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Manuel Farach

Johnson v. Deutsche Bank National Trust Company Americas, Case No. 2D16-4262 (Fla. 2d DCA 2018). The de novo standard of review on appeal, absent fundamental error, still does not permit arguing on appeal an alleged error that was not preserved in the trial court.

Obsessions in Time, Inc. v. Jewelry Exchange Venture, LLLP, Case No. 3D16-2620 (Fla. 3d DCA 2018). The following exculpatory clause in a lease is ambiguous, and therefore, unenforceable:

> In making this lease, it is hereby agreed that lessor does not assume the relations and duty of bailee and shall not be liable for any loss or damage to the contents of the vault within the premises caused by burglary, fire, or any cause whatsoever, but that the entire risk of such loss or damage is assumed by the lessee. The lessor shall not be liable for any delay caused by failure of the vault doors to lock, unlock, or otherwise operate and the sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee.

Sammie Investments, LLC, v. Strategica Capital Associates Inc., Case No. 3D17-2052 (Fla. 3d DCA 2018). The inability to recover money damages does not amount to an inadequate remedy at law for purposes of issuing a temporary injunction.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

KELI N. JOHNSON and THOMAS E. JOHNSON, Appellants, v. DEUTSCHE BANK NATIONAL TRUST COMPANY AMERICAS, as Trustee RALI 2007-QS1, Appellee.	)	Case No. 2D16-4262

Opinion filed May 11, 2018.

Appeal from the Circuit Court for Polk County; Keith P. Spoto, Judge.

Mark P. Stopa of Stopa Law Firm, Tampa, for Appellants.

William L. Grimsley, Kimberly Held Israel, and N. Mark New, II, of McGlinchey Stafford, Jacksonville, for Appellee.

LUCAS, Judge.

Keli and Thomas Johnson appeal the circuit court's entry of a final summary judgment against them in a residential mortgage foreclosure case brought by Deutsche Bank National Trust Company Americas, as Trustee RALI 2007-QS1 (RALI).

They raise five arguments on appeal. We find merit within the fourth—that RALI failed to conclusively establish its standing to enforce the Johnsons' promissory note—and reverse the summary judgment on that basis.

The Johnsons borrowed $236,000, apparently in connection with a home improvement construction loan, which was memorialized by a promissory note in that amount dated April 28, 2006. The Johnsons' note was originally payable to National City Mortgage, a division of National City Bank of Indiana, and secured by a mortgage on the Johnsons' property in Polk County, Florida. The promissory note contained three endorsements, the last of which made the note payable to "Deutsche Bank Trust Company Americas as Trustee," with no further identifying information of which trust this entity was acting on behalf of.[1]

When the Johnsons allegedly defaulted on the note in 2011, RALI filed the underlying complaint. It later amended its complaint twice, so that in its final, operative iteration, RALI alleged it had standing to enforce the Johnsons' note as a holder of the note. The Johnsons generally denied RALI's allegations in their answer and asserted

[1]Independently of the endorsements, RALI also filed a series of assignments, which it maintained established its standing as an owner and a holder of the Johnsons' note. These assignments would not establish RALI's standing for purposes of summary judgment, however, because the final assignment in the series only purported to assign the Johnsons' mortgage to RALI, not the note itself. See, e.g., Houk v. PennyMac Corp., 210 So. 3d 726, 732 (Fla. 2d DCA 2017) (holding that plaintiff "did not acquire standing to foreclose based on an assignment of only the mortgage"); Caballero v. U.S. Bank Nat'l Ass'n ex rel. RASC 2006-EMX7, 189 So. 3d 1044, 1046 (Fla. 2d DCA 2016) ("[A]ssignment was insufficient to show standing because it only purported to assign the mortgage, not the note."); Lamb v. Nationstar Mortg., LLC, 174 So. 3d 1039, 1041 (Fla. 4th DCA 2015) ("A bank does not have standing to foreclose where it relies on an assignment of the mortgage only."). RALI's second amended complaint asserts its standing solely on the theory that it was the holder of the Johnsons' note.

several affirmative defenses, including lack of standing on the part of RALI to enforce the note. RALI eventually filed the original note, which contained endorsements appearing to match those on the copy attached to its pleading.[2]

The case proceeded with itinerant discovery and motion practice, and on July 8, 2016, RALI filed a motion for summary judgment. In support of its motion, it also filed an affidavit signed by Sarah Greggerson, an employee of PNC Mortgage, an entity that purported to be servicing the Johnsons' loan. It appears from the record that RALI relied upon PNC's status as its servicer as a basis to establish RALI's status as a holder of the Johnsons' note (Ms. Greggerson's affidavit was the only one filed in support of RALI's motion for summary judgment). In our view, that was insufficient evidence of RALI's standing for purposes of summary judgment in this case.

We review a summary judgment under a de novo standard of review. Herendeen v. Mandelbaum, 232 So. 3d 487, 489 (Fla. 2d DCA 2017) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)).

