasonable or unjust." *Id.* (citing *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986)). Aggrieved parties may appeal nonfinal orders that concern venue, Fla. R. App. P. 9.130(a)(3)(A), so they can avoid being "forced to litigate the entire controversy in the wrong forum." *Mgmt. Comput. Controls, Inc.*, 743 So. 2d at 630.

Everyone agrees that the 2007 and 2011 agreements contained mandatory forum-selection clauses, in which the parties "irrevocably and unconditionally consent[ed]" to "exclusive jurisdiction" in Delaware courts for any litigation "arising out of or relating" to the agreements. And everyone agrees that the 2007 and 2011 agreements are no longer in force. The principal question on appeal is whether the forum-selection clauses survived after the agreements terminated. We conclude that they did.

Unlike the substantive rights and obligations in a contract, a forum-selection clause is a structural provision that addresses the procedural requirements for dispute resolution. *See Silverpop Sys., Inc. v. Leading Mkt. Techs., Inc.*, 641 F. App'x 849, 857 (11th Cir. 2016) ("While contractual obligations may expire upon the termination of a contract, provisions that are structural (e.g., relating to remedies and the resolution of disputes) may survive that termination."). "Generally, dispute-related provisions, such as forum-selection clauses, are enforceable beyond the expiration of the contract if they are otherwise applicable to the disputed issue and the parties have not agreed otherwise." *U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd.*, 612 F. App'x 671, 672-73 (4th Cir. 2015).

This court has held that an arbitration provision does not require any type of "savings clause" to survive termination of the contract. *Auchter Co. v. Zagloul*, 949 So. 2d 1189, 1194 (Fla. 1st DCA 2007). The *Auchter* holding is applicable to forum-selection clauses as well.[2] If the parties wanted the forum-selection clauses to apply only during the life of the contracts, they could have explicitly stated so. *See id.* ("Because post-termination disputes are not expressly excluded from the scope of the dispute resolution provisions of the contract, we must construe them as intended to be included."). Instead, the clauses note that the parties "irrevocably and unconditionally" consent to submit to Delaware jurisdiction for "any" actions, suits, proceedings, or litigation arising out of or relating to the agreements. Because "any" means "all," *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir. 2003) (citing *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997)), the forum-selection clauses apply to *all* disputes related to the contracts, whether those disputes arose before or after termination of the contracts. *See Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255 (1977) ("[T]he parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship.").

In arguing that the forum-selection clauses terminated when the rest of the contracts did, ERS relies on the Third District's

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[2] "Courts have often compared forum selection clauses to arbitration clauses and have applied a similar enforceability analysis to both." *Carnival Corp. v. Booth*, 946 So. 2d 1112, 1115 (Fla. 3d DCA 2006) (quoting *Thunder Marine, Inc. v. Brunswick Corp.*, No. 8:06-CV-384-T17 EAJ, 2006 WL 1877093, at *8 (M.D.Fla. July 6, 2006)); *accord Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (noting that an agreement to arbitrate before a specific tribunal is "in effect, a specialized kind of forum-selection clause"). We reject ERS's argument that the pro-arbitration public-policy rationale included in *Auchter* means we should not follow it in a forum-selection case.

opinion in *DVDPlay, Inc. v. DVD 123 LLC*, 930 So. 2d 816 (Fla. 3d DCA 2006). In that case, contracting parties agreed their disputes would be litigated in California. *Id.* at 817. One party nonetheless sued in Florida, and the other party invoked the forum-selection clause. *Id.* The trial court found the defendant's repudiation of the agreement meant it could not enforce the forum-selection clause. *Id.* The Third District reversed, finding that the forum-selection clause "clearly was intended to survive the termination of the contract." *Id.* at 819. In doing so, the court noted the agreement's survival provision, which specifically stated the forum-selection clause would survive the expiration and/or termination of the agreement. *Id.* Based on that, ERS argues that a forum-selection clause will not survive the agreement's termination *unless* the agreement specifically says so. But that argument overstates *DVDPlay*'s holding. The Third District did not create a per se rule; it merely found that the forum-selection clause survived termination, citing the survival provision as clear evidence of the parties' intent. A forum-selection clause can survive an agreement's termination even without an explicit survival provision. *See TriState HVAC Equip., LLP v. Big Belly Solar, Inc.*, 752 F. Supp. 2d 517, 536 (E.D. Pa. 2010) *amended on other ground on reconsideration*, No. 10-1054, 2011 WL 204738 (E.D. Pa. Jan. 21, 2011) ("The exclusion of the forum-selection clause from the 'survival' clause—which, as a general matter, is intended to ensure the survival of certain contractual provisions that might otherwise be extinguished upon termination of the agreement—simply does not evidence a clear intent that, upon termination of the agreement, the forum-selection clause would cease to apply to claims arising under the agreement.").[3]

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[3] ERS also briefly argues that the forum-selection clauses are unenforceable because they are unjust and unreasonable, that "[f]orcing piecemeal litigation" of some claims against some defendants in Delaware and other claims against other defendants in Florida would burden all parties and waste judicial resources. (Ans. Br. at 17). This is insufficient to invalidate a forum-selection clause. *See Manrique*, 493 So. 2d at 440 n.4 ("We emphasize that the test of unreasonableness is not mere inconvenience or additional expense."); *Ill. Union Ins. Co. v. Co-Free, Inc.*, 128 So.

III.

Having determined that the forum-selection clauses survived the agreements' terminations, we must next decide whether the clauses covered the disputes at issue. In its complaint, ERS sought declaratory relief as to what governed Baker and Thornton's post-employment obligations: the 2007 and 2011 agreements or the 2015 compensation plan. ERS now argues that we should affirm because there is a live dispute as to which agreement governs the parties' relationship. ERS contends that if the 2015 compensation plan controls, as Baker and Thornton maintain, then the forum-selection clauses in the 2007 and 2011 agreements would be inapplicable. ERS therefore suggests that before the case could be dismissed for improper venue, the trial court must first determine which contract applies. We disagree.

The 2007 and 2011 agreements required that *any* dispute arising out of or relating to the agreements be resolved in Delaware. The declaratory-judgment action seeks to determine if the 2007 and 2011 agreements remain in force, an action that unquestionably relates to or arises out of those agreements. The declaratory-judgment count therefore falls within the scope of the forum-selection clauses. The trial court should have dismissed that count for improper venue.

IV.

The remaining issue is whether the trial court also should have dismissed the rest of ERS's claims. In addition to the declaratory-judgment claim, ERS raised breach-of-contract claims relating to the 2007 and 2011 agreements, along with claims for breach of common law fiduciary duty, breach of duty of good faith

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3d 820, 820 (Fla. 1st DCA 2013) ("[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." (quoting *Manrique*, 128 So. 2d at 440 n.4 (quoting *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)))).

and loyalty, unfair competition, intentional interference, and civil conspiracy. ERS argues that even if the forum-selection clauses remain enforceable, its entire complaint against Baker and Thornton should not be dismissed because the complaint raises claims independent from the contractual claims—claims that do not arise out of or relate to the contracts.

When determining whether an agreement's forum-selection clause applies to non-contractual claims, courts have considered whether there is a "significant and obvious nexus" between the claims and the agreement. *Farmers Grp., Inc. v. Madio & Co., Inc.*, 869 So. 2d 581, 582 (Fla. 4th DCA 2004). In *Jackson v. Shakespeare Foundation, Inc.*, 108 So. 3d 587 (Fla. 2013), the supreme court considered this issue in the context of arbitration clauses, noting that:

> A "significant relationship" between a claim and an arbitration provision does not necessarily exist merely because the parties in the dispute have a contractual relationship. Rather, a significant relationship is described to exist between an arbitration provision and a claim if there is a "contractual nexus" between the claim and the contract. A contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract. More specifically, a claim has a nexus to a contract and arises from the terms of the contract if it emanates from an inimitable duty created by the parties' unique contractual relationship. In contrast, a claim does not have a nexus to a contract if it pertains to the breach of a duty otherwise imposed by law or in recognition of public policy, such as a duty under the general common law owed not only to the contracting parties but also to third parties and the public.

Id. at 593 (citations omitted).

Because the trial court never determined whether the breach of common law fiduciary duty, breach of duty of good faith and loyalty, unfair competition, intentional interference, and civil conspiracy claims arose out of or related to the agreements, we

conclude we should remand for the trial court's determination in the first instance. If the court concludes that any of the above claims are not significantly related to the 2007 or 2011 agreement, those claims may proceed below. *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 642 (Fla. 1999) (concluding common law negligence action did not bear a significant relationship to a contractual agreement and, therefore, the agreement's arbitration provision did not require the tort claim be arbitrated). Any remaining claims (along with the breach-of-contract claims and declaratory judgment action) may not.

REVERSED and REMANDED.

WINSOR, J., and BROWN, JOHN T., ASSOCIATE JUDGE, concur; MAKAR, J., concurs in part and dissents in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring in part, dissenting in part.

I agree with much of the court's analysis, but I would allow the trial court to adjudicate ERS's declaratory judgment claim, which seeks to determine whether the 2015 agreements govern the post-employment obligations of Baker and Thornton. *See United Services General Life Co. v. Bauer*, 568 So. 2d 1321 (Fla. 2d DCA 1990). If the 2015 agreements supersede their prior agreements, the forum selection issue becomes academic. Whether the parties have chosen independently to displace their prior agreements is an issue separate and apart from issues that might arise from or relate to those prior agreements. If the parties intended to abandon or forego their prior agreements, and enter the new ones, they should have that narrow issue adjudicated where all the witnesses, evidence, and alleged conduct occurred, which is in Leon County, rather than in Delaware. Absent the ability to show that they've superseded their prior agreements, or enter a novation that effectively does so, parties and their potential assignees become permanently shackled to forum-selection clauses

they may no longer desire or intend, resulting in needless and costly litigation in far-away fora. For these reasons, the trial court ought to decide this threshold issue in the pending declaratory judgment claim.

