Real Property and Business Litigation Report

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Manuel Farach

Kolawole v. Sellers, Case Nos. 15-13720 & 15-15801 (11th Cir. 2017).
Typically in federal court, the period to file an appeal of a final judgment begins on the later of either two events: (1) when the district court enters the order constituting the final judgment, or (2) when the court disposes of the last motion seeking relief from the final judgment. However, a district court may still certify a non-final judgment (one that fails to adjudicate all of the parties' claims) as final if "there is no just reason for delay." Fed. R. Civ. P. 54(b). Cases that are consolidated, either by order or as a practical matter, will be considered one case for appellate purposes.

The Leila Corporation of St. Pete v. Ossi, Case No. 2D15-3279 (Fla. 2d DCA 2017).
An appeal must be filed from the date of the original (not the amended) final judgment if the amended final judgment does not substantively change the final judgment; attorney's fees and costs added into an amended final judgment are collateral to and do not substantively change the final judgment.

Carlisle v. U.S. Bank, Case No. 3D17-58 (Fla. 3d DCA 2017).
A non-party may use the *Pearlman* (*v. Pearlman*, 405 So. 2d 764 (Fla. 3d DCA 1981)), Exception to raise a Florida Rule of Civil Procedure 1.540 (b) claim only if their interests predated the litigation. Accordingly, a purchaser pendent lite who takes after a lis pendens is filed cannot use the Pearlman Exception to raise a 1.540 (b) claim.

Bautista REO U.S., LLC v. ARR Investments, Inc., Case No. 4D16-3658 (Fla. 4th DCA 2017).
Even if failure to do so results in loss of real property, a trial court may not issue an injunction to require a lender to deliver an estoppel letter in a certain amount as borrower has an adequate remedy at law and there is no irreparable harm for any breach.

Don Facciobene, Inc. v. Hough Roofing, Inc., Case Nos. 5D15-1527 (Fla. 5th DCA 2017).
A written construction contract containing a merger and integration clause replaces an existing oral agreement, even if the construction is substantially completed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BAUTISTA REO U.S., LLC, a Delaware limited liability company,
Appellant,

v.

ARR INVESTMENTS, INC., a Florida corporation,
Appellee.

No. 4D16-3658

[July 19, 2017]

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barbara McCarthy, Judge; L.T. Case No. CACE-16-017788 (21).

Denise Dell-Powell and Christopher R. Thompson of Burr & Forman, LLP, Orlando, for appellant.

Andrew C. Hill and John W. Zielinski of NeJame Law, P.A., Orlando, for appellee.

PER CURIAM.

Bautista REO U.S., LLC ("Bautista REO"), appeals a non-final order granting ARR Investment, Inc.'s ("ARR") motion for temporary injunction. Because ARR failed to establish irreparable harm with no adequate remedy at law, we reverse.

Factual Background

ARR is the owner and holding company of five daycare facilities in Florida. In April of 2003, ARR and Doral Bank, predecessor in interest to Bautista REO, entered into a loan transaction for $1,550,000. As evidence of the loan, ARR and Doral Bank executed a Loan and Security Agreement. Pursuant to the Loan and Security Agreement, and as security for the loan, ARR granted Doral Bank two mortgages: one mortgage on two parcels of ARR's real property in Broward County (the "first mortgage"), and a collateral mortgage on real property in Pembroke Pines (the "collateral mortgage"). The Loan and Security Agreement provided that the collateral mortgage would secure a $250,000 demand note, plus 7.65% interest, executed by ARR. All of the notes and mortgages were executed on the

same day as part of one transaction. The collateral mortgage is the subject of the underlying litigation.

In 2011, ARR refinanced the loan documents with City National Bank of Florida ("City National"). ARR then defaulted on its payment obligations under the loan documents. City National filed a foreclosure complaint seeking to foreclose on its first mortgage interest in the Pembroke Pines property. In the complaint, City National named both ARR and Bautista REO as defendants with an interest in the property.

In order to pay off City National and avoid foreclosure, ARR entered into a purchase and sale agreement to sell the Pembroke Pines property to a third party. After several extensions, the closing was scheduled to occur on October 31, 2016. In the course of the transaction, a title search revealed that Doral Bank never released the collateral mortgage, as ARR claims it should have in the course of the 2011 refinance. Instead, the collateral mortgage was assigned to Bautista REO, along with the $1,550,000 loan.

In September of 2016, ARR requested that Bautista REO provide an estoppel letter identifying the amount of indebtedness due under the collateral mortgage. Bautista REO, through Capital Crossing Servicing, Inc., the servicer for the loan, provided ARR with an estoppel letter which provided a total payoff amount of $478,534.72.

Subsequently, ARR filed a verified four-count complaint against Bautista REO alleging: (1) violation of section 701.04(1), Florida Statutes (2016); (2) interference with a contractual relationship, including a request for injunctive relief to enjoin Bautista REO from interfering with ARR's purchase and sale contract for the subject property and to compel Bautista REO to issue an estoppel letter in the amount of $250,000; (3) an action for declaratory judgment to determine whether the collateral note and collateral mortgage entitle Bautista REO to recover any amounts over $250,000 (interest, fees, costs); and (4) an action for Bautista REO's violations of Florida usury laws under sections 687.04 and 687.071, Florida Statutes (2016).