> Summary judgment is proper only where the moving party shows conclusively that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. When the nonmoving party has alleged affirmative defenses, the moving party must *conclusively refute the*

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[2]RALI has not argued, either below or in this appeal, that it was entitled to an inference of possession of the note at the time the complaint was filed under Ortiz v. PNC Bank, National Ass'n, 188 So. 3d 923, 925 (Fla. 4th DCA 2016) ("[I]f the Bank later files with the court the original note in the same condition as the copy attached to the complaint, then we agree that the combination of such evidence is sufficient to establish that the Bank had actual possession of the note at the time the complaint was filed and, therefore, had standing to bring the foreclosure action, absent any testimony or evidence to the contrary."). Moreover, the trial court never made a finding upon which we could conclude that the Ortiz inference would have been applicable. See, e.g., Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) ("[A]n appellate court cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue.").

> *factual bases for the defenses* or establish that they are legally insufficient. "The burden of proving the existence of genuine issues of material fact does not shift to the opposing party until the moving party has met its burden of proof."

Coral Wood Page, Inc. v. GRE Coral Wood, LP, 71 So. 3d 251, 253 (Fla. 2d DCA 2011) (emphasis added) (citations omitted) (quoting Deutsch v. Global Fin. Servs., LLC, 976 So. 2d 680, 682 (Fla. 2d DCA 2008)). "If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." Atria Grp., LLC v. One Progress Plaza, II, LLC, 170 So. 3d 884, 886 (Fla. 2d DCA 2015) (quoting Holland v. Verheul, 583 So. 2d 788, 789 (Fla. 2d DCA 1991)).

This court has held that in residential mortgage foreclosure cases, the plaintiff bears the burden of proving its standing at the time of trial and at the time it filed its complaint if the issue of standing is contested. See Corrigan v. Bank of Am., N.A., 189 So. 3d 187, 189 (Fla. 2d DCA 2016) (en banc); see also Winchel v. PennyMac Corp., 222 So. 3d 639, 642-43 (Fla. 2d DCA 2017) (noting the "legal oddity" that standing has become in residential foreclosure cases and summarizing, "[o]nce put at issue by a defendant, then, standing becomes a part of the prima facie case that a foreclosure plaintiff must prove in order to secure a judgment"). The summary judgment evidence regarding RALI's standing—challenged, as it was, by the Johnsons' affirmative defense—fell short of what was required for a summary adjudication.

Ms. Greggerson's affidavit stated only that "Plaintiff has owned and held the Note since prior to the filing of the Complaint in this action." The problem with that assertion, however, is that Ms. Greggerson was not affiliated in any way with the plaintiff, RALI. The limited facts stated in her affidavit failed to address how she derived

this knowledge about RALI's connection to the Johnsons' note or how RALI became an owner or holder of the Johnsons' note; and there was no claim within her affidavit that PNC was holding the Johnsons' note on behalf of RALI. See, e.g., Peters v. Bank of N.Y. Mellon, 227 So. 3d 175, 180 (Fla. 2d DCA 2017) (finding testimony of "case manager" employed by servicer—who took over servicing after the filing of the lawsuit—was insufficient to establish ownership of the lost note because "Ms. Stevens had no personal knowledge about the Bank's claim to have acquired ownership of the note in 2006. Moreover, Ms. Stevens's testimony in this regard was not supported by the limited documentary evidence about the loan that was available. Because Ms. Stevens's testimony was not based on personal knowledge and was not supported by any documentation, we conclude that the testimony was insufficient to establish the Bank's ownership of the lost note."); Rosa v. Deutsche Bank Nat'l Tr. Co., 191 So. 3d 987, 988-89 (Fla. 2d DCA 2016) (holding that "the record in this case does not establish that Deutsche Bank had standing to foreclose at the time it filed its complaint" because its sole witness, an employee of its servicer, Wells Fargo, "was unable to provide any testimony as to Deutsche Bank's acquisition of the note" and remarking that "[t]he only testimony as to possession of the note suggests that Wells Fargo, not Deutsche Bank, was the last entity to have possession of the note prior to the filing of the complaint"); Stoltz v. Aurora Loan Servs., LLC, 194 So. 3d 1097, 1098 (Fla. 2d DCA 2016) (finding second servicer's representative's testimony was insufficient to prove first servicer's standing at time of inception of suit because "[t]hat testimony established at most that the first servicer was in fact servicing the mortgage when it filed suit, not that the first servicer held the note when it filed suit"); Jaffer v. Chase Home Fin. LLC, 92 So. 3d 240,

242 (Fla. 4th DCA 2012) ("Under [Florida Rule of Civil Procedure 1.510(e)], affidavits must be based on personal knowledge, set forth facts which would be admissible in evidence, and show 'the affiant is competent to testify to the matters stated therein.' " (quoting Coleman v. Grandma's Place, Inc., 63 So. 3d 929, 932 (Fla. 4th DCA 2011))). And in this case, the documents attached to Ms. Greggerson's affidavit did not dispel the question of this note's ownership or who was the note's holder such that there was not "the slightest doubt that an issue might exist" concerning RALI's standing. See Atria Grp., 170 So. 3d at 886. Indeed, on this record, it is not even clear that PNC had the underlying authority to act as a servicer for RALI or to hold the Johnsons' note on RALI's behalf. Cf. Rosa, 191 So. 3d at 988 n.2 (noting that foreclosing plaintiff, Deutsche Bank, did not argue constructive possession of its note by its servicer, Wells Fargo, or that Wells Fargo was acting as Deutsche Bank's agent that was authorized to hold the note on Deutsche Bank's behalf (citing Phan v. Deutsche Bank Nat'l Tr. Co., 198 So. 3d 744 (Fla. 2d DCA 2016))). With respect to PNC's authority, Ms. Greggerson's affidavit stated only that "PNC is the mortgage servicer for the Plaintiff . . . for the mortgage loan account that is the subject of this litigation (the 'Mortgage Loan'). *A copy of the Power of Attorney from the Deutsche Bank Trust Company Americas, as Trustee to PNC is attached hereto as Exhibit 'A.'* " The limited power of attorney attached to her affidavit actually named Ocwen Loan Servicing, LLC, as RALI's servicer, not PNC.[3] Having elected to rely solely on this affidavit and its attachments, RALI failed