Christopher C. Marquardt of Alston & Bird LLP, Atlanta, Georgia, and Claire A. Duchemin of Claire A. Duchemin PA, Tallahassee, for Appellants.

Albert T. Gimbel and Robert J. Telfer III of Messer Caparello PA, Tallahassee, and John P. Leonard and Alfred R. Brunetti of McElroy, Deutsch, Mulvaney & Carpenter, LLP, Morristown, New Jersey, pro hac vice, for Appellee.

Third District Court of Appeal

State of Florida

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

Nos. 3D17-1198 & 3D17-1197
Lower Tribunal Nos. 16-26521 and 16-26529

Central Carillon Beach Condominium Association, Inc., et al.,
Petitioners,

vs.

Pedro J. Garcia, etc., et al.,
Respondents.

On Petitions for Writs of Certiorari from the Circuit Court for Miami-Dade County, Monica Gordo, Judge.

Rennert Vogel Mandler & Rodriguez, P.A., and Thomas S. Ward and Jason R. Block, for petitioners.

Abigail Price-Williams, Miami-Dade County Attorney, and Jorge Martinez-Esteve and Daija Page Lifshitz, Assistant County Attorneys, for respondent Pedro J. Garcia.

Before SALTER, EMAS and FERNANDEZ, JJ.

SALTER, J.

In these consolidated cases, two condominium associations ("Associations") seek a writ of certiorari quashing orders denying their motions for certification of a class of the defendant unit owners in their respective associations. The plaintiff/respondent in each case is the property appraiser of Miami-Dade County, Florida ("Appraiser"). We treat the cases as appeals from non-final orders determining "whether to certify a class,"[1] and affirm the orders below.

The interplay between (a) the condominium statute authorizing a condominium association to sue and be sued "on behalf of all unit owners concerning matters of common interest," section 718.111(3), Florida Statutes (2016), and (b) the statute requiring the "taxpayer" to be the party defendant in a circuit court action brought by a county property appraiser to appeal an administrative determination of the county's value adjustment board, section 194.181(2), Florida Statutes (2016), apparently presents a case of first impression in Florida's appellate courts. As the issue turns on the meaning and application of the two statutes, our review of the circuit court orders denying class certification is de novo. Borden v. East-European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006).

Proceedings Below

Central Carillon Beach Condominium is condominium with some 140 residential units and various common elements. It is operated and maintained by

[1] Fla. R. App. P. 9.130(a)(3)(C)(vi).

petitioner/appellant Central Carillon Beach Condominium Association. Similarly, 2201 Collins Avenue Condominium has some 180 residential units and various common elements, all operated and maintained by petitioner/appellant 2201 Collins Avenue Condominium Association.

For tax year 2015, each of the Associations filed, with the approval of its board of directors, a single joint petition with the Miami-Dade County Value Adjustment Board (the "VAB") challenging the Appraiser's proposed assessments for all of the units within the applicable condominium building.[2] Such a joint petition by an association on behalf of the unit owners is expressly authorized by a provision within the ad valorem tax statutes, though it is subject to (1) a determination by the property appraiser that the units "are substantially similar with respect to location, proximity to amenities, number of rooms, living area, and condition," and (2) notice by the association to each unit owner of a twenty-day right to opt out of inclusion in the joint petition.[3] These conditions were satisfied in the present case, and the joint petitions were heard administratively and ruled upon by the VAB.

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[2] The common elements are not separately assessed. §§ 193.023(5), and 718.120(1), Fla. Stat. (2016). Each residential unit owner's undivided interest in those common elements is taxed as a part of the residential unit.

[3] These conditions are detailed in section 194.011(3)(e), Florida Statutes (2016).

Each Association obtained, for its respective unit owners, substantial reductions in assessed value in the VAB decision—approximately 20% in the case of Central Carillon, and approximately 40% in the case of 2201 Collins Avenue. As further permitted by the ad valorem statutes, the Appraiser appealed those VAB determinations to the circuit court in separate lawsuits for each condominium. Each lawsuit, however, named each of the individual unit owners as a defendant; it did not sue the applicable Association "on behalf of" all of the unit owners.

In response, each Association moved to dismiss the lawsuit and to strike the unit owners as defendants. Each Association sought joint representation of all unit owners in its condominium, as a defendants' class action (joint, representative defense, versus the joint, representative petition protesting the assessments, as had been the case before the VAB). The Appraiser opposed the motions to dismiss and moved to default all of the condominium unit owners for failing to file an individual responsive pleading. These motions were further briefed by counsel and then heard on the same day by the trial court.[4]

The trial court entered separate, but (appropriately) nearly identical orders in each case, denying each Association's motion to dismiss and also denying its

[4] The separate lawsuits for each condominium and Association were defended by the same law firm. Because the same legal issues were presented in each lawsuit, the same trial judge heard and decided the motions applicable to each of the two Associations.

motion for certification of the unit owners as a defense class with the Association as the owners' class representative. These appeals followed.

Analysis

Allowing an Association to represent the interests of its hundred-plus unit owners in the Appraiser's appeal from the VAB reductions seems eminently logical. If a joint petition can be pursued before the VAB, why shouldn't a joint defense be allowed in the Appraiser's appeal from the VAB's determinations?

The answer is found in the plain language of section 194.181, "Parties to a tax suit." Subparagraph (2) of that statute states that the "taxpayer" shall be the party defendant in an action brought by the county property appraiser to appeal a decision of the VAB.[5] "Taxpayer" is defined in section 192.001(13) to mean "the person or other legal entity in whose name property is assessed, including an agent of a timeshare period titleholder." The individual condominium units at issue in this case, together with each unit's undivided interest in the common elements, are assessed in the name of the individual owners—not their Association.

In response, the Associations argue that those statutes are contrary to the specific rights of collective representation given to them in the condominium law, section 718.111(3), and in Rule 1.221, Florida Rules of Civil Procedure. We disagree.

[5] It is undisputed that the Appraiser had a right to appeal the VAB decision pursuant to section 194.036(1), Florida Statutes (2016).

Section 718.111(3) provides, in pertinent part:

> The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property. After control of the association is obtained by unit owners other than the developer, the association may institute, **maintain**, settle, or appeal **actions** or hearings in its name **on behalf of all unit owners concerning matters of common interest to most or all unit owners**, including, **but not limited to**, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; **and protesting ad valorem taxes on commonly used facilities and on units**; and **may defend actions in eminent domain** or bring inverse condemnation actions. **If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action.**

(Emphasis provided).

The provision only addresses ad valorem taxes in one phrase: "protesting ad valorem taxes on commonly used facilities and on units." The Associations protested the ad valorem taxes administratively on behalf of all units, but the lawsuits brought by the Appraiser against the unit owners are not "protests"—they are judicial review proceedings in which the unit owners are defendants. The specific cases in which an association may defend on behalf of all unit owners are "actions in eminent domain."

The Associations also argue that because they could bring a class action if they were appealing a decision of the VAB as plaintiff, the Associations "may be joined in an action as a representative of that class with reference to litigation," namely the actions brought by the Appraiser. But section 718.111(3), with its lack of precise application to the Appraiser's lawsuits against the unit owners, is no match for the precise requirement imposed by the ad valorem litigation provision, section 194.181(2), that when the Appraiser is the plaintiff seeking circuit court review of the VAB decision, "the taxpayer **shall** be the party defendant." (Emphasis provided).

Rule 1.221 essentially repeats the language in 718.111(3) in its enumeration of the circumstances in which an association may act on behalf of "association members." The defense of a circuit court ad valorem tax suit brought by a county property appraiser is not specifically mentioned in the Rule, while "defense of actions in eminent domain" is singled out for approved collective representation of owners by an association. Again, the oblique examples and categories within Rule 1.221 must yield to the precise legislative directive in section 194.181(2); "the taxpayer shall be the defendant." The Associations simply do not pay the taxes in question.

The numerous cases cited by the Associations approving collective or class representation of condominium unit owners by their condominium association do

not involve, as the present cases do, a separate statute specifying that each individual unit owner must be a party defendant. See, e.g., Trintec Const., Inc. v. Countryside Village Condo. Ass'n, Inc., 992 So. 2d 277, 281 (Fla. 3d DCA 2008) (permitting association as class representative as defendant on behalf of unit owners in contractor lien foreclosure case); Four Jay's Const., Inc. v. Marina at Bluffs Condo. Ass'n, Inc., 846 So. 2d 555 (Fla. 4th DCA 2003) (permitting association as defense class representative in breach of contract case); Kesl, Inc. v. Racquet Club of Deer Creek II Condo., Inc., 574 So. 2d 251 (Fla. 4th DCA 1991) (permitting association as defense class representative in suit for fees due from owners).

Our holding in these cases regarding property tax appeals brought by a county property tax appraiser against condominium unit owners does not dilute or qualify the continued amenability of other types of lawsuits to the common representation of unit owners by their association as permitted by section 718.111(3) and Rule 1.221.

Conclusion

Although we appreciate the Associations' arguments that judicial efficiency would be better served by allowing the Associations to represent the 140 (Central Carillon) or 180 (2201 Collins Avenue) unit owners as a defense class in the

lawsuits brought by the Appraiser, those arguments must be presented to the Legislature rather than the courts if they are to be effectual.

The orders denying class certification are affirmed.

Third District Court of Appeal

State of Florida

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

No. 3D17-1144
Lower Tribunal No. 17-3330

Lynne Bloch Mullen, et al.,
Appellants,

vs.

Bal Harbour Village, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge.

KYMP LLP, and Juan-Carlos "J.C." Planas, for appellants.

Weiss Serota Helfman Cole & Bierman, P.L., and Edward G. Guedes, Matthew H. Mandel and John J. Quick, for appellees.