That same day, ARR sought a temporary injunction enjoining Bautista REO from continuing to violate sections 687.04, 687.071, and 701.04, Florida Statutes, and from tortiously interfering in the real estate sales contract regarding the Pembroke Pines property, and requiring Bautista REO to immediately issue an estoppel letter in the amount of $250,000 without additional charges.

Bautista REO responded, arguing that ARR had not met its burden of demonstrating that it was entitled to injunctive relief. Bautista REO argued it timely provided the requested estoppel letter, in the amount which reflected properly accrued interest, as provided for in the collateral note. Bautista REO asserted that even if the trial court finds that it wrongfully included interest or included usurious interest, requiring it to issue an estoppel letter for $250,000 would permanently alter Bautista REO's rights in the subject property. Bautista REO also argued ARR failed to establish irreparable harm because it can be adequately compensated by a monetary award and failed to establish its likelihood of success on the merits.

A hearing on ARR's motion for temporary injunction was held on October 24, 2016.

Order Granting Temporary Injunction

On October 27, 2016, the trial court entered an order granting the temporary injunction. The order required Bautista REO to release the $250,000 collateral mortgage against the Pembroke Pines property. The order further required ARR to deposit $250,000 with the Broward County Circuit Court Clerk Registry within two business days of the closing of the Pembroke Pines property.

Bautista REO filed an emergency motion in the trial court to increase the bond amount, or, alternatively, to stay the injunction. The emergency motion was denied without a hearing.[1] This Court granted Bautista REO's motion for stay pending this appeal.

Analysis

We employ a mixed standard of review. "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." *Foreclosure FreeSearch, Inc. v. Sullivan,* 12 So. 3d 771, 774 (Fla. 4th DCA 2009) (quoting *E.I. DuPont De Nemours & Co. v. Bassett*, 947 So. 2d 1195, 1196 (Fla. 4th DCA 2007)).

To be entitled to a temporary injunction, a party must prove that: "'(1) irreparable harm will result if the temporary injunction is not entered; (2) an adequate remedy at law is unavailable; (3) there is a substantial likelihood of success on the merits; and (4) entry of the temporary

[1] The emergency motion was denied by a different judge.

injunction will serve the public interest.'" *Minty v. Meister Fin. Grp., Inc.*, 97 So. 3d 926, 930 (Fla. 4th DCA 2012) (quoting *Burtoff v. Tauber*, 85 So. 3d 1182, 1183 (Fla. 4th DCA 2012)). The party seeking the injunction has the burden to provide competent substantial evidence, and the court's order must contain "[c]lear, definite, and unequivocally sufficient factual findings" to support each of the four elements. *Concerned Citizens for Judicial Fairness, Inc. v. Yacucci*, 162 So. 3d 68, 72 (Fla. 4th DCA 2014) (alteration in original) (quoting *Liberty Fin. Mortg. Corp. v. Clampitt*, 667 So.2d 880, 881 (Fla. 2d DCA 1996)).

"A temporary injunction is an extraordinary remedy which should be granted sparingly." *Gooding v. Gooding*, 602 So. 2d 615, 616 (Fla. 4th DCA 1992). "The primary purpose of a temporary injunction is to preserve the status quo while the merits of the underlying dispute are litigated." *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. 2d DCA 2014) (quoting *Manatee Cty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012)); *accord City of Miami Springs v. Steffen,* 423 So. 2d 930, 931 (Fla. 3d DCA 1983). In this case, ARR failed to establish irreparable harm and that there was no adequate remedy at law.

Irreparable Harm

"[A]n injury is irreparable where the damage is estimable only by conjecture, and not by any accurate standard." *Hatfield v. AutoNation, Inc.*, 939 So. 2d 155, 157 (Fla. 4th DCA 2006) (alteration in original) (quoting *JonJuan Salon, Inc. v. Acosta*, 922 So. 2d 1081, 1084 (Fla. 4th DCA 2006)). Irreparable harm is not established if the harm can be adequately compensated by a monetary award. *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989).

The trial court erred in finding ARR established irreparable harm because of the potential that they would lose the property to foreclosure sale at a significantly reduced price than that under the purchase and sale agreement. The initiation of foreclosure proceedings does not constitute irreparable harm. *See Reserve at Wedgefield Homeowners' v. Dixon,* 948 So. 2d 65, 67-68 (Fla. 5th DCA 2007) (holding that threat of foreclosure proceedings and potential loss of property does not constitute irreparable harm). The only potential loss is economic, which can be adequately remedied by monetary damages.

Adequate Remedy at Law

The trial court held that "[d]ue to the numerous changes in ownership, an adequate remedy at law is not present when the loan

documents are subject to additional future assignments." The trial court erred in finding there is no adequate remedy at law.

The harm alleged by ARR is that it would suffer the loss of the Pembroke Pines property at a foreclosure sale, which might result in a lower sale price than that in the purchase and sale agreement. However, such a loss could be remedied by monetary damages. *See 3299 N. Fed. Highway, Inc. v. Bd. of Cty. Comm'rs of Broward Cnty.*, 646 So. 2d 215, 220 (Fla. 4th DCA 1994).