[3]A separate "certification" of one of Ocwen Loan Servicing, LLC's assistant secretaries was also attached as an exhibit to Ms. Greggerson's affidavit, and it appeared to include an enumerated list of certain PNC employees authorized to act on Ocwen's behalf. Ms. Greggerson's name did not appear on that list.

to meet its burden of proving there was no material issue of fact concerning RALI's standing. We must, therefore, reverse the final summary judgment.

In so holding, we do not reach the remaining issues the Johnsons present; first, because we need not do so in order to resolve this appeal, but second, because we are hesitant to do so in a case where we have no transcript from the summary judgment hearing in our record. This latter point is one we believe merits some elucidation.

Some of the arguments raised by the Johnsons in this appeal, while perhaps meritorious, presented the very real potentiality that they were either unpreserved or even waived. To take one example, the first issue the Johnsons advanced in their briefing was that RALI should not have obtained a summary judgment premised upon a loan modification agreement that RALI had neither pleaded nor attached to its operative complaint. We can see from our record that the final summary judgment in this case was indeed based, in part, upon a loan modification agreement that was introduced through Ms. Greggerson's affidavit. We can also see that that loan modification agreement was not mentioned anywhere within RALI's second amended complaint or attached as an exhibit to that pleading. See Fla. R. Civ. P. 1.130(a) ("All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought . . . must be incorporated in or attached to the pleading."); cf. Tracey v. Wells Fargo Bank, N.A., 43 Fla. L. Weekly D652b, D655b (Fla. 2d DCA Mar. 23, 2018) (holding that the trial court erred in permitting a foreclosing lender to amend its complaint to conform to the evidence at trial in order to recover on unpled loan modification agreements). What we cannot see is whether the Johnsons brought that

pleading impropriety to the circuit court's attention at any time prior to or during the summary judgment hearing. See Martinez v. Abraham Chevrolet-Tampa, Inc., 891 So. 2d 579, 581 (Fla. 2d DCA 2004) (holding that employer's failure to object to the sufficiency of employee's administrative complaint's verification during the administrative process "acted as a waiver of any objection" to the pleading's sufficiency (citing Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1991))); Gordon v. Gordon, 543 So. 2d 428, 429 (Fla. 2d DCA 1989) ("An issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination."). Were we to take up this argument, we would have to tacitly assume that the Johnsons had presented it below in the face of a record that is completely silent on that point.

Florida law calls upon appellate courts to provide a careful de novo scrutiny of summary judgment rulings, given what is at stake. See Bifulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997) (observing that summary judgment "brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim"). In that spirit, we, along with our sister courts, have occasionally remarked that the lack of a transcript of a summary judgment hearing will not necessarily thwart an appellate review of a summary judgment. See, e.g., Kamin v. Fed. Nat'l Mortg. Ass'n, 230 So. 3d 546, 548 n.2 (Fla. 2d DCA 2017) ("[A] hearing transcript is usually 'not necessary for appellate review of a summary judgment.' " (quoting Houk v. PennyMac Corp., 210 So. 3d 726, 730 (Fla. 2d DCA 2017))); Shahar v. Green Tree Servicing LLC, 125 So. 3d 251, 254 (Fla. 4th DCA 2013) ("[H]earing transcripts ordinarily are not necessary for

appellate review of a summary judgment."); Gonzalez v. Chase Home Fin. LLC, 37 So. 3d 955, 958-59 (Fla. 3d DCA 2010) (holding that it was "not necessary to procure a transcript of the summary judgment hearing" where "the [summary judgment] evidence—in the form of the pleadings, [the defendant's] affidavit, and the county records"—demonstrated that genuine issues of material fact remained (quoting Seal Prods. v. Mansfield, 705 So. 2d 973, 975 (Fla. 3d DCA 1998))).

But the context in which this observation arises is almost universally confined to appeals concerning the sufficiency of the summary judgment evidence before the trial court. See, e.g., Kamin, 230 So. 3d at 548; Shahar, 125 So. 3d at 253-54; Gonzalez, 37 So. 3d at 958-59. That was why in Houk, 210 So. 3d at 731, a case where we devoted a section of analysis to the absence of a summary judgment hearing transcript, we took care to point out that "in this case," where the summary judgment evidence about enforcement of a lost note included "the operative complaint, . . . [the] answer and affirmative defenses, the motion and the order for substitution of the plaintiff, the amended motion for summary judgment, and the supporting and opposing affidavits, including the affidavit of lost note," we had "all of the portions of the record necessary for us to determine whether the summary judgment was properly entered." "Under these circumstances," we concluded, a hearing transcript would provide no further insight about the evidentiary record's sufficiency. Id. These kinds of pronouncements, issued within case-specific, de novo reviews of evidentiary records, should not be read to the neglect of securing court reporters to transcribe summary judgment hearings. To the contrary, presenting an adequate record—one that demonstrates not only what evidence was presented below but also which arguments