Before LOGUE, SCALES and LUCK, JJ.

SCALES, J.

Lynne Bloch Mullen, Beth Berkowitz and Good Government for Bal Harbour ("Plaintiffs") appeal the trial court's non-final order denying injunctive

relief against Bal Harbour Village and Dwight Danie, the Village Clerk. We affirm because the trial court did not reversibly err in denying the requested injunction.[1]

I. Relevant Facts and Procedural Background

A. Plaintiffs submit petitions to the Village

As part of Plaintiffs' effort to secure passage of two amendments to the Village Charter, pursuant to section 166.031 of the Florida Statutes,[2] Plaintiffs gathered and submitted to the Village Clerk signatures in support of two petitions to amend the Village Charter. One petition sought to amend section 81 of the Village Charter to require a vote of at least sixty percent of Village electors to approve the sale, lease or disposal of real property owned by the Village ("Petition 81").[3] The second petition sought to add a new section 82 to the Village Charter to

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[1] As elaborated upon more fully in Section II, *infra*, the order on appeal denied a motion styled as Plaintiffs' Motion for Declaratory Relief, Permanent Injunction and Mandamus With Incorporated Memorandum of Law; our review is of the trial court's denial of the requested injunction.

[2] Section 166.031(1) provides, in relevant part, as follows:

> [E]lectors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter . . . . [T]he governing body of the municipality shall place the proposed amendment contained in the . . . petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose.

§ 166.031(1), Fla. Stat. (2017).

require a vote of at least sixty percent of Village electors to approve certain, defined commercial development within the Village ("Petition 82").

B. The Village provides erroneous instructions to the Supervisor

The Village Clerk received Petition 81 and Petition 82, including the elector signatures in support of them, on November 16, 2016, and forwarded them on December 23, 2016, to the Miami-Dade County Supervisor of Elections ("Supervisor") for signature verification. In a subsequent letter to the Supervisor, the Village Clerk provided the Supervisor with the Village Charter's requirements for petition drives, adding a "requirement" for petition drives to amend the Village Charter – not contained in either section 166.031, the Village Charter or the Village Code – that all petitions must be accompanied by affidavits of the petition circulators ("circulator affidavit"). The Village Clerk premised such a "requirement" in his letter to the Supervisor on "long-standing custom and practice."

The Village Clerk's advice regarding the circulator affidavit also appears to be influenced by his surface examination of Petition 81 and Petition 82. After receiving these petitions, which Plaintiffs had submitted as one package under one cover letter, the Village Clerk noticed several irregularities within them: (i) the cover letter identified a different number of signatures from the number on each of

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[3] The Village Charter requires a simple majority vote.

the two petitions; (ii) both Petition 81 and Petition 82 had more than one format, in that individual petition pages contained a single line for signature or multiple signature lines; (iii) there was a slight variation in language among the Petition 82 petition pages; and (iv) certain people signed petitions more than once.

C. The Supervisor deems the petitions insufficient and Plaintiffs file suit

Ultimately, the Supervisor deemed the petitions insufficient because the circulator affidavits were missing. The Supervisor did not thereafter proceed to verify the sufficiency of the signatures or further process the petitions for inclusion on an election ballot. After learning that their petitions were deemed insufficient, Plaintiffs, on February 13, 2017, filed a two-count complaint against the Village and the Village Clerk (collectively, "Defendants") alleging entitlement to both declaratory and mandamus relief. Plaintiffs' complaint contained a single "WHEREFORE" clause seeking, *inter alia*, a declaration that their petitions "met the requirements of the Florida Statutes regarding petitions for Charter Amendments within municipalities" and an order requiring the Village to submit the petitions to the Supervisor for verification without any "interference" by the Village. Importantly, Paragraph 10 of Plaintiffs' complaint alleged that:

> As of the general election on November 8, 2016, there were 1,732 registered voters in Bal Harbour Village. Accordingly, the requisite number of petitions that needed to be verified in order to place a referendum in the next election was 174.

D. Defendants move to dismiss Plaintiffs' complaint asserting illegality of Petition 82

Defendants moved to dismiss Plaintiffs' complaint. In their motion to dismiss, however, Defendants did not mention, much less defend, the Village Clerk's "requirement" that a circulator affidavit must accompany petition signatures. Rather, Defendants argued in their dismissal motion that Plaintiffs are not entitled to mandamus relief because they have no clear legal right to the requested remedy; and that Plaintiffs are not entitled to declaratory relief because Plaintiffs' ultimate desire – to amend the Village Charter to require voter approval for development orders – already has been "declared" illegal by the Florida Legislature. Specifically, in their motion to dismiss, Defendants contended, for the first time, that Petition 82 purported to amend the Village charter *illegally*,[4] and that the Village could not be compelled to forward to the Supervisor signatures for verification in support of an illegal initiative. The trial court denied Defendants' motion to dismiss and ordered that Defendants answer Plaintiffs' complaint.

E. Plaintiffs file Motion for relief

Prior to Defendants answering Plaintiffs' complaint, Plaintiffs, presumably to obtain expeditious relief, filed a Motion for Declaratory Relief, Permanent Injunction and Mandamus With Incorporated Memorandum of Law ("Motion"). In

[4] The Village asserted that Petition 82 violates section 163.3167(8)(a) of the Florida Statutes. We address this issue in Section III. *B*., *infra*.

this Motion, Plaintiffs essentially argued that, after receiving a sufficient number of petitions to amend a municipal charter under section 166.031, a municipality has *a ministerial duty* to forward the collected signatures to the Supervisor for verification, unless a municipal charter or code provision affirmatively requires otherwise. Plaintiffs argued that, because nothing in section 166.031, the Village Charter or Village Code required a circulator affidavit as a condition for amending the Village Charter, Plaintiffs were entitled to a writ of mandamus compelling Defendants to forward the signatures to the Supervisor for verification.

To the extent that the Village's duty to forward the petition signatures to the Supervisor is not purely ministerial, Plaintiffs' Motion alternately sought declaratory and injunctive relief. Specifically, as an alternative to mandamus relief, Plaintiffs sought both (i) a declaration from the trial court that no provision of the Village's code or charter required the circulator affidavit, and (ii) an ensuing injunction requiring the Village to forward the signatures for both petitions to the Supervisor for validation. Plaintiffs' Motion did not mention, much less argue against, the alleged illegality of Petition 82 earlier raised in Defendants' motion to dismiss.

F. Defendants file their answer, affirmative defenses and response to Motion

Four days after the filing of Plaintiffs' Motion, Defendants filed their answer and affirmative defenses to Plaintiffs' complaint. In their answer

Defendants *admitted* the first sentence of the complaint's Paragraph 10 (that as of the November 8, 2016 general election, there were 1,732 registered voters in the Village), while denying the other material allegations of Plaintiffs' complaint. As an affirmative defense, Defendants once again alleged, as an absolute bar to Plaintiffs' requested relief, that Petition 82 was illegal.

Defendants also filed a response to Plaintiffs' Motion that contained much of the same argument contained in Defendants' prior motion to dismiss. Simply put, Defendants argued that Petition 82's illegality prevents Plaintiffs from prevailing on either a mandamus or a declaratory relief claim.

G. Trial court conducts hearing on Plaintiffs' Motion

On May 3, 2017, the trial court conducted a hearing on Plaintiffs' Motion. While Plaintiffs' Motion is not captioned as a summary judgment motion, the parties and the trial court treated the Motion, and the May 3rd hearing, as such. Indeed, at the hearing Plaintiffs presented no witnesses and moved no documents into evidence; rather, Plaintiffs relied upon the Village's admissions and the Village Clerk's interrogatory responses that were in the trial court's record.[5] In his interrogatory answers, the Village Clerk admitted that Plaintiffs had submitted 250 signatures in support of Petition 81, and 241 signatures in support of Petition 82 (noting a discrepancy between his count and the numbers represented in Plaintiffs'

[5] See Florida Rule of Civil Procedure 1.510(c).

cover letter). Defendants admitted in their answer that the total number of registered Village voters was 1,732. Plaintiffs thus argued that, because Plaintiffs had submitted to the Village the requisite number of signatures (representing more than ten percent of Village's registered voters), Plaintiffs were entitled to mandamus and mandatory injunctive relief because the Village had a ministerial duty to forward the signatures to the Supervisor for verification.

Defendants countered that, because Petition 82 was illegal, Defendants could not be compelled to forward to the Supervisor signatures in support of that petition. Plaintiffs argued that any alleged illegality could be addressed by the Village after the Village had forwarded the signatures to the Supervisor. At no point did Plaintiffs seek an order requiring the Village to forward to the Supervisor the signatures supporting only Petition 81, for which no illegality was claimed.

H. Trial court enters order on appeal denying Plaintiffs' Motion

Two days after the May 3rd hearing, the trial court entered the order on appeal, denying Defendants' Motion. The order expressly states that the trial court treated Defendants' Motion as a summary judgment motion, and then denied the Motion on two distinct grounds. First, the trial court found that Plaintiffs were precluded from obtaining the requested relief because the record lacked sufficient evidence "that the Petitions contain the required 10% of the Village's voters (as required by section 166.031)." Second, the trial court held that Plaintiffs could not

prevail because Petition 82 violated section 163.3167(8)(a), which expressly prohibits a municipality from engaging in an initiative or referendum process regarding a development order. The trial court reasoned that, because the Village Charter could not be lawfully amended to effectuate Petition 82, Plaintiffs did not have a clear legal right to an order requiring the Village to forward to the Supervisor the signatures supporting Petition 82. This appeal ensued.