The fact that the damages may not be collectible is irrelevant. *See Hiles v. Auto Bahn Fed'n, Inc.,* 498 So. 2d 997, 999 (Fla. 4th DCA 1986) ("The possibility that a money judgment, once obtained, will not be collectible is irrelevant under the test of inadequacy of remedy at law.").

Because ARR failed to prove that it would incur irreparable harm with no adequate remedy on appeal, the court erred in granting the temporary injunction. We therefore reverse and direct the trial court to dissolve the injunction.

Reversed and remanded with directions.

WARNER, DAMOORGIAN and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Third District Court of Appeal

State of Florida

Opinion filed July 19, 2017.

Not final until disposition of timely filed motion for rehearing.

No. 3D17-58
Lower Tribunal No. 09-86386

Thomas Carlisle,
Appellant,
vs.

U.S. Bank, National Association, as Trustee for the Benefit of Harborview 2005-10 Trust Fund,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Jacqueline Hogan Scola, Judge.

Jacobs Keeley, PLLC, and Bruce Jacobs, Court E. Keeley, Amid U. Frey, and Anna C. Morales, for appellant.

Akerman LLP, and Nancy M. Wallace (Tallahassee); Akerman LLP, and William P. Heller (Fort Lauderdale); Akerman, LLP, and Eric M. Levine (West Palm Beach), for appellee.

Before SUAREZ, LAGOA, and LUCK, JJ.

LAGOA, J.

ON MOTION TO DISMISS

Thomas Carlisle ("Carlisle") appeals from the denial of his motion to vacate final judgment filed pursuant to Florida Rule of Civil Procedure 1.540(b). U.S. Bank, N.A. ("U.S. Bank") moves to dismiss the appeal for lack of standing. We grant the motion and dismiss the appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

U.S. Bank commenced an action to foreclose on property located in Miami-Dade County. Carlisle purchased the property from the original mortgagor sometime after the lis pendens was filed. Carlisle was not named as a party in the foreclosure action. Carlisle sought leave to intervene, and his motion to intervene was initially granted. Prior to trial commencing, however, the trial court *sua sponte* orally vacated the order granting leave to intervene and denied the motion. Following the trial's conclusion, final judgment of foreclosure was entered in favor of U.S. Bank. Carlisle filed a motion to vacate the final judgment pursuant to Florida Rule of Civil Procedure 1.540(b). The trial court denied the motion, and this appeal ensued.

II. ANALYSIS

Only "a party or a party's legal representative" may seek relief from a final judgment pursuant to Rule 1.540(b). SR Acquisitions-Fla. City, LLC v. San Remo Homes at Fla. City, LLC, 78 So. 3d 636, 638 (Fla. 3d DCA 2011). In order for a non-party to bring a 1.540(b) motion, generally the non-party must first intervene

and thereby become a party to the suit. In response to U.S. Bank's motion to dismiss, Carlisle argues that pursuant to this Court's opinion in Pearlman v. Pearlman, 405 So. 2d 764 (Fla. 3d DCA 1981), he should be found to have standing to set aside the final judgment under Rule 1.540(b). While this Court has in the past recognized a limited exception in Pearlman that permits a non-party to seek relief under Rule 1.540(b), we do not find that limited exception applicable here.

Before this Court addresses the Pearlman exception, we note that Carlisle purchased the mortgaged property *after* the lis pendens was filed in this action. As such, Carlisle was not named or made a party in the complaint below. Second, while Carlisle sought leave to intervene and his motion was initially granted, that order was later vacated. As this Court has repeatedly stated, "a trial court has inherent authority to reconsider and modify its interlocutory orders," AC Holdings 2006, Inc. v. McCarty, 985 So. 2d 1123, 1125 (Fla. 3d DCA 2008), and, as "an order granting intervention is necessarily interlocutory," Superior Fence & Rail of N. Fla. v. Lucas, 35 So. 3d 104, 105 n. 1 (Fla. 5th DCA 2010) (citing In re J.P., 12 So. 3d 253, 254 (Fla. 2d DCA 2009)), the trial court had the inherent authority to reconsider and modify its order granting leave to intervene. [1]

[1] Because Carlisle failed to timely appeal the denial of his motion to intervene, we do not reach the merits of whether such denial was proper, although we remind the parties of the general rule that "when property is purchased during a pending foreclosure action in which a lis pendens has been filed, the purchaser generally is

We now address whether Carlisle meets the limited exception set forth in Pearlman that permits a non-party to seek relief under Rule 1.540(b). In Pearlman, this Court held that an "unnamed party whose rights were directly and injuriously affected by a judgment fraudulently obtained may seek relief from that judgment either by motion or by independent collateral attack." 405 So. 2d at 766. This "Pearlman standing," which has been repeatedly recognized throughout the state, is a narrow exception that permits a non-party to use Rule 1.540 to seek relief from a judgment.

In Pearlman, the personal representative of the decedent's estate had allegedly colluded to obtain a judgment for a creditor against the estate he represented in order to deprive the decedent's wife of her share of the estate. 405 So. 2d at 765. Upon discovering this, the wife moved for relief from the creditor's judgment against the estate on the ground that the judgment had been fraudulently obtained. Id. This Court found that the wife, who had a "right to a lawful share of her husband's estate" and was "a known heir and devisee under the will" had "standing under Florida Rule of Civil Procedure 1.540(b) to move that the court set aside the judgment." Id. at 767.