were preserved—remains the appellant's burden in an appeal of a summary judgment. See Aills v. Boemi, 29 So. 3d 1105, 1109 (Fla. 2010) ("Except in cases of fundamental error, an appellate court cannot consider any ground for objection not presented to the trial court." (citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982))); Cagwin v. Thrifty Rents, Inc., 219 So. 3d 1003, 1004 (Fla. 2d DCA 2017) (discussing appellant's argument that the affiant who executed a summary judgment affidavit did not have sufficient knowledge to attest to the matters in the affidavit but concluding "we cannot determine whether such a challenge was properly raised or addressed at the summary judgment hearing because we have no transcript" (citing Zarate v. Deutsche Bank Nat'l Tr. Co., 81 So. 3d 556, 557-58 (Fla. 3d DCA 2012))); Black Point Assets, Inc. v. Fed. Nat'l Mortg. Ass'n, 220 So. 3d 566, 567 (Fla. 5th DCA 2017) (addressing the sufficiency of a complaint and summary judgment evidence to establish foreclosure and noting "Black Point's additional objections to the summary judgment were not preserved for appeal"); Rose v. Clements, 973 So. 2d 529, 530 (Fla. 1st DCA 2007) ("Any basis for reversal of summary judgment must be preserved by raising the issue in the trial court.").

All of which is to say, the de novo review that we employ for summary judgment rulings is not a gateway to reach unpreserved legal arguments, as if they were fundamental error. Cf. Coba v. Tricam Indus., Inc., 164 So. 3d 637, 646 (Fla. 2015) ("[I]n civil cases, reversal based on the concept of 'fundamental error' where a timely objection has not been made is exceedingly rare."). So while a lack of a transcript, in and of itself, will not necessarily prohibit appellate review of the evidence underlying a summary judgment ruling, it could in some cases stymie the fullness of a legal argument

challenging that ruling on appeal if there is a question about whether the argument was preserved. We reiterate, then, what we stated in Houk: while it might not be necessary to procure a transcript from a summary judgment hearing in every case, it is indeed "often helpful to do so," id. at 731 (quoting Seal Prods., 705 So. 2d at 975), especially in cases where preservation of a legal argument might otherwise be in question.

Here, however, we are satisfied that the record we do have reflects a genuine issue of material fact that was argued below. RALI's standing was a contested point almost from the beginning of this litigation, and the evidence of its standing as an owner or holder of the Johnsons' promissory note was insufficient to sustain a summary judgment in its favor. For that reason, we reverse the circuit court's final summary judgment and remand this case for further proceedings.

Reversed and remanded.

SILBERMAN and SLEET, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed May 9, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2620
Lower Tribunal No. 15-12254

Obsessions in Time, Inc., et al.,
Appellants,

vs.

Jewelry Exchange Venture, LLLP,
Appellee.

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

Mansfield, Bronstein & Stone, LLP, and David Stone, Gary N. Mansfield, Ariane Wolinsky (Fort Lauderdale), for appellants.

Stok Folk + Kon, and Robert A. Stok and Natasha Shaikh, for appellee.

Before SALTER, EMAS and LINDSEY, JJ.

EMAS, J.

Appellants, Obsessions in Time, Inc. and Marc Shaffman ("Obsessions"), appeal the trial court's order dismissing their third amended complaint with prejudice. Because we conclude the exculpatory clause in the lease agreement is ambiguous and unenforceable, we reverse the order of dismissal.

FACTS AND PROCEEDINGS BELOW

In May 2009, Obsessions leased a booth from Jewelry Exchange Venture, LLLP ("Jewelry Exchange") to sell classic watches and other valuable items. Jewelry Exchange provided a master safe in which Obsessions had the option to store their valuable items. The lease agreement, prepared by Jewelry Exchange, required that all valuables must be in the vault within one hour of closing. In addition, paragraph 37 of the lease states in relevant part as follows:

> In making this lease, it is hereby agreed that lessor does not assume the relations and duty of bailee and shall not be liable for any loss or damage to the contents of the vault within the premises caused by burglary, fire, or any cause whatsoever, but that the entire risk of such loss or damage is assumed by the lessee. The lessor shall not be liable for any delay caused by failure of the vault doors to lock, unlock or otherwise operate and the sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee.

Obsessions alleged that an employee of Jewelry Exchange allowed an unauthorized individual to access and remove Obsessions' items, which were stored in the master safe, resulting in a loss in excess of $2 million. Obsessions filed suit and, following several amendments, the operative Third Amended

Complaint asserted claims against Jewelry Exchange for breach of contract (Count VIII) and negligence (Count IX). Jewelry Exchange moved to dismiss the Third Amended Complaint and, following a hearing, the trial court granted the motion and dismissed these claims with prejudice.[1] The trial court later denied Obsessions' motion for rehearing, and this appeal followed.

ANALYSIS

We review de novo an order granting a motion to dismiss for failure to state a cause of action. Morin v. Fla. Power & Light Co., 963 So. 2d 258, 260 (Fla. 3d DCA 2007).

On appeal, Obsessions contends that, contrary to the trial court's determination that the exculpatory clause in the lease agreement is clear and unambiguous, the clause is in fact ambiguous, and thus, unenforceable. We agree. As the Florida Supreme Court has observed:

> Public policy disfavors exculpatory contracts because they relieve one party of the obligation to use due care and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss.