II. Jurisdiction

As mentioned earlier, the parties characterized Plaintiffs' Motion, and conducted the proceedings on the Motion, as if the Motion were a summary judgment motion. Generally, we lack appellate jurisdiction to review an order denying a party's summary judgment motion. Miami-Dade Cty. v. Perez, 988 So. 2d 40, 41 (Fla. 3d DCA 2008). Presumably, though, because Plaintiffs' Motion essentially sought the exact same relief as Plaintiffs' complaint, and the order denying the Motion denied such relief, the parties and the trial court, as well as Plaintiffs' notice of appeal, characterized the order on appeal as a "final order." Yet, notwithstanding the trial court's careful and thorough explanation of its rationale, the order simply denies Plaintiffs' Motion. The order does not contain any language purporting otherwise to dispose of, or end all further judicial labor in, Plaintiffs' case. The order therefore is not a final order reviewable under Florida Rule of Appellate Procedure 9.030(b)(1)(A). Ball v. Genesis Outsourcing Sols.,

LLC, 174 So. 3d 498, 499 (Fla. 3d DCA 2015). While it may be unclear exactly what further judicial labor may be required to bring finality to this case,[6] it is clear that the order does deny Plaintiffs' request for injunctive relief. We therefore review the order as an appealable, non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(B).

III. Analysis

The order on appeal provides two distinct bases for denying Plaintiffs' Motion: (1) the record evidence is insufficient to warrant relief to Plaintiffs; and (2) the illegality of Petition 82 is fatal to Plaintiffs' requested relief. Alas, if we were able to affirm on the first basis, this opinion would be brief and succinct because we would not need to reach the more complicated second issue. But because the record evidence before the trial court, along with the Village's admissions and concession, establish that Plaintiffs submitted enough signatures to trigger the Supervisor verification process, we are unable to affirm on this basis; and thus, the bulk of this opinion's analysis discusses the illegality of Petition 82 and issues that radiate from such illegality.

A. Sufficiency of the "summary judgment" evidence[7]

[6] We express no opinion as to what further judicial labor may be required to bring finality to this case.

[7] Because the parties and the trial court treated Plaintiffs' Motion as if it were a summary judgment motion, we review *de novo* the trial court's determination that the record evidence was insufficient to warrant relief. See Haber v. Deutsche Bank

As a threshold matter, for Plaintiffs to be entitled to any relief, it was incumbent upon them to establish with record evidence that they had acquired signatures from the requisite ten percent of the Village's registered voters. The trial court denied Plaintiffs' claims, concluding that "Plaintiffs have not submitted any affidavits or sworn testimony in support of their Motion that the Petitions contain the required 10% of the Village's voters (as required by section 166.031 Florida Statutes)." Our *de novo* review of the record, however, and the Village's own concession below, belie this conclusion.

In relevant part, Florida Rule of Civil Procedure 1.510(c) requires the trial court to enter summary judgment for the moving party if "the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact . . . ." Our review of the record confirms that Plaintiffs had submitted to the Village Clerk the requisite number of signatures to invoke section 166.031's municipal charter amendment process. The Village admitted in its pleadings that, as of the November 8, 2016 general election, there were a total of 1,732 registered voters in the Village.[8] In his sworn interrogatory responses, the Village Clerk asserted that Plaintiffs had submitted 250 signatures in support of Petition 81 and 241 signatures in support of Petition 82. Plaintiffs were not required by Florida's

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Nat'l Trust Co., 81 So. 3d 565, 566 (Fla. 4th DCA 2012).

[8] Once an issue is admitted by a party in its pleadings, it is unnecessary for the party to present further proof of that issue at a subsequent hearing. Fernandez v. Fernandez, 648 So. 2d 712, 713 (Fla. 1995).

summary judgment standards to present extrinsic evidence from a mathematician to establish that a rounded ten percent of 1,732 is 174, and that both 250 and 241 are numbers greater than 174. This evidence was uncontested. Additionally, in its response to Plaintiffs' Motion, the Village conceded below that, if Plaintiffs agreed to *separate* Petitions 81 and 82 and "treat them individually, [the Village] agree[s] that the Section 81 Petition can be properly forwarded to the [Supervisor] for . . . its potential placement on the ballot. If Plaintiffs continue to insist that the Petitions be treated together, then they both fail of a result of the illegality of [Petition] 82 . . . ." In light of the entire record, we read this as a concession by the Village that the signatures obtained by Plaintiffs were sufficient to warrant the forwarding of same to the Supervisor for verification. Thus, because the record, coupled with the Village's concession, reflects that Plaintiffs met their initial burden to establish they had acquired the requisite number of signatures to invoke section 166.031, we are unable to affirm the trial court's order on this basis.[9] Our analysis necessarily now shifts to the other basis for the trial court's order.

B. The illegality of Petition 82[10]

[9] Our conclusion in this regard is based on the summary judgment evidence and concession developed in this case, and should not be characterized or construed as holding that a municipality has a legal duty to forward signatures for verification so long as the mathematical ten percent threshold is met. Similar to our discussion in section III. *C.*, *infra*, we need not, and therefore do not, reach the issue as to what may trigger a municipality's legal duty under section 166.031 to forward obtained signatures to the supervisor of elections for verification.

Village residents were presented with the following language in proposed Petition 82:

> Any proposed development plan for an existing commercial property that increases the existing commercial space by more than thirty (30) percent of the current amount of retail space, must be submitted for approval to the electors in Bal Harbour Village and approved by a vote of at least sixty (60) percent of the Village electors voting on such referendum.

Petition 82 is directed to applicants for development orders from the Village. "[A] 'development order' means any order granting, denying, or granting with conditions an application for a development permit." § 163.3164(15), Fla. Stat. (2017). In 2011, the Florida Legislature prohibited local government referenda pertaining to development orders. In a simple, straightforward sentence, the Legislature provided: "An initiative or referendum process in regard to any development order is prohibited." § 163.3167(8)(a), Fla. Stat. (2017).

The legislative prohibition in section 163.3167(8)(a) tackles the issue of whether an individual's property rights may be subject to the will of the voters. In resolving this issue in favor of the property owner, the Legislature established consistency with land use law that confers due process rights on property owners through a quasi-judicial process. See Preserve Palm Beach Political Action Comm. v. Town of Palm Beach, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2011). The quasi-

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[10] Our review of an issue of statutory interpretation is *de novo*. Wright v. City of Miami Gardens, 200 So. 3d 765, 770 (Fla. 2016).

judicial process for site-specific development orders has become an unassailable principle of the process of property development in Florida. See Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder, 627 So. 2d 469, 474-75 (Fla. 1993).

Petition 82 conflicts with section 163.3167(8)(a). A municipality may not adopt a law, whether a Charter section or an ordinance, that conflicts with a state statute. See City of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 929 (Fla. 2013) (stating that "municipalities are precluded from taking any action that conflicts with a state statute"). We therefore agree with the trial court's holding regarding the legality of Petition 82.

Our inquiry, however, does not stop here. Plaintiffs assert that, irrespective of Petition 82's legality, the Village had an obligation to forward the signatures to the Supervisor for verification. From this assertion, two issues arise: (i) did the Village have such a ministerial obligation; and (ii) should the trial court at least have ordered the Village to forward to the Supervisor the signatures supporting Petition 81?

C. Is the Village's duty to forward signatures to the Supervisor merely ministerial?

Plaintiffs' argue that the Village had a ministerial duty[11] to submit their petitions to the Supervisor for signature verification even though the Village's

[11] For a duty to be ministerial, it is imposed expressly by law and involves no discretion in its exercise. See Miami-Dade Cty. Bd. of Cty. Comm'rs v. An Accountable Miami-Dade, 208 So. 3d 724, 731 (Fla. 3d DCA 2016).

attorneys determined that Petition 82 was invalid. Plaintiffs suggest that, if the Village questioned the validity or legality of Petition 82, the Village, *after* forwarding the signatures to the Supervisor, then should have challenged any legal infirmity by filing an action for declaratory relief. Although the Village does not respond to this argument directly in its answer brief, inherent in its response is the idea that an unlawful initiative should not be placed before the voters.

Section 166.031 governs municipal charter amendment elections. It does not set forth with specificity the procedures for moving a charter amendment from petition form to ballot. Nor is there a Florida statute governing the obligations of a county supervisor of elections upon receipt of municipal petitions. Similarly, there is no statutorily prescribed mechanism for challenging the legality of a referendum question. Thus, there is a gap in the statutory law on when and how a municipality should address petitions that appear to its officials as presumptively invalid. The parties suggest that this Court, in this case, determine whether a municipality's duty to move the petitions to the supervisor of elections is ministerial, or whether a municipality may, through its officials, restrain the petition process if the officials have a good faith belief that the petition is unlawful. We respectfully decline the parties' invitation to craft, via judicial fiat, the rules dictating when and how a challenge to an allegedly illegal referendum should be mounted.

A review of Florida case law reveals several different methods employed by various parties to challenge the legality of a referendum question. In some cases, like this one, municipal officials fearing an invalid referendum question would reach voters stopped the referendum process, which compelled referendum proponents to seek a writ of mandamus.[12] In some cases, third parties sought to enjoin an alleged illegal referendum.[13] And, in some cases, the municipality (along with an intervening third party) sought declaratory relief to enjoin an alleged illegal referendum.[14] Irrespective of *how* the issue landed in the courts, in each case, the trial and appellate courts court reached and decided the issue of referendum legality. In none of these cases did a referendum question that had been adjudicated illegal reach the voters.

As this Court stated nearly a half-century ago, our role in the statutorily defined referendum process is limited:

> This referendum, involving as it does, not only an election process of the City of Coral Gables, but also an exercise of legislative power by the electors, should not be impeded or prevented by a court *except where it is made to appear that the proceeding is inapplicable under*

[12] See City of Boca Raton v. Siml, 96 So. 3d 1140 (Fla 4th DCA 2012); Gaines v. City of Orlando, 450 So. 2d 1174 (Fla. 5th DCA 1984).

[13] See City of Miami Beach v. Herman, 346 So. 2d 122 (Fla. 3d DCA 1977); City of Coral Gables v. Carmichael, 256 So. 2d 404 (Fla 3d DCA 1972).