The distinction between Pearlman (and its progeny) and the instant case is significant. The wife in Pearlman (and the non-parties in other Pearlman progeny[2])

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not entitled to intervene in the pending foreclosure action." Bymel v. Bank of Am., N.A., 159 So. 3d 345, 347 (Fla. 3d DCA 2015).

had rights which predated the litigation, which rights were directly affected by the judgment that had been fraudulently obtained, and which arguably may have qualified the wife (and the non-parties in other Pearlman progeny) to intervene pursuant to Florida Rule of Civil Procedure 1.230.

In contrast, as a purchaser post-lis pendens, Carlisle had no rights in the property at the time the litigation commenced, and he purchased the property subject to and bound by any judgment rendered in the foreclosure action. See § 48.23(1)(d), Fla. Stat. (2016). Moreover, Carlisle was subject to the general rule

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[2] E.g., Gotham Ins. Co. v. Matthew, 179 So. 3d 437, 441 (Fla. 5th DCA 2015) (holding that non-party insurer had standing to move to vacate judgment as the insurer's rights were directly affected by fraudulently amended judgment which could have a preclusive effect on insurer in later proceedings); Davis v. M & M Aircraft Acquisitions, Inc., 76 So. 3d 1066, 1066 (Fla. 4th DCA 2011) (finding that non-party minority shareholder had standing to vacate final judgment fraudulently obtained by parties and which directly affected minority shareholder's rights); Chaluts v. Nagar, 862 So. 2d 925, 927 (Fla. 2d DCA 2004) (upon learning that judgment in separate collection action dissipated marital asset, wife intervened in collection action, and collection action was consolidated with divorce proceeding; holding that trial court in divorce proceeding had authority to set aside judgment agreed to by husband in separate collection action as trial court concluded that the judgment had been entered as a fraud upon the court; upon learning that judgment in separate collection action dissipated marital asset, wife intervened in collection action, and collection action was consolidated with divorce proceeding and transferred to trial court presiding over dissolution); Woginiak v. Kleiman, 523 So. 2d 1209, 1210 (Fla. 3d DCA 1988) (holding that son had standing to seek to vacate order fraudulently obtained to establish posthumous marriage license in separate action as son had interest in father's estate and marriage was disputed in separate, probate proceeding). But see State Airlines, Inc. Through Struve v. Menut, 511 So. 2d 421, 424 (Fla. 4th DCA 1987) (finding that bankruptcy trustee did not have standing to set aside judgment allegedly procured by fraud as bankruptcy estate and creditors would not be affected by judgment.

that such purchasers are "not entitled to intervene in the pending foreclosure action," Bymel, 159 So. 3d at 347.

We therefore reject Carlisle's argument, as it would require this Court to hold, on the one hand, that purchasers post-lis pendens are generally not entitled to intervene in a pending foreclosure action but hold, on the other hand, that purchasers post-lis pendens have "rights . . . directly and injuriously affected by a judgment" giving them Pearlman standing to contest the judgment through a 1.540 motion. Cf. Whitburn, LLC v. Wells Fargo Bank, N.A., 190 So. 3d 1087, 1091–92 (Fla. 2d DCA 2015), reh'g denied (Apr. 29, 2016), review denied, SC16-945, 2016 WL 6998444 (Fla. Nov. 30, 2016) ("[A third-party purchaser's] interest in this foreclosure proceeding is not a legally cognizable interest because even though it *now* holds legal title to the property, it purchased the property subject to [the bank's] foreclosure proceeding and superior interest in the property." (emphasis added)).

Instead, we find the instant case akin to YHT & Associates, Inc. v. Nationstar Mortgage LLC, 177 So. 3d 641 (Fla. 2d DCA 2015). In that case, the Second District Court of Appeal, dealt with "the increasingly common situation in which title to property is transferred while the property is the subject of a foreclosure proceeding and a lis pendens." Id. at 642. The trial court denied intervention to a purchaser and refused to allow the purchaser to participate at trial.

Id. at 643. When the purchaser attempted to appeal the final judgment, the Second District Court of Appeal dismissed the appeal for lack of standing, faulting the purchaser for not timely appealing the earlier order denying intervention. Id. at 642-43. While there are some distinctions between YHT and the instant case, those distinctions (if significant at all) only strengthen the argument that purchasers post-lis pendens lack Pearlman standing. We see no reason to expand Pearlman's application to permit a purchaser post-lis pendens to contest a judgment under Rule 1.540.

III. CONCLUSION

While this Court has recognized a limited exception in Pearlman regarding non-party standing, the general rule remains, and best practice requires, that a non-party must seek and be granted leave to intervene before it will have standing to pursue relief under a Rule 1.540(b). For a non-party who does not fall within Pearlman's exception, when leave to intervene is denied and that decision is not timely appealed, the non-party lacks standing to later file a 1.540(b) motion with the trial court. Because Carlisle did not timely appeal the order denying his motion to intervene and does not fall within Pearlman's limited exception, we find that Carlisle lacks standing to appeal the trial court's denial of his 1.540(b) motion, and dismiss the appeal.