[1] The trial court's order dismissed with prejudice all claims against Jewelry Exchange and was therefore an appealable partial final judgment. See Fla. R. App. P. 9.110(k) (providing: "If a partial final judgment totally disposes of an entire case as to one party, it must be appealed within 30 days of rendition"). Obsessions also sued the individual who allegedly stole the items from the safe, Michael Fisher, and his company, Timepiece Collection, LLC, alleging nine additional counts. The claims against those defendants were dismissed without prejudice, and remain pending below in a subsequently-filed Fourth Amended Complaint.

Sanislo v. Give Kids the World, Inc., 157 So. 3d 256, 260 (Fla. 2015) (citations omitted).

Because exculpatory provisions are viewed with disfavor, "Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability." Sunny Isles Marina, Inc. v. Adulami, 706 So. 2d 920, 922 (Fla. 3d DCA 1998). To be enforceable, the language of the exculpatory provision must be clear, unambiguous and unequivocal:

> Exculpatory clauses are unambiguous and enforceable where the intention to be relieved from liability was made clear and unequivocal and the wording was so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away.

Sanislo, 157 So. 3d at 260-61. See also Gayon v. Bally's Total Fitness Corp., 802 So. 2d 420, 421 (Fla. 3d DCA 2001) (the wording of an exculpatory clause must be so clear and understandable that "an ordinary and knowledgeable person will know what he is contracting away").

The exculpatory provision in the instant case fails to meet this standard. The lease agreement provides in relevant part:

> In making this lease, it is hereby agreed that lessor does not assume the relations and duty of bailee and **shall not be liable for any loss or damage to the contents of the vault within the premises caused by burglary, fire, or any cause whatsoever, but that the entire risk of such loss or damage is assumed by the lessee**. The lessor shall not be liable for any delay caused by failure of the vault doors to lock, unlock or otherwise operate and **the sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent**

the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee.

(Emphasis added).

As can be seen, these two highlighted and juxtaposed portions create an ambiguity:

- The lessor "shall not be liable for any loss or damage to the contents of the vault within the premises caused by burglary, fire, or any cause whatsoever . . . ."
- "[T]he sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee.

Although the first provision plainly appears to relieve Jewelry Exchange of any liability, the second provision plainly appears to impose liability should Jewelry Exchange fail to exercise ordinary care to prevent unauthorized access to the vault and boxes. These two provisions within the same paragraph of the lease agreement are not reconcilable, and render the exculpatory clause unclear, equivocal and ambiguous. We also conclude, following our review of the entire lease agreement, that none of its remaining provisions renders this conflicting language clear, unequivocal or unambiguous.

In Adulami, 706 So. 2d at 922, this court affirmed the trial court's order finding an exculpatory clause ambiguous and unenforceable. Sunny Isles Marina

owned and operated a marina and dry storage facility. Id. at 921. Adulami and other plaintiffs owned boats and stored them at Sunny Isles Marina pursuant to a boat storage agreement. Id. A fire broke out at the facility, causing damage to several boats, including Adulami's. Id. Adulami and other boat owners filed insurance claims, alleging that the fire was the result of Sunny Isles' improper installation, maintenance, and use of a portable battery charging system aboard one of the boats. Id. Sunny Isles filed a declaratory judgment action, seeking a determination that it was relieved of all liability based upon the exculpatory clause contained in the boat storage agreement entered into with the boat owners. Id. That exculpatory clause provided in pertinent part:

> 7. RISK OF LOSS. The assigned space shall be occupied at the sole risk of the Owner. Owner agrees that the Marina is not the insurer of the Boat.... The Marina shall not be liable in any way for any loss or damage sustained by Owner or anyone claiming by, through or under Owner which arises **out of any cause not attributable to the willful gross negligence of the Marina**, nor shall the Marina be liable for any loss or damage to the Boat, its equipment or property stored thereon, due to fire, theft, vandalism, collision, Marina equipment failure, wind storm, rain, hurricane or other casualty loss. Personal property aboard the Boat is stored at the sole risk of Owner for loss from any cause.
>
> 8. INDEMNIFICATION. The Owner hereby waives any right it has to claim any damages or other loss or liability from the Marina, its employees or agents arising out of any accident, fire, or other casualty about the Marina, **whether the same results from any act or neglect of the Marina or any occupant, invitee, guest or other persons in or about the Marina.**

> Owner agrees to indemnify the Marina against all claims, actions, liability and damages, including attorney's fees, whether claimed by the owner, its guests, family, employees, agents or other third parties, arising out of the Owner's possession and use of the storage space and other facilities of the Marina.
>
> Owner agrees to indemnify the Marina from and against any claim, suit, loss, liability or costs, including attorney's fees, arising out of, or resulting from, any use, operation or occupancy of the Boat by Owner or anyone claiming by, through or under Owner.

Id. (Emphasis added.)