[14] See Archstone Palmetto Park, LLC v. Kennedy, 132 So. 3d 347 (Fla. 4th DCA 2014); Preserve Palm Beach Political Action Comm., 50 So. 3d at 1176.

> *the law or is in violation of the law . . . No such showing of illegality of the referendum proceeding having been made in the trial court,* the . . . injunctions restraining the progress of the referendum were improvidently entered.

City of Coral Gables, 256 So. 2d at 411 (emphasis added) (citation omitted).

We leave it to the Legislature and, where authorized, municipal governing bodies to codify any preferred mechanism for challenging a purported invalidity of a referendum question. Therefore, we limit our adjudication in this case to whether the trial court erred in determining Petition 82's legality. It did not. We do not reach the issues of when and how such legality determinations should be presented to the courts.

D. Should the trial court, sua sponte, have severed Petitions 81 and 82?

Finally, in both their initial brief and reply brief, Plaintiffs suggest to this Court that, even if Petition 82 were illegal, the trial court should have ordered the Village to forward to the Supervisor Petition 81 and its supporting signatures. Indeed, as alluded to earlier, Defendants, in their written response to Plaintiffs' Motion, seemingly invited Plaintiffs to separate the two petitions, conceding that no inherent illegality existed with regard to Petition 81.[15]

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[15] Defendants stated: "To date Plaintiffs have insisted that the two Petitions be treated and considered together. To the extent that Plaintiffs are now willing to separate the Petitions and treat them individually, Defendants agree that the

Yet, Plaintiffs do not cite to any portion of the record below where Plaintiffs requested the trial court to enjoin or order the Village to forward only the signatures associated with Petition 81 to the Supervisor for verification. The relevant injunctive relief sought in Plaintiffs' complaint is: "Requiring the CLERK, to submit *the petitions* to the Elections Department for verification of the signatures of the voters that signed them." (Emphasis added). Similarly, the injunctive relief sought in the Motion is for the issuance of an injunction requiring the Village Clerk to "immediately resubmit *the petitions* to the Miami-Dade Supervisor of Elections . . ." (Emphasis added). Even after Defendants acknowledged that no illegality existed regarding Petition 81, at no point during the May 3, 2017 hearing, or thereafter, did Plaintiffs request the trial court to sever the two petitions and grant Plaintiffs relief regarding Petition 81 alone.

We hardly can conclude then that the trial court somehow abused its discretion[16] by failing, *sua sponte*, to grant Plaintiffs injunctive relief that they never sought. See Cano v. Cano, 140 So. 3d 651, 652 (Fla. 3d DCA 2014) ("To grant unrequested relief is an abuse of discretion.").

IV. Conclusion

Section 81 Petition can properly be forwarded to the Miami-Dade Elections Department for its consideration and potential placement on the ballot. If Plaintiffs continue to insist that the Petitions be treated together, then they both fail as a result of the illegality of the Section 82 Petition . . . ."

[16] We review an order denying injunctive relief for abuse of discretion. Allied Universal Corp. v. Given, 223 So. 3d 1040, 1042 (Fla. 3d DCA 2017).

We affirm the trial court's non-final order denying Plaintiffs their requested injunctive relief because the trial court correctly held that Petition 82 would constitute an illegal referendum.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JONATHAN ROUFFE and **RACHEL PEARL**
a/k/a **RACHEL ROUFFE,**
Appellants,

v.

CITIMORTGAGE, INC.,
Appellee.

No. 4D16-3583

[March 21, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jeffrey D. Gillen, Judge; L.T. Case No. 50-2011-CA-018454-XXXX-MB.

W. Trent Steele of Steele Law, Hobe Sound, for appellants.

David Rosenberg and Jarrett Cooper of Robertson, Anschutz & Schneid, P.L., Boca Raton, for appellee.

BELANGER, ROBERT, Associate Judge.

Appellants, Jonathan Rouffe and Rachel Pearl, a/k/a Rachel Rouffe, ("the Heirs"), appeal the final judgment of foreclosure entered in favor of appellee, CitiMortgage, Inc. ("Citi"). On appeal, the Heirs contend that the trial court erred in denying their motion for involuntary dismissal at trial, arguing that Citi failed to prove the borrower defaulted, Citi failed to provide evidence of a forbearance agreement, and failed to establish the correct date of default. For the reasons discussed below, we affirm in part and reverse in part with remand.

In 2003, the borrower borrowed money to purchase her home. Citi acquired the note and mortgage which secured the borrower's loan.

In March 2010, the borrower failed to make payments required under the loan. In March 2011, the borrower died, and in November 2011, Citi filed a foreclosure action to enforce the note and mortgage. The Heirs were heirs of the borrower, and were indispensable parties properly named in Citi's complaint.

At trial, Citi's main witness testified regarding the date of default, but provided several dates, explaining that the borrower made partial payments for some time, so there was a date of "last full payment," versus partial payments received.

This witness also mentioned forbearance agreements between the borrower and Citi, and over Citi's objection, the Heirs' counsel questioned the witness regarding these agreements. Neither party, however, offered the agreements into evidence.

After Citi rested, the Heirs moved for involuntary dismissal, arguing that Citi failed to provide the forbearance agreements, and therefore, failed to prove how and when the borrower defaulted. The trial court disagreed, denied the Heirs' motion, and eventually entered a final judgment of foreclosure. The Heirs gave notice of appeal.

The applicable standard of review for a motion for involuntary dismissal is *de novo*. *Deutsche Bank Nat'l Tr. Co. v. Clarke,* 87 So. 3d 58, 60 (Fla. 4th DCA 2012). A motion for involuntary dismissal under Florida Rule of Civil Procedure 1.420(b) in a non-jury trial can be equated to a motion for directed verdict in a jury trial:

> 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.

Id.; *see also Deutsche Bank Nat'l Tr. Co. v. Huber*, 137 So. 3d 562, 563-64 (Fla. 4th DCA 2014). On appeal, the Heirs argue, as they did below, that Citi failed to prove how and when the borrower defaulted.

We affirm the trial court's ruling for two reasons: (1) the Heirs did not have standing to challenge the borrower's liabilities under the note and mortgage; and (2) even if the Heirs did have standing, it was their burden to plead the affirmative defense regarding the forbearance agreement.

In *Clay County Land Trust No. 08-04-25-0078-014-27, Orange Park Trust Services, LLC v. JPMorgan Chase Bank, National Ass'n*, 152 So. 3d 83 (Fla. 1st DCA 2014), the appellant, the current owner of the property at issue, asserted that the appellee-bank failed to give the borrower written notice of default and an opportunity to cure as required by the mortgage.

Id. at 84. The First District held that "[b]ecause appellant was not a party to the mortgage, appellee correctly asserts that appellant does not have standing to challenge any violation of these mortgage terms." *Id.* The borrower "was the only party who could plead nonperformance of these conditions precedent." *Id.*; *see also Pealer v. Wilmington Tr. Nat'l Ass'n for MFRA Tr.*, 212 So. 3d 1137, 1139 (Fla. 2d DCA 2017) ("At no time were the Pealers parties to the note and mortgage. As such, the Pealers' interest is limited to their possession of the property and is subordinate to the bank's interest, which stems from the note and mortgage. Therefore, the Pealers may participate in the bank's foreclosure proceedings only to the extent that they plan to exercise their statutory right of redemption….").

We hold that since the Heirs were not parties to the note and mortgage in this case, they lack standing to challenge the borrower's rights and liabilities under the contract as opposed to challenging only the amount of damages. *Clay Cty.,* 152 So. 3d at 84; *Pealer*, 212 So. 3d at 1139.

However, even if the Heirs had standing, we would still affirm. On appeal, the Heirs argue that Citi failed to prove the borrower's default. Specifically, the Heirs argue that Citi was required, but failed, to allege and prove a default of the forbearance agreement, as opposed to proving a default of the original note and mortgage. They cite to two cases in support of this argument: *Nowlin v. Nationstar Mortgage,* LLC, 193 So. 3d 1043 (Fla. 2d DCA 2016), and *Kuehlman v. Bank of America, N.A.,* 177 So. 3d 1282 (Fla. 5th DCA 2015). However, *Nowlin* and *Kuehlman* are distinguishable insofar as both cases involved the parties who actually signed the note and mortgage, and therefore had standing to contest liability under the contract as modified. *Nowlin*, 193 So. 3d at 1044; *Kuehlman*, 177 So. 3d at 1283. Here, as Citi correctly argues, and discussed above, the Heirs were never parties to the note and mortgage, and as such, lacked standing to litigate the borrower's liability thereunder.

We also agree with Citi's argument that even if the Heirs had standing, it was their burden to plead the existence of a modification or forbearance agreement as an affirmative defense. *Accord Bank of N.Y. Mellon v. Bloedel,* 43 Fla. Law Weekly D258, 2018 Fla. App. LEXIS 1242, 2018 WL 627016 (Fla. 2d DCA Jan. 31, 2018) ("[W]e are certain that neither *Kuehlman* nor this court's parenthetical citation to *Kuehlman* in *Nowlin*, 193 So. 3d at 1046, purported to recede from long-settled law that modification, when asserted as an avoidance of liability, is an affirmative defense." (footnote omitted)).

We agree with Citi and align our court with the well-reasoned opinion of *Bloedel*.

Bloedel reiterates well-settled law, that:

> The effect of a modification to a legal agreement, to the extent it would constitute an avoidance of all or part of a defendant's liability under the agreement, is an affirmative defense that must be pled and proven by the defendant. *See* Fla. R. Civ. P. 1.110(d) "[A] party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."; *BSP/Port Orange, LLC v. Water Mill Props., Inc.*, 969 So. 2d 1077, 1078 (Fla. 5th DCA 2007) (holding that an alleged modification to an oral commission agreement was an affirmative defense that had to be pled).