Dismissed.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

DON FACCIOBENE, INC.,

Appellant/Cross-Appellee,

v. Case Nos. 5D15-1527

HOUGH ROOFING, INC., AND DIGIACINTO HOLDINGS, LLC,

Appellees/Cross-Appellants.

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Opinion filed July 21, 2017

Appeal from the Circuit Court
for Brevard County,
Charles M. Holcomb, Judge.

Allan P. Whitehead, of Frese, Hansen, Anderson, Anderson, Heuston & Whitehead, P.A., Melbourne, for Appellant/Cross-Appellee.

Ruth C. Rhodes, of Rhodes Law, P.A., Melbourne, for Appellee/Cross-Appellant, Hough Roofing, Inc.

No Appearance for Digiacinto Holdings, LLC.

BERGER, J.

Don Facciobene, Inc. (DFI), a licensed general contractor, and its subcontractor, Hough Roofing, Inc. (HRI), appeal the amended final judgment entered by the trial court on HRI's breach of contract claim and DFI's counterclaim after a non-jury trial. DFI

asserts, inter alia, that the trial court erred in finding that its subcontract with HRI did not apply retroactively and that, consequently, HRI was barred from receiving any payment at all due to noncompliance with the conditions precedent to progress payments and final payment in section 8 of the subcontract. HRI filed a cross-appeal seeking, inter alia, payment for the full value of its subcontract.[1] We agree with DFI that the trial court erred in failing to apply the subcontract retroactively. However, we find no merit in DFI's argument that HRI was barred from receiving payment for failing to comply with conditions precedent. To the contrary, we agree with HRI on its cross-appeal and conclude it was entitled to the full value of its subcontract, minus certain setoffs. Accordingly, we reverse the amended final judgment.

In late 2010, DFI contracted with Digiacinto Holdings, LLC, (Owner) to perform various renovations to a house in Melbourne, Florida, known locally as the Nannie Lee House or the Strawberry Mansion (Mansion), as part of Owner's preparations to open a restaurant on the premises. The Mansion, erected in 1905, needed a new roof. As general contractors are not permitted to place a new roof on an existing structure, DFI subcontracted the roofing work to HRI, a licensed roofing subcontractor. HRI provided an estimate and proposed statement of work to DFI in mid-March 2011. DFI's project manager, Jim Monarchy, signed HRI's proposal on April 5, 2011, as well as an additional expanded proposal on April 11, 2011. The proposals stated that payment was due on completion. HRI began work on the roof on April 15, 2011. However, the parties did not

[1] In a separate appeal, HRI challenged the trial court's order denying its motion for attorney's fees for the trial proceedings. DFI filed a cross-appeal claiming that it was entitled to attorney's fees. Hough Roofing, Inc. v. Don Facciobene, Inc., No. 5D15-2878 (Fla. 5th DCA July 21, 2017).

actually sign the subcontract until June 8, 2011, and, by that time, the project was nearly complete. The subcontract price was $21,051.

Under section 8 of the subcontract, HRI was due progress payments, minus a ten percent retainage, for work completed in a particular month on the twentieth day of the following month. Final payment was not due until thirty days after the completion of the entire renovation. Monarchy testified that the final payment amounted to the payment of the accrued ten percent retainage. Section 8 of the subcontract also imposed several conditions precedent to progress payments and final payments. For progress payments, DFI had to (1) receive payment from Owner for HRI's work that was due for the progress payment and (2) HRI had to provide, upon request from DFI, a sworn statement listing the parties who furnished labor and materials to HRI with their names and addresses and documentation showing that HRI paid them. The conditions precedent to final payment included the conditions precedent for progress payments and additional requirements that HRI's work was at least ninety-eight percent complete and that HRI submit unspecified closeout documents to DFI for approval and provide a final lien waiver and release to DFI.

HRI had mostly finished its work by the end of May 2011, and on June 8, 2011, it submitted its first "final" invoice for $22,370.[2] Due to disputes over some of HRI's charges,[3] DFI never paid HRI anything for its work on the Mansion even though it received

[2] This amount included $10,720 for metal roofing panels, $4100 for plywood sheathing, $3590 for the flat roof and base sheet, $2635 for thirty-one pitch pockets, $275 for eleven torch patches, and $1050 for Owner requested items.

[3] DFI disputed the $3590 charge for the flat roof and base sheet, seeking a credit reducing the charge to $2333.50, the eleven torch patches and the owner requested items. DFI also sought a credit for HRI's use of DFI's crane. On August 15, 2011, HRI amended its invoice to grant DFI credits of $1440 for the crane rental and $290 for the flat roof and base sheet installation. HRI also removed the owner requested items. These changes reduced HRI's invoice to $19,590.

payment for HRI's work from Owner on July 15, 2011, final payment for the entire project from owner on December 21, 2011, and concluded the renovations on December 30, 2011.[4] As a result, a claim of lien was filed against the property,[5] and on December 6, 2011, HRI filed its complaint for breach of contract against DFI and Owner. On December 27, 2011, DFI notified HRI that Owner had discovered a leak in the roof.[6] Despite this, Owner refused to give HRI permission to come onto the premises and repair the leak until May 2012. Consequently, DFI undertook repairing the roof, without a roofing license, and filed a counterclaim seeking damages for the estimated cost of repairing the leak. DFI also answered HRI's breach of contract claim by asserting, as an affirmative defense, noncompliance with unspecified conditions precedent.