In affirming the trial court's dismissal of Sunny Isles' declaratory action, we noted the manifest ambiguity when reading paragraphs seven and eight in pari materia, and held the exculpatory clause was unenforceable:

> On the one hand, section seven of the Sunny Isles boat storage agreement purports to absolve Sunny Isles of liability for any actions except willful gross negligence. On the other hand, paragraph eight of the agreement purports to absolve Sunny Isles from any form of negligence (be it simple or gross).
>
> Further, not only do paragraphs seven and eight conflict with each other, we also note a fatal ambiguity within paragraph seven's language. This paragraph first says that Sunny Isles is not liable for any loss not attributable to its willful gross negligence, but it also says that Sunny Isles is not liable for any loss due to fire, theft, vandalism, collision, etc. Thus, if there was damage to property due to, for example, theft, and that theft was caused by the willful gross negligence of Sunny Isles, it is unclear which clause of that sentence in paragraph seven would prevail; the one which says Sunny Isles can be liable, or the one which says Sunny Isles cannot be liable. The next sentence of paragraph seven, which states that personal property aboard the boat is stored at the sole risk of the owner for loss from any cause, creates a similar ambiguity.

> Because of the ambiguity caused by the conflict of paragraphs seven and eight, and the internal conflict within paragraph seven, we find that an ordinary and knowledgeable party would not know what he or she is contracting away in this regard.

Id. at 922.

In Murphy v. Young Men's Christian Association of Lake Wales, Inc., 974 So. 2d 565 (Fla. 2d DCA 2008), Murphy brought a personal injury action, alleging negligence against the YMCA. The trial court entered summary judgment in favor of the YMCA based upon a membership application signed by Murphy, purporting to release YMCA from all liability and all claims, including those based on negligence. Id. at 566. That release provided in pertinent part:

> I am an adult over 18 years of age and wish to participate in Lake Wales Family YMCA activities. In addition I give my children permission to participate in Lake Wales Family YMCA activities. **I understand that even when every reasonable precaution is taken, accidents can sometimes still happen.** Therefore, in exchange for the YMCA allowing me to participate in YMCA activities, I understand and expressly acknowledge that **I release the Lake Wales Family YMCA and its staff members from all liability for any injury, loss or damage** connected in any way whatsoever to my (or my children's) participation in YMCA activities, whether on or off the YMCA's premises. **I understand that this release includes any claims based on negligence**, action or inaction of the Lake Wales Family YMCA, its staff, directors, members and guests. I have read and am voluntarily signing this authorization and release.

Id. (emphasis added).

The Second District reversed, finding the exculpatory clause ambiguous and unenforceable:

> We recognize that the waiver in the instant case does specifically state that the YMCA is not liable for "any claims based on negligence." However, the waiver also suggests that the YMCA will take "every reasonable precaution" against accidents. Confusion results from the juxtaposition of the "every reasonable precaution" provision with the provision for the release of "any claims based on negligence." A reasonable reader might be led to believe that the waiver of liability extends only to claims for injuries that were unavoidable "even when every reasonable precaution" had been taken by the YMCA. In light of the "every reasonable precaution" language, the waiver does not clearly and unequivocally release the YMCA from liability and is therefore not enforceable.

Id. 568-69.

In Brooks v. Paul, 219 So. 3d 886 (Fla. 4th DCA 2017), the Fourth District similarly reversed a summary judgment upon a finding that the exculpatory clause contained in a release form was ambiguous. In Brooks, plaintiff filed suit alleging her doctor and other medical providers were negligent during a spinal fusion surgery. Defendants moved for summary judgment based upon an exculpatory clause in the release executed by plaintiff prior to surgery. That clause read:

> As of January 1, 2003, Dr. Michael D. Paul, and the professional corporation of MacMillan, Paul and Burkarth, P.A., also known as Treasure Coast Neurosurgery, will not carry any medical malpractice insurance. Being of sound mind and sound body, I hereby acknowledge this fact **and agree not to sue** Dr. Michael D. Paul, or the professional corporation of MacMillan Paul and Burkarth, P.A. **for any reason. My reason for doing this is that I realize that Dr. Michael D. Paul and his staff will do the very best to take care of me according to community medical standards.**

Id. at 887 (emphasis added).

The trial court entered summary judgment in favor of the defendants. The Fourth District reversed, holding that "[t]he third sentence*, which qualifies the first two sentences*, creates an ambiguity. Indeed, if the defendants intended to be released from their own negligence, it begs the question as to why the third sentence is included in the release." Id. at 891.

Turning to the instant case, if (as appellee urges) the exculpatory clause was intended to relieve lessor/appellee from all liability for loss or damage, regardless of its nature or cause, it begs the question of why that same clause would include this phrase: "the sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee." As our sister court observed in construing a similarly ambiguous exculpatory clause:

> By their own choice of language, appellees agreed to take reasonable precautions to assure [the child's] safety. This duty to undertake reasonable care expressed in the first part of the provision would be rendered meaningless if the exculpatory clause absolved appellees from liability. We cannot ignore this language because all terms of a contract provision must be read as a whole to give every statement meaning. Construing the exculpatory clause as a whole, appellees' release from liability rests on their exercise of reasonable care to ensure [the child's] safety and good health. Whether appellees fulfilled this duty is a factual question which the trial court must resolve.

Goyings v. Jack & Ruth Eckerd Found., 403 So. 2d 1144, 1146 (Fla. 2d DCA 1981), disapproved on other grounds by Sanislo, 157 So. 3d at 271.