Notably, although we hold that the Heirs lack standing to challenge liability in this case, they do have standing to challenge the amount due under the note, because it affects their substantive right of redemption under section 45.0315, Florida Statutes (2016). In this case, there was testimony and evidence in the form of a payment history, sufficient to present a prima facie case on damages. *Wachovia Mortg., F.S.B. v. Goodwill*, 199 So. 3d 346, 348 (Fla. 4th DCA 2016) (remanding for further proceedings because "[t]he payment history and testimony of [the bank]'s witness were sufficient to present a prima facie case on damages and withstand involuntary dismissal"); *Ottawa Props. 2 LLC v. Cent. Mortg. Co.*, 202 So. 3d 102, 103 (Fla. 4th DCA 2016) ("Because there was some, but insufficient, evidence of the total amount of indebtedness, we reverse on the issue of damages and remand for further proceedings.").

However, we agree with the Heirs that the conflicting evidence regarding the exact date of default affects the specific amount due in order to exercise their right of redemption.

As this court held in *Beauchamp v. Bank of New York*, 150 So. 3d 827 (Fla. 4th DCA 2014):

> Beauchamp has a right of redemption wherein he may prevent divestiture of his legal title upon payment of the amount of the debt specified in the judgment. *CCC Props., Inc. v. Kane*, 582 So. 2d 159, 161 (Fla. 4th DCA 1991); § 45.0315, Fla. Stat. (2013). Therefore, even though Beauchamp is not personally liable for the debt, the amount of the debt owed is important as it relates to Beauchamp's right of redemption, specifically as to the amount due under the judgment in order to exercise his right to stop the foreclosure sale.

> Thus, the Bank's failure to provide admissible evidence that would establish the proper amount due on the note was not harmless error. Rather, proof of the amount of debt owed was required to allow the foreclosure, and Beauchamp's ownership rights and right of redemption are substantive rights that were adversely affected by the error.

Id. at 828-29 (footnote omitted).

As in *Beauchamp*, we affirm the judgment of foreclosure, except as to the amount due under the note, and remand the case for further proceedings to determine that amount.

Affirmed in part; reversed in part; remanded for further proceedings consistent with this opinion.

CIKLIN and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SHIVA STEIN, on behalf of herself and all others similarly situated,
Appellant,

v.

BBX CAPITAL CORP., JOHN E. ABDO, NORMAN H. BECKER, STEVEN M. COLDREN, WILLIS N. HOLCOMBE, JARETT S. LEVAN, ANTHONY P. SEGRETO, CHARLIE C. WINNINGHAM II, BFC FINANCIAL CORPORATION, and **BBX MERGER SUBSIDIARY LLC,**
Appellees.

No. 4D16-4309

[March 21, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack Tuter, Judge; L.T. Case No. 16-014713 CACE (07).

Emily Komlossy and Ross A. Appel of Komlossy Law, P.A., Hollywood, and Gustavo F. Bruckner and Gabriel Henriquez of Pomerantz LLP, New York, NY, for appellant.

Eugene E. Stearns, Grace L. Mead, Andrea N. Nathan, and Veronica de Zayas of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, and Thomas G. Aubin of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Fort Lauderdale, for BFC Financial Corporation, BBX Merger Subsidiary LLC, John E. Abdo, and Jarett S. Levan.

Brian P. Miller and Samantha J. Kavanaugh of Akerman LLP, Miami, for BBX Capital Corporation, Norman H. Becker, Steven M. Coldren, Willis N. Holcombe, Anthony P. Segreto, and Charlie C. Winningham II.

FORST, J.

Appellant Shiva Stein, on behalf of herself and others similarly situated, challenged the consideration offered for her shares in Appellee BBX Capital Corporation that were acquired in a merger with Appellee BFC Financial Corporation. She appeals a final order dismissing her complaint with prejudice. Concluding that Appellant has not set forth "sufficient ultimate facts" showing entitlement to relief beyond the statutory remedy to which Appellee concedes Appellant is entitled, we affirm.

Background

At the time of her complaint, Appellant owned shares of BBX. Her complaint was directed at BFC's proposed acquisition of BBX. BFC already owned eighty-one percent of BBX, and sought to acquire the remaining nineteen percent in exchange for cash or shares in BFC. The purchase was conditioned on both the approval of a special committee composed of independent BBX directors and an approving vote of a majority of the minority BBX shareholders unaffiliated with BFC. Under the terms of the proposed transaction, BBX shareholders could elect to receive shares of BFC's common stock; a cash payment for each share held; or a combination of shares and cash.

The complaint maintained that the proposed transaction significantly undervalued BBX with flawed calculations and that, by agreeing to sell BBX at an inadequate price, the result of an unfair process, the BBX board breached its fiduciary duties to shareholders. Appellant also alleged that material calculations were omitted in arriving at a sale price, and that minority shareholders were not fully informed with respect to the material details of the transaction. Appellant refused the near exclusive statutory remedy of an independent appraisal pursuant to section 607.1302, Florida Statutes (2016). Instead, she contended that she qualified for the statute's limited exception to appraisal set forth in section 607.1302(4)(b) (discussed below), and sought equitable relief from the courts. The trial court's order quoted *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st DCA 2008), and dismissed the complaint because it failed to sufficiently allege "specific acts of fraud, misrepresentation, self-dealing, [or] deliberate waste of corporate assets."

Analysis

The standard of review of orders dismissing complaints with prejudice is de novo. *MEBA Med. & Benefits Plan v. Lago*, 867 So. 2d 1184, 1186 (Fla. 4th DCA 2004). To survive a motion to dismiss, a complaint must allege "sufficient ultimate facts" showing entitlement to relief. *Id.* While we must accept the facts alleged as true and make all reasonable inferences in favor of the pleader, *id.*, conclusory allegations are insufficient. *Shands Teaching Hosp. and Clinics, Inc. v. Estate of Lawson ex rel. Lawson*, 175 So. 3d 327, 331 (Fla. 1st DCA 2015) (en banc).

"Section 607.1302, Florida Statutes (2003)—Florida's 'appraisal rights' statute—generally requires minority shareholders who dissent from a major transaction or disposition of assets to seek the remedy of tendering

their shares for appraisal and buy-back at a fair price . . . ." *Williams*, 977 So. 2d at 726-27. The statute aids the courts from becoming "bogged down in a wide range of disputes over the fairness of cash-out prices." *Id.* at 729. This includes mergers. § 607.1302(1)(a), (e), Fla. Stat. (2016).

"A shareholder entitled to appraisal rights . . . may not challenge a completed corporate action for which appraisal rights are available unless such corporate action: . . . (b) [w]as procured as a result of fraud or material misrepresentation." § 607.1302(4). This exception Appellant invokes has been interpreted to mean:

> Where the acts of waste of the corporate assets make the valuation on the appraisal date unfair, "a minority shareholder who alleges specific acts of 'fraud, misrepresentation, self-dealing, [or] deliberate waste of corporate assets,' may be entitled to equitable remedies beyond an appraisal proceeding if the alleged acts have so besmirched the propriety of the challenged transaction that no appraisal could fairly compensate the aggrieved minority shareholder."

Foreclosure FreeSearch, Inc. v. Sullivan, 12 So. 3d 771, 777 (Fla. 4th DCA 2009) (alteration in original) (quoting *Williams*, 977 So. 2d at 730). Typically, the misconduct would have to affect the value of the shares before appraisal rights are triggered, such that appraisal of the shares' worth "[i]mmediately before the effectuation of the corporate action to which the shareholder objects" would provide an unfairly low value. § 607.1301(4)(a), Fla. Stat. (2016).

"[A] plaintiff's mere allegation of 'unfair dealing,' without more, cannot survive a motion to dismiss . . . ." *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1105 (Del. 1985)). Here, the claims of breach of fiduciary duties are largely based on speculative and conclusory allegations that do not specifically assert fraud or material misrepresentation.

The sole Florida case that Appellant relies upon in seeking an exception to the general statutory remedy of appraisal, *Williams*, is quite distinguishable from the instant case. There, the court found that, at the time the minority shareholders' "appraisal right crystalized, the company's treasury—and thus the corresponding value of their shares—had been all but eviscerated through several years of . . . alleged misappropriations and mismanagement of corporate funds . . . ," making appraisal of the shares' current worth likely insufficient and a hearing necessary to determine if they were entitled to "equitable remedies beyond an appraisal proceeding

if those allegations are proven true . . . ." *Williams*, 977 So. 2d at 729-30. *see also Foreclosure FreeSearch*, 12 So. 3d. at 778 (noting that "additional relief" is appropriate under the *Williams* analysis "where the majority has engaged in bad conduct and fraudulently diluted the value of the corporation.").

Appellant does not assert specific claims of "misappropriation," "mismanagement," or "fraudulent[] dilut[ion of] the value of the corporation" in the instant case. Although she speaks of "procedural shenanigans" in her initial brief, the focus of her complaint is on her perceived lack of access to information regarding the merger. However, an adequate remedy at law exists—a court-supervised independent appraisal, wherein she would be "entitled to the same discovery rights as parties in other civil proceedings." *Foreclosure FreeSearch*, 12 So. 3d at 776 (quoting § 607.1330(4), Fla. Stat.).

Conclusion

Attempting to invoke section 607.1302(4)(b), Appellant's complaint baldly asserts that the offer to the shareholders "[w]as procured as a result of fraud or material misrepresentation." We agree with the trial court's well-articulated and supported order which concludes that Appellant's "complaint is devoid of any allegations of *specific* acts of fraud or misrepresentation, such that [Appellant] has remedies beyond appraisal." As noted above, an adequate remedy at law was available. Therefore, we affirm.

Affirmed.

GROSS and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WAVERLY 1 AND 2, LLC, a Florida limited liability company,
Appellant,

v.