The case proceeded to trial, at which both parties presented expert witness testimony concerning the leak. DFI's expert, Luke Miorelli,[7] testified that while most of the roof was installed correctly, there were potential problems with the roof installation on the south and west dormers and estimated repairs would cost $7378.80. HRI's expert, Joseph Horschel,[8] testified that only the portion of the roof with the active leak needed to

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[4] DFI's notice of termination of renovations stated that it had paid all of its subcontractors in full.

[5] DFI transferred the lien from the property by posting bond. The bond cost DFI $750. Alan Hough, owner of HRI, canceled the lien in December 2011.

[6] Owner first reported the leak to DFI in July 2011, but Monarchy was instructed by the owner of DFI not to mention the leak to HRI.

[7] Miorelli is a licensed general contractor who designs and sometimes installs roofs but he is not certified or licensed in roofing.

[8] Horschel is a licensed general contractor who also holds a roofing license.

be redone and estimated that the issue could be fixed by two laborers working about six hours each.

On April 7, 2015, the trial court issued its amended final judgment.[9] It found that both parties did not sign the subcontract until June 8, 2011, and that by that point, HRI's performance was more than ninety percent complete. The trial court determined that "to retroactively apply the language to the work performed prior to the Contract being fully executed is not required since the total work called for by the Contract was substantially performed prior to the written Contract being signed." The trial court ruled that DFI breached the implied covenant of good faith and fair dealing by cutting off communications with HRI and deciding not to pay HRI in late June 2011. For damages, the trial court awarded HRI the uncontested charges of $10,720 for the metal roofing panels, $4100 for the plywood sheathing, $2635 for the thirty-one pitch pockets, and $2333.50 for the flat roof and base sheet. After offsetting the $1440 HRI owed DFI for the crane rental and the ten percent retainage of $1978.85, the trial court ruled that DFI should have paid HRI $16,369.65 in July 2011. The trial court further found that DFI could not recover on the unlicensed repair work it performed on the roof and that its expert's testimony was not credible on the cost to repair the leak. The trial court found that HRI's expert's testimony was credible on that point and awarded DFI only $180 on the counterclaim based on six hours of labor by two workers being paid $15 per hour. It also awarded DFI an offset for the $750 cost of bonding the lien off the property resulting in a $15,439.65 award in favor of HRI plus postjudgment interest. The trial court further ruled

[9] After issuing the final judgment, the trial court granted DFI's motion for reconsideration, in part, and amended the final judgment.

that HRI was barred from recovering the balance of the contract price because it did not comply with the conditions precedent to final payment.

We find multiple errors in the amended final judgment that warrant reversal. First, the trial court's decision not to apply the subcontract retroactively was error in light of the merger clause found in section 18 of the subcontract. The merger clause requires retroactive application because it acts to replace the original contract with the new one. See Katz v. Fifield Realty Corp., 746 F. Supp. 2d 1265, 1269 (S.D. Fla. 2010); Aly Handbags, Inc. v. Rosenfeld, 334 So. 2d 124, 126 (Fla. 3d DCA 1976) ("The well established rule of law is that a contract may be discharged or extinguished by merger into a later contract entered into between the parties in respect to the same subject which replaces the original contract." (citing 7 Fla. Jur. Contracts § 166 (1956))). Here, failing to apply the subcontract retroactively resulted in HRI being barred by the conditions precedent from collecting the final payment but not being barred from receiving a progress payment[10] for work performed before the subcontract was executed.

DFI asserts that applying the subcontract retroactively will bar HRI from receiving any payment at all due to HRI's failure to comply with the conditions precedent. We disagree. The fact that the subcontract applies retroactively does not mean that HRI is barred from receiving payment by the conditions precedent to progress payments and final payment in section 8 of the subcontract. In its complaint, HRI alleged that it had

[10] DFI's argument that HRI did not request a progress payment in its complaint ignores the fact that the testimony during the trial established that the final payment consists of the ten percent retainage while the remaining ninety percent would normally be disbursed as progress payments. HRI attached a copy of its August 15, 2011 final invoice to its complaint, in which it requested full payment, thus implicitly requesting both the progress payment and final payment. This attachment is part of the complaint for all purposes. Fla. R. Civ. P. 1.130(b).

"fully performed all of its obligations under the Contract or has been excused from performance." In its amended answer, DFI asserted, as an affirmative defense, that HRI "has failed to allege, nor can it establish that it had meet [sic] each and every condition precedent to recovering payment in this cause pursuant to its Complaint." Contrary to the requirements in Florida Rule of Civil Procedure 1.120(c), DFI did not specify which conditions precedents HRI did not comply with or how HRI failed to comply with them. Consequently, DFI's answer to the complaint failed to preserve its right to demand proof that HRI complied with the conditions precedent to progress payments and final payment.[11] See Fla. R. Civ. P. 1.120(c); Deutsche Bank Nat'l Tr. Co. v. Quinion, 198 So. 3d 701, 703-04 (Fla. 2d DCA 2016) ("[T]o construct a proper denial under the rule, a defendant must, at a minimum, identify both the nature of the condition precedent and the nature of the alleged noncompliance or nonoccurrence."); Bank of Am., Nat'l Ass'n v. Asbury, 165 So. 3d 808, 810-11 (Fla. 2d DCA 2015); Cooke v. Ins. Co. of N. Am., 652 So. 2d 1154, 1156 (Fla. 2d DCA 1995); Paulk v. Peyton, 648 So. 2d 772, 774 (Fla. 1st DCA 1994).