CONCLUSION

In a single clause, Jewelry Exchange purported to absolve itself of all liability for loss or damage while at the same time agreeing that its "sole liability" was "limited to the exercise of ordinary care to prevent the opening of the vault by any person other than lessee or the authorized agent of the lessee." As in Murphy, Brooks and Goyings, this latter provision would be rendered meaningless if we were to construe the exculpatory clause to absolve Jewelry Exchange of all liability. We hold that the exculpatory clause is ambiguous: While purporting to relieve Jewelry Exchange of all liability, the exculpatory clause concurrently imposes a duty upon Jewelry Exchange to exercise ordinary care to prevent the unauthorized opening of the vault or boxes, and potential liability if Jewelry Exchange failed to exercise such care. Thus, the trial court erred in entering its final order of dismissal with prejudice.[2]

We reverse the final judgment of dismissal and remand this cause to the trial court for further proceedings consistent with this opinion.

[2] Because we reverse the trial court's order on this ground, we need not address the other arguments raised on appeal.

Third District Court of Appeal

State of Florida

Opinion filed May 9, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2052
Lower Tribunal No. 17-14434

Sammie Investments, LLC, a Florida Limited Liability Company,
Appellant,

vs.

Strategica Capital Associates, Inc.,
Appellee.

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

Borowski & Traylor, P.A., and T.A. Borowski, Jr., and Darryl Steve Traylor, Jr., (Pensacola), for appellant.

Pathman Lewis, LLP, and Aaron W. Tandy, and John A. Moore, for appellee.

Before SALTER, EMAS, and LINDSEY, JJ.

LINDSEY, J.

Sammie Investments, LLC appeals the trial court's order granting Strategica Capital Associates, LLC's motion for temporary injunctive relief rendered in this breach of contract action. The order directed Sammie to turn over $200,000 of the proceeds derived from the sale of real property to its counsel to be held in its counsel's trust account pending further order of the trial court. Because irreparable harm does not exist and Strategica has an adequate remedy at law, we reverse the entry of the temporary injunction.

I. BACKGROUND

Strategica sued Sammie and its manager, Mary Moulton, in a six-count complaint filed on June 15, 2017. Stategica brought three counts against Sammie for breach of contract, two counts against Ms. Moulton for misrepresentation and unjust enrichment, and one count against Sammie and Ms. Moulton for declaratory judgment. Thereafter, on June 21, 2017, Strategica filed a verified emergency motion for injunctive relief on the basis it provided services and advanced funds on behalf of Sammie and its affiliated companies and entities (the "Moulton entities") in exchange for a twenty percent interest in the profits of Sammie. Strategica claimed that Sammie's only asset was its investment in and co-manager position of 9 Mile-NF Joint Venture LLC ("9 Mile"). 9 Mile was purportedly poised to sell real property (the "9-Mile property") and Strategica sought the entry of an injunction to prohibit Sammie from distributing the proceeds of that sale.

Seven days later, Sammie filed a response asserting it did not agree to grant Strategica an interest in twenty percent of the gross amount it received and argued that a profits interest in it is separate and distinct from a twenty percent assignment of the proceeds of its interest in 9 Mile. Ms. Moulton filed an affidavit in support of Sammie's response, stating that no written agreement was ever executed by the parties.

Although Sammie conceded that Strategica advanced $75,000 for the benefit of the Moulton entities, it claimed substantial factual disputes existed as to the alleged agreement's terms, performance, and remedies. Sammie also asserted it has other ongoing business activities. As such, Strategica contended, even assuming Sammie is correct, there is no basis for the entry of a temporary injunction because money damages provide an adequate remedy at law and irreparable harm does not exist where the potential loss is compensable by money damages.

On August 3, 2017, the trial court held an evidentiary hearing on Strategica's injunction motion.[1] The trial court considered an engagement letter

[1] Prior to the hearing, on July 3, 2017, Strategica filed an amended complaint, adding claims against Sammie for breach of implied contract at law and the imposition of a constructive trust over the funds which correspond to twenty percent of the profit interest received by Sammie from the sale of the 9 Mile property and the other amounts due to Strategica under the parties' alleged agreement. However, the order entered by the trial court makes no mention of the constructive trust claim. As such, we decline to address this theory.

and a supplemental agreement from September 2015, neither of which is signed by, or mentions Sammie, as well as emails from November of 2015. The engagement letter from Strategica was addressed to Ms. Moulton and James C. Moulton, who signed the letter as President of Moulton Properties, Inc. and affiliates. The supplemental agreement was allegedly between Strategica and the Moulton Entities. The emails include an exchange between Strategica's executive vice president, Steven Cook, and its counsel. Mr. Cook testified that although Strategica exchanged drafts with Sammie, they never reached an agreement on the disposition of the proceeds of the sale of the 9 Mile property. He further testified that based on the 9 Mile property closing statement, Strategica is owed "slightly over $200,000" from the sale. Mr. Cook also opined that Sammie did not have operations other than this investment in 9 Mile.

Thereafter, on August 29, 2017, the trial court entered the order granting Strategica's motion for temporary injunctive relief, wherein the trial court found that Strategica satisfied its burden of showing:

> a. the likelihood of irreparable harm and the unavailability of an adequate remedy at law based on the testimony presented regarding the limited resources and operations of [Sammie];
> b. a substantial likelihood of success on the merits based on the testimony presented regarding the contract formed between [Strategica] and [Sammie];
> c. that the threatened injury to [Strategica] outweighs any possible harm to the [Sammie], and
> d. that the granting of the preliminary injunction will not

disserve the public interest.