WAVERLY AT LAS OLAS CONDOMINIUM ASSOCIATION, INC.,
a Florida corporation, not-for-profit,
Appellee.

No. 4D16-2866

[March 21, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Cynthia G. Imperato and Barbara McCarthy, Judges; L.T. Case No. CACE15-005333 (21).

Joel D. Eaton of Podhurst Orseck, P.A., Miami, for appellant.

Darrin Gursky and Carolina Sznajderman Sheir of Gursky Ragan, P.A., Miami, for appellee.

ON MOTION FOR REHEARING

SMALL, LISA, Associate Judge.

We deny appellee's motion for rehearing en banc; however, we withdraw our previously issued opinion and substitute the following opinion.

Waverly 1 and 2, LLC ("the Owner") appeals the trial court's final judgment entered in favor of Waverly at Las Olas Condominiums Association, Inc. ("the Association"). After a non-jury trial, the trial court concluded that the Declaration of Condominium ("the Declaration") required commercial unit owners to obtain the written consent of the Association's board before altering landscaping appurtenant to their condominium units. Finding that the Declaration does not require commercial unit owners to obtain written consent of the Association's board before altering landscaping appurtenant to their condominium units, we reverse the final judgment and remand with directions to enter judgment in favor of the Owner.

Background

Appellant is the owner of two commercial units at Waverly at Las Olas Condominiums. Waverly at Las Olas Condominiums is a mixed use condominium development which contains both residential and commercial units.

The Association sought declaratory relief, injunctive relief, and damages against the Owner for allegedly violating the Condominium's Declaration. The Association claimed that the Owner made unauthorized modifications to the property's landscaping scheme when the Owner removed two $18,000 canary palm trees without prior written approval from the Association's board.

The issue at trial was whether the Declaration requires commercial unit owners to obtain the written consent of the Association's board before altering landscaping appurtenant to their condominium units.

The Declaration states in pertinent part:

> 2.42 "Unit" means part of the Condominium Property which is subject to exclusive ownership, and except where specifically excluded, or the context otherwise requires, shall be deemed to include the Residential and the Commercial Units.
>
> . . . .
>
> 3.3(d) Patios, Balconies, Terraces, Lanais and/or Sidewalks appurtenant to Commercial Units. Any patios, balconies, terraces, lanais and/or sidewalks adjacent to a Commercial Unit, shall, subject to the provisions hereof, be a Limited Common Element of such Unit(s), so that the Commercial Unit Owner, from time to time, to the extent permitted by law, may incorporate and use such areas in connection with, or relating to, the operations from the Commercial Unit. . . .
>
> It is further understood and agreed that, anything herein contained to the contrary notwithstanding, the external surfaces, terraces, and balconies of each Commercial Unit shall be deemed Limited Common Elements thereof and the Owners thereof may place on such surfaces, or on the balconies appurtenant thereto such signage, mechanical equipment and/or other items thereon as they may desire, without requiring approval from the Association, the Board, or any other Unit Owner . . . and may further make any alterations or improvements, in the Commercial Unit Owner's sole discretion, to the Owner's Commercial Unit and/or Limited Common Elements appurtenant thereto or to the Common Elements. . . .

9.1 Consent of the Board of Directors. No Residential Unit Owner shall make any addition, alteration, or improvement in or to the Common Elements (including, without limitation, the Residential Limited Common Elements and/or Commercial Limited Common Elements), the Association Property, any structural addition, alteration, or improvement in or to his or her Residential Unit. . . . Without limiting the generality of this subsection 9.1, no Unit Owner shall cause or allow improvements or changes to his or her Unit, or to any Limited Common Elements, Common Elements or any property of the Condominium Association which does or could in any way affect, directly or indirectly, the structural, electrical, plumbing, Life Safety Systems, or mechanical systems, or any landscaping or drainage, of any portion of the Condominium Property without first obtaining the written consent of the Board of the Association. . . . The Board shall have the obligation to answer, in writing, any written request by a Residential Unit Owner for approval of such an addition, alteration, or improvement. . . .

9.3 Improvements, Additions or Alterations by Developer or Commercial Unit Owners. Anything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units. . . . Additionally, each Commercial Unit Owner shall have the right, without the consent or approval of the Association, the Board of Directors or other Unit Owners, to make alterations, additions, or improvements, structural and non-structural, interior and exterior, ordinary and extraordinary, in, to and upon any Commercial Unit owned by it or them and Limited Common Elements appurtenant or adjacent thereto . . . .

17.4 Alterations. Without limiting the generality of section 9.1 . . . no Residential Unit Owner shall cause or allow improvements or physical or structural changes to any Residential Unit, Limited Common Elements appurtenant thereto, Common Elements or Association Property. . . .

The foregoing shall specifically not apply to Owners of the Commercial Units. *Specifically, the Owner of any Commercial Unit is expressly permitted (without requiring consent from the Association or any Unit Owner or any other party, other than applicable governmental authorities to the extent that prior approval from them is required), to install on the exterior walls of such Owner's Commercial Unit and any Limited Common Element or Common Element balconies, terraces, patios, lanais, decks, or other areas appurtenant thereto such signage, mechanical equipment, furniture,*

antennas, dishes, receiving, transmitting, monitoring, and/or other equipment thereon as it may desire and may further make any alterations or improvements, in the Commercial Unit Owner's sole discretion, to such Commercial Unit, Limited Common Elements or Common Elements.

At trial, the Association did not dispute that the Owner, as a commercial unit owner, has extraordinary rights to alter the units. However, the Association claimed that the Owner did not have the right to alter the landscaping appurtenant to the condominium units before obtaining written approval from the Association's board. The Owner maintained that the Declaration allowed the Owner, as a commercial unit owner, to alter the landscaping without obtaining written consent from the Association's board.

The trial court found that the landscaping was a Common Element of the building. Additionally, the trial court found that section 9.1, when read in conjunction with section 2.42, required both residential and commercial unit owners to obtain written consent from the Association's board before altering the landscaping.

Analysis

A trial court's interpretation of a declaration of condominium is subject to *de novo* review. *See Thomas v. Vision I Homeowner's Ass'n*, 981 So. 2d 1, 2 (Fla. 4th DCA 2007). "The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association." *Id.* (citation omitted). "Interpretation of a contract is a question of law, and an appellate court may reach a construction contrary to that of the trial court." *Id.* (citation omitted).

The principles governing contractual interpretation are well settled in Florida. "Generally, the intentions of the parties to a contract govern its construction and interpretation." *Id.* "The intent of the parties by their use of such terms must be discerned from within the 'four corners of the document.'" *Emerald Pointe Property Owners' Ass'n, Inc. v. Commercial Const. Indus., Inc.*, 978 So. 2d 873, 877 (Fla. 4th DCA 2008) (citation omitted). Furthermore, the language being interpreted must be read in conjunction with the other provisions in the contract. *Royal Oak Landing Homeowners Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993). "Where contractual terms are clear and unambiguous, the court is bound by the plain meaning of those terms." *Emerald Pointe*, 978 So. 2d at 877.

Upon our de novo review of the trial court's interpretation of the Declaration, we conclude that the trial court erred in finding that sections 2.42 and 9.1 of the Declaration require commercial unit owners to obtain the Association's board's written consent before altering a unit's landscaping. We find that section 9.3's

first sentence, "Anything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units," means section 9.1 does not apply to Commercial Unit Owners. Put simply, section 9.3 supersedes section 9.1 and any other restrictions set forth in section 9. Furthermore, we agree with the Owner that section 9.1's requirement to obtain the Association's board's written approval before altering the landscaping clearly applies only to "residential unit owners." The Association's interpretation that sections 2.42 and section 9.1 require commercial unit owners to obtain written authorization to alter landscaping is not reasonable.

The Association relied on the following emphasized language contained within section 9.1:

> *Without limiting the generality of this subsection 9.1, no Unit Owner shall cause or allow improvements or changes to his or her Unit, or to any Limited Common Elements, Common Elements or any property of the Condominium Association which does or could in any way affect, directly or indirectly, the structural, electrical, plumbing, Life Safety Systems, or mechanical systems, or any landscaping or drainage, of any portion of the Condominium Property without first obtaining the written consent of the Board of the Association.* . . . The Board shall have the obligation to answer, in writing, any written request by a *Residential Unit Owner* for approval of such an addition, alteration, or improvement. . . .

The trial court erred in adopting the Association's interpretation of this language to the exclusion of, and consideration of, the remainder of section 9.1 and the pertinent Declaration provisions set forth in sections 9.3 and 17.4. Notably, section 9.1 only requires the Association's board to answer in writing any written request made by a residential unit owner for approval of such an addition, alteration or improvement.

Conclusion

For the aforementioned reasons, the trial court erred in its finding that commercial unit owners are required to obtain the Association's board's written consent before altering landscaping appurtenant to their units. Thus, this Court reverses the final judgment and remands with directions for the trial court to enter final judgment in favor of the Owner.

Reversed and remanded for proceedings consistent with this opinion.

LEVINE and CONNER, JJ., concur.

* * *

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MILTON N. WHYNES,
Appellant,

v.

AMERICAN SECURITY INSURANCE COMPANY and **WELLS FARGO BANK, N.A.,**
Appellees.

Nos. 4D16-2862 and 4D16-3668

[March 21, 2018]

Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard L. Oftedal, Judge; L.T. Case No. 50-2015-CA-013127-XXXX-MB.

Jeffrey Golant of The Law Offices of Jeffrey N. Golant, P.A., Coral Springs, for appellant.

Farrokh Jhabvala, Frank Burt and Peter D. Webster of Carlton Fields Jorden Burt, P.A., Miami, for appellee, American Security Insurance Company.

Sara F. Holladay-Tobias and Emily Y. Rottmann of McGuireWoods LLP, Jacksonville, for appellee, Wells Fargo Bank, N.A.

CIKLIN, J.