Second, while awarding HRI the uncontested charges of $10,720 for the metal roofing panels, $4100 for the plywood sheathing, and $2635 for the thirty-one pitch pockets was appropriate, the trial court should have also awarded HRI the ten percent retainage, $2600 out of the $3590 charged for the flat roof and base sheet installation,[12]

[11] We take no position on the parties' other arguments regarding the conditions precedent to progress payments and final payment.

[12] The record indicates that DFI acted, albeit wrongfully, under section 5 of the subcontract when it installed the flat roof base sheet without informing HRI. Any wrongful termination under section 5 is, pursuant to paragraph L, construed as a termination for the convenience of the general contractor. When this happens, paragraph L states that HRI is entitled only to compensation "for the reasonable cost of, and a reasonable

and $275 for the eleven torch patches.[13] Moreover, because this case involves liquidated damages, the trial court also erred in failing to award prejudgment interest from July 20, 2011, for the progress payment and January 29, 2012, for the final payment. See Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 214-15 (Fla. 1985); Metro. Dade Cty. v. Bouterse, Perez & Fabregas Architects Planners, Inc., 463 So. 2d 526, 527 (Fla. 3d DCA 1985) (citing Jockey Club, Inc. v. Bleemer, Levine & Assocs. Architects & Designers, Inc., 413 So. 2d 433, 434 (Fla. 3d DCA 1982)). Finally, although the trial court was correct in offsetting the award by $1440 for the crane rental, and $180 for DFI's counterclaim,[14] it erred in including an offset for the $750 cost DFI incurred in bonding off Hough's lien. DFI did not request the $750 in bond costs as relief. Therefore, the trial court erred in granting relief outside the pleadings. See Wachovia Mortg. Corp. v. Posti, 166 So. 3d 944, 945 (Fla. 4th DCA 2015) (citing S. Indus. Tire, Inc. v. Chicago Indus. Tire, Inc., 541 So. 2d 790, 791 (Fla. 4th DCA 1989)); Bank of N.Y. Mellon v. Reyes, 126 So. 3d 304, 309 (Fla. 3d DCA 2013); Cardinal Inv. Grp., Inc. v. Giles, 813 So. 2d 262, 263 (Fla. 4th DCA 2012) (citing Pond v. McKnight, 339 So. 2d 1149 (Fla. 2d DCA 1976)).

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overhead and profit on, the acceptable work performed and/or materials furnished . . . ." Hough testified that his costs, overhead, and profit for the work performed on the flat roof and base sheet amounted to $2600.

[13] The testimony at trial indicates that the eleven torch patches were necessary to conform the work to the contract plans and specifications and did not constitute an alteration or addition to the contract. See Acq. Corp. of Am. v. Am. Cast Iron Pipe Co., 543 So. 2d 878, 880 (Fla. 4th DCA 1989) (citing City of Miami v. Nat Harrison Assocs., 313 So. 2d 99, 100 (Fla. 3d 1975)).

[14] We affirm the trial court's factual findings on the counterclaim and its credibility determinations as to the expert witnesses as they were supported by competent, substantial evidence. See Flood v. Union Planters Bank, 878 So. 2d 407, 411 (Fla. 3d DCA 2004) (citing Iden v. Kasden, 609 So. 2d 54, 57 (Fla. 3d DCA 1992)); Ross v. J.E. Hill Contractors, 410 So. 2d 638 (Fla. 1st DCA 1982).

In total, HRI was owed $20,330, including retainage, before the offsets. Ninety percent of the total, $18,297, was due on July 20, 2011. The ten percent retainage, $2033, minus the $1440 offset for the use of DFI's crane and the $180 counterclaim results in a $413 final payment, which was due to HRI on January 29, 2012.[15] In total, HRI was due $18,710 plus prejudgment interest running from the date specified above.

For the foregoing reasons, we reverse the amended final judgment and remand for entry of a final judgment consistent with this opinion.

REVERSED AND REMANDED.

WALLIS and LAMBERT, JJ., concur.

[15] Final payment was due thirty days after the renovations were completed.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 15-13720 & 15-15801

D.C. Docket Nos. 0:12-cv-62064-RNS & 0:13-cv-60443-RNS

BABASOLA KOLAWOLE, et al.,

Plaintiffs-Appellants,

versus

STACEY SELLERS, as Personal Representative of the Estate of Peter Simon Waxtan,

Defendant-Appellee.

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

(July 21, 2017)

Before MARCUS, DUBINA, and WALKER,[*] Circuit Judges

[*] Honorable John M. Walker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

WALKER, Circuit Judge:

These two related appeals are brought by representatives of the estates of decedents who perished in a plane crash in Nigeria. Plaintiffs appeal from two judgments entered in the United States District Court for the Southern District of Florida (Scola, *J.*) dismissing their claims based upon the doctrine of *forum non conveniens* and denying their motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. We conclude that the district court did not abuse its discretion, either in dismissing the claims or in denying the Rule 60(b) motion, and therefore AFFIRM both the judgment and the order of the district court.