In its order, the trial court directed Sammie to "immediately deliver up to $200,000.00 of the proceeds derived from the sale [the 9-Mile property] to its counsel . . . to be held in counsel's trust account, until further order of the Court." The trial court further required Strategica to obtain a $500 bond and set this minimal amount based on Strategica's likelihood of success on the merits. This timely appeal follows.

II. JURISDICTION

This Court has jurisdiction to review the non-final order granting temporary injunctive relief pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(B). See also Fla. R. App. P. 9.130(a)(3)(B) (authorizing district courts of appeal to review non-final orders that "grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions.").

III. STANDARD OF REVIEW

"The standard of review of trial court orders on requests for temporary injunctions is a hybrid. To the extent the trial court's order is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to *de novo* review." Bookall v. Sunbelt Rentals, Inc., 995 So. 2d 1116, 1117 (Fla. 4th DCA 2008) (emphasis added) (citations omitted). "Although a trial court has broad discretion in granting injunctive relief,

it is an extraordinary remedy that requires a clear legal right, free from reasonable doubt." Meritplan Ins. Co. v. Perez, 963 So. 2d 771, 776 (Fla. 3d DCA 2007) (internal quotations omitted).

IV. ANALYSIS

To establish entitlement to a temporary injunction, the moving party must show "the likelihood of irreparable harm; the unavailability of an adequate remedy at law; the substantial likelihood of success on the merits; the threatened injury to the petitioner outweighs the possible harm to the respondent; and the granting of the temporary injunction will not disserve the public interest." Chevaldina v. R.K./FL Mgmt., 133 So. 3d 1086, 1089 (Fla. 3d DCA 2014). Moreover, a temporary injunction "should be granted only sparingly and only after the moving party has alleged and proved facts entitling it to relief." Id. (quoting Liberty Fin. Mortg. Corp. v. Clampitt, 667 So. 2d 880, 881 (Fla. 2d DCA 1996)). The party seeking an injunction has the burden of providing competent, substantial evidence satisfying each element. See SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC., 78 So. 3d 709, 711 (Fla. 1st DCA 2012).

The trial court below based its finding of the likelihood of irreparable harm and the unavailability of an adequate remedy at law on the testimony presented regarding the limited resources and operations of Sammie. Specifically, the trial court reasoned that if Sammie does not "have any other assets based on the only

testimony provided, then there would be irreparable harm because there would be nowhere else from where to gain that money. Those monies are not set aside." As such, the trial court concluded that "the most [it could do] is enjoin [Sammie] from somehow not disbursing or otherwise dissipating, [it] would say, $200,000 of whatever they obtain from the closing from that 9 Mile property. It has been dispersed [sic] to them. Hopefully, it's still in an account somewhere."

Strategica has failed to meet its burden of proving that it will incur irreparable harm because it has no adequate remedy at law. As defined by this Court, "irreparable injury is injury that cannot be cured by money damages." Lutsky v. Schoenwetter, 172 So. 3d 534, 534 (Fla. 3d DCA 2015) (citing Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1092 (Fla. 3d DCA 2014)). And, "[t]he test for unavailability of an adequate remedy at law, under these requirements, is 'whether a judgment can be obtained, not whether, once obtained, it will be collectible.'" Lopez-Ortiz v. Centrust Sav. Bank, 546 So. 2d 1126, 1127 (Fla. 3d DCA 1989) (citations omitted).

Here, even if Strategica is ultimately successful in establishing entitlement to the $75,000 purported loan or to twenty percent of Sammie's profits from the sale of the 9 Mile property, it will only be entitled to an award of money damages. Strategica, therefore, has an adequate remedy at law to recover the disputed funds. Accordingly, because the injury Strategica is attempting to prevent is purely

monetary and can be cured by money damages, Strategica will not suffer irreparable harm.

As this Court stated in Konover Realty associates, Ltd. v. Mladen:

> It is entirely settled by a long and unbroken line of Florida cases that in an action at law for money damages, there is simply no judicial authority for an order requiring the deposit of the amount in controversy into the registry of the court, or indeed for any restraint upon the use of a defendant's unrestricted assets prior to the entry of judgment. The rule has been specifically applied, as on general principles it must be, to an action like this one for the recovery of unsegregated earnest money, and is unequivocally not affected by the claim that recovery upon any subsequently-entered judgment may be made difficult by the dissipation or unreachability of the debtor's assets.

511 So. 2d 705, 706 (Fla. 3d DCA 1987) (internal citations omitted); see also Leight v. Berkman, 483 So. 2d 476, 477 (Fla. 3d DCA 1986) (citations omitted) ("The law is unequivocally established that an injunction against the disposition of a defendant's assets simply may not be granted upon the ground that their preservation is required to satisfy a subsequent money judgment."); De Leon v. Aerochago, S.A., 593 So. 2d 558, 559 (Fla. 3d DCA 1992) ("Injunctive relief may not be used to enforce money damages, or to prevent any party from disposing of assets until an action at law for an alleged debt can be concluded." quoting Hiles v. Auto Bahn Federation, Inc., 498 So. 2d 997, 998 (Fla. 4th DCA 1986)).

V. CONCLUSION

Because Strategica has suffered no irreparable injury that cannot be cured by money damages and an adequate remedy at law is available, we reverse the trial court's order granting Strategica's motion for temporary injunctive relief and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.