Milton N. Whynes ("Whynes") appeals the dismissal of his complaint against American Security Insurance Company ("ASIC") and Wells Fargo Bank, N.A. ("Wells Fargo"). The complaint alleged a violation of a consumer protection statute, section 626.9551(1)(d), Florida Statutes (2015), and sought a declaratory judgment. Because the trial judge correctly determined that the statute is inapplicable to any of the allegations contained in the complaint, we affirm.

Whynes, a borrower, challenges the exchange of information between his mortgagee bank, Wells Fargo, and the servicer that monitors required levels of insurance on its mortgaged properties, ASIC, pursuant to section 626.9551(1)(d). Whynes alleges that, in exchange for this mortgage

monitoring service, ASIC has the exclusive right to impose "force-placed insurance"[1] on the Wells Fargo properties if the properties become uninsured through lapses or otherwise under-insured.

Underlying this action is section 626.9551(1)(d)'s provision that no person may use or provide to others insurance information required to be disclosed by a borrower to a lending institution in connection with a loan "for the purpose of *soliciting* the sale of insurance" without the borrower's consent. (Emphasis added). Whynes alleged that, despite his maintenance of insurance, ASIC force-placed insurance on Whynes' home. Further, he essentially alleged a specific violation of section 626.9551(1)(d) in that ASIC used Whynes' information to *solicit* the sale of a force-placed insurance policy to Wells Fargo. Whynes sought a declaratory judgment stating that ASIC may not retain his insurance information and that Wells Fargo may not provide any more protected information to ASIC.

ASIC and Wells Fargo separately moved to dismiss, alleging, among other things, that Whynes failed to state a cause of action: He did not allege a "solicitation" within the meaning of section 626.9551(1)(d) since his insurance was force-placed and Whynes, the borrower, was not directly solicited. The trial court agreed and dismissed the complaint.

Accordingly, the issue before this court is whether section 626.9551(1)(d) requires the prohibited solicitation to be directed to a borrower. We agree with the trial court that it does and, because there is no binding authority interpreting section 626.9551(1)(d), we offer our interpretation.

> It is a fundamental principle of statutory interpretation that legislative intent is the "polestar" that guides this Court's interpretation. We endeavor to construe statutes to effectuate the intent of the Legislature. To discern legislative intent, we look "primarily" to the actual language used in the statute. Further, "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."

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[1] "Force-placed insurance" refers to insurance coverage obtained by a mortgage servicer where a borrower has failed to maintain or renew insurance coverage on the subject property as required under the terms of the mortgage. *See* 12 U.S.C. § 2605(k)(2).

Borden v. East–European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006) (alteration in original) (citations omitted). "In determining legislative intent, we must give due weight and effect to the title . . . which was placed at the beginning of the section by the legislature itself" and which "is a direct statement by the legislature of its intent." *State v. Webb*, 398 So. 2d 820, 824-25 (Fla. 1981). Further, "[a] phrase must be viewed in the context of the entire statutory section." *WFTV, Inc. v. Wilken*, 675 So. 2d 674, 678 (Fla. 4th DCA 1996).

Turning to the subject statute, section 626.9551 is part of Florida's Unfair Insurance Trade Practices Act, *see* section 626.951(2), Florida Statutes (2015), and is entitled "Favored agent or insurer; coercion of debtors." The statute provides in relevant part:

> (1) No person may:
>
> . . . .
>
> (d) Use or provide to others insurance information required to be disclosed by a customer to a financial institution, or a subsidiary or affiliate thereof, in connection with the extension of credit *for the purpose of soliciting the sale of insurance*, unless the customer has given express written consent or has been given the opportunity to object to such use of the information. Insurance information means information concerning premiums, terms, and conditions of insurance coverage, insurance claims, and insurance history provided by the customer. The opportunity to object to the use of insurance information must be in writing and must be clearly and conspicuously made.

§ 626.9551, Fla. Stat. (emphasis added).

The trial court did not err because the plain language of section 626.9551 indicates its prohibition of solicitations made directly to borrowers. Although the language of subsection (1)(d) does not contain such an express limitation, the portion of the section's title, "coercion of debtors," contemplates a situation in which an insurer is dealing directly with an unsophisticated party such as an individual borrower, not a situation in which two sophisticated financial entities are dealing with one another, such as when a bank purchases a force-placed insurance policy from an insurer. The other subsections within section 626.9551 also support this conclusion, as they largely contemplate direct dealings with borrowers and/or customers. *See, e.g.*, § 626.9551(1)(a)-(b) (prohibiting a

lender from conditioning a loan on a borrower obtaining an insurance policy through a particular insurer and prohibiting the rejection of a requisite insurance policy because it was underwritten by a person not associated with a lender).

Whynes urges this court to defer to Florida Administrative Code Rule 69O-124.015, which he contends supports his interpretation of the statute. Because the language of the statute is clear, there is no reason to and therefore we will not defer to administrative construction. *See Felder v. King Motor Co. of S. Fla.*, 110 So. 3d 105, 107 (Fla. 4th DCA 2013) ("[A]dministrative construction of a statute . . . and other extraneous matters are properly considered *only in the construction of a statute of doubtful meaning*." (emphasis in original) (citation omitted)).

Affirmed.

LEVINE and KLINGENSMITH, JJ., concur.
LEVINE, J., concurs specially with opinion, in which KLINGENSMITH, J., concurs.

LEVINE, J., concurring specially.

I concur with the majority opinion that the trial court correctly found that the text of section 626.9551(1)(d), Florida Statutes, was inapplicable to the facts of this case. However, I write to address two issues.

First, I write to note that in interpreting a statute, one should first consider the text of the statute. The legislature's intent is then considered only if a statute is not clear and unambiguous. The majority opinion contains the oft-quoted maxim that "[i]t is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' that guides this Court's interpretation." As Justice Lawson recently opined:

> Florida's appellate courts have for decades routinely framed the statutory construction task in general (for all cases) as starting with the "legislative intent as polestar" maxim. We next explain that "legislative intent" is discerned "primarily from the text of the statute." This construct improperly and confusingly elevates a secondary rule of construction to a primary position, but is harmless in most cases because we regularly explain that intent is determined primarily from the text of the statute—and that the inquiry should end with the text when it is clear and unambiguous. However, there is a potential harm.

Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 313-14 (Fla. 2017) (Lawson, J., concurring) (citations omitted). Our consideration of a statute should always start—and if possible, end—with the text. Only after reviewing the text should we look, if needed, to "legislative intent."

Second, I write to join those judges who have questioned the idea that courts should automatically defer to an agency's interpretation of a statute even where there is no technical expertise involved in its interpretation. In this case, appellant in his brief complained that "the circuit court failed to accord appropriate deference to the Florida Department of Financial Services' authoritative interpretation" of the statute in question. Appellant fails to explain why an agency can read or interpret a statute like the one dispositive to the resolution of this case with more clarity or accuracy than the members of the judiciary. *See Housing Opportunities Project v. SPV Realty, LC*, 212 So. 3d 419, 425 n.9 (Fla. 3d DCA 2016) ("There is no reason for the rule [of deference] when we are as capable of reading the statute or rule as the agency, which may well have its own [] agenda.").

The judiciary has long grappled with this issue. Justice Scalia analyzed the problem of federal administrative deference, or "*Chevron* deference," by noting that it could lead to the "abdication of judicial responsibility." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989). A half century earlier, Justice Sutherland warned that the "appropriation of unauthorized power by lesser agencies" threatens constitutional guarantees. *See Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1, 24 (1936).

I agree with Judge Frank Shepherd, who opined in a concurrence that "this court should seriously consider the constitutional implications of blindly adhering to the mantra so regularly incanted by the Court to support, uphold, or approve agency decision-making that 'an agency's interpretation of a statute, with which it is entitled with administering shall be accorded great weight . . . .'" *Pedraza v. Reemployment Assistance Appeals*, 208 So. 3d 1253, 1256 (Fla. 3d DCA 2017) (citation omitted). He rightly pointed to the "due process problem of automatically taking the side of one of the parties in the case." *Id.* at 1257. He further noted that "deference to an agency's construction or application of a statute implicates . . . separation of powers questions deserving of serious contemplation by future members of this and other courts around the state." *Id.*

Because of due process and separation of powers concerns, I agree that we should give serious thought to the implications of automatic deference.

That sort of deference to agencies is often removed from any showing of agency expertise justifying such deference.

Thus, although there are times that there could be a demonstrable need for deference to agency interpretation, that deference ought to be coupled to a showing of exacting technical expertise. *See, e.g.*, *Island Harbor Beach Club, Ltd. v. Dep't of Nat. Res.*, 495 So. 2d 209 (Fla. 1st DCA 1986) (deferring to Department of Natural Resources' interpretation of "beach-dune system" because it required agency expertise).

In other circumstances, such deference is unwarranted. *See Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000) (rejecting Florida Commission on Human Relations' interpretation of "marital status," an unambiguous phrase); *Muratti-Stuart v. Dep't of Bus. & Prof'l Regulation*, 174 So. 3d 538, 540 (Fla. 4th DCA 2015) (observing that a court need not defer to an agency interpretation when that interpretation did not require the use of agency's special expertise); *Doyle v. Dep't of Bus. Regulation*, 794 So. 2d 686, 690-91 (Fla. 1st DCA 2001) (declining to defer to labor regulation agency's interpretation of an attorney fee statute).

Deference should be rare and infrequent and observed only when it is warranted by significant, specialized technical knowledge. Thus, as a result of legitimate concerns of due process and separation of powers, we ought to think long and hard before we automatically defer to agencies and, by deferring, diminish the court's own ability to read, analyze, and interpret the statute or regulation at issue. Justice Gorsuch got it right when writing about federal administrative deference while on the Tenth Circuit:

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

Maybe the time has come to face unwarranted deference to administrative agencies here in Florida as well.

* * *

Not final until disposition of timely filed motion for rehearing.