BACKGROUND

The events giving rise to these appeals were tragic. On June 3, 2012, Dana Airlines Flight 992, traveling from Abuja, Nigeria, while on approach to Murtala Muhammed International Airport in Lagos, Nigeria, lost power in both engines and crashed in a densely populated area. All 153 passengers and crew members were killed, along with ten confirmed deaths on the ground. The plane was destroyed in the post-crash fire.

The two flight recorders were analyzed at the U.S. National Transportation Safety Board in Washington, D.C, but only thirty-one minutes of audio could be recovered due to fire damage. The airplane had last undergone maintenance two days before the crash. According to the plane's logs, no mechanical conditions had

been reported during the previous month. Published reports indicated that the accident was likely caused by the flight crew's failure to properly monitor fuel flow to the engines and to activate certain fuel pumps.

The pilot, Peter Waxtan, was a United States citizen who resided in Fort Lauderdale, Florida. Mr. Waxtan's estate remains open in Broward County, Florida. Two suits were separately filed against Mr. Waxtan's estate. On September 18, 2012, twenty plaintiffs filed a complaint, styled *Olojo v. Sellers*, in state court. Defendant Stacey Sellers, Mr. Waxtan's daughter and the representative of his estate, removed that action to federal court. On February 26, 2013, eighteen additional plaintiffs filed a complaint, styled *Obot v. Sellers*, in the Southern District of Florida. The district court consolidated the *Olojo* and *Obot* suits on March 28, 2013.

On April 10, 2013, Sellers moved to dismiss the consolidated action upon the basis of *forum non conveniens*. The district court denied Sellers' motion regarding claims maintained on behalf of United States citizen or resident decedents ("domestic decedents") but granted it with respect to decedents who had not been United States citizens or residents ("foreign decedents"). On February 6, 2015, the district court declined to grant Plaintiffs relief from the judgment pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure. The

district court granted Plaintiffs' motion for entry of final judgment, pursuant to Rule 54(b), on July 24, 2015. This appeal followed.

On August 4, 2015, some, but not all, Plaintiffs filed a further motion for reconsideration, pursuant to Rule 60(b), which the district court denied on November 30, 2015. Those Plaintiffs then timely appealed. The two appeals were administratively consolidated.

DISCUSSION

On appeal, Plaintiffs contend that the district court abused its discretion in: (1) granting Sellers' motion to dismiss based upon *forum non conveniens* and (2) denying the final Rule 60(b), which was submitted on August 4, 2015.

We review for abuse of discretion both a district court's dismissal for *forum non conveniens*, *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 951 (11th Cir. 1997), and denial of relief pursuant to Rule 60(b), *Tobinick v. Novella*, 848 F.3d 935, 943 (11th Cir. 2017). Abuse of discretion review is "extremely limited" and "highly deferential." *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1288 (11th Cir. 2009) (internal quotation marks and citation omitted). We must affirm unless the district court applied an incorrect legal standard, applied the law in an unreasonable or incorrect manner, followed improper procedures in making a determination, or made findings of fact that are

clearly erroneous. *See Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1068 (11th Cir. 2014).

I.

A.

We must first address the timeliness of these appeals. Sellers does not contest that Plaintiffs timely appealed the denial of their August 4, 2015 Rule 60(b) motion. She argues, however, that the appeal from the dismissal of Plaintiffs' claims was not timely. Sellers' argument, in substance, is that the district court's order dismissing the claims was a final judgment. If Sellers is correct, Plaintiffs were required to file their appeal within thirty days of the February 6, 2015 order denying reconsideration, which they did not do. To remedy this error, Sellers argues, Plaintiffs filed an unwarranted motion for entry of final judgment pursuant to Rule 54(b). When the district court granted that motion, Plaintiffs were therefore improperly provided an additional thirty days to file their appeal. However, because the district court's order dismissing Plaintiffs' claims was not a final judgment, we conclude that the appeal was timely.

A party against whom a district court rules typically has thirty days to file a notice of appeal. *See* Fed. R. App. P. 4(a)(1)(A). As this case demonstrates, however, when the thirty day period begins is not always clear. An appeal may normally only be taken from a final judgment. *See* 28 U.S.C. § 1291. The period to

file an appeal of a final judgment begins on the later of either two events: (1) when the district court enters the order constituting the final judgment, *see* Fed. R. App. P. 4(a)(1)(A), or (2) when the court disposes of the last motion seeking relief from the final judgment, Fed. R. App. P. 4(a)(1)(A), (a)(4)(A)(iv), (vi). However, even when a district court enters a non-final judgment, *i.e.*, one that fails to adjudicate all of the parties' claims, it may still certify the judgment as final if "there is no just reason for delay." Fed. R. Civ. P. 54(b). In such a scenario, the thirty day period begins when the court enters the judgment pursuant to Rule 54(b). *See* Fed. R. App. P. 4(a)(1)(A), 4(a)(7)(A)(ii).

Where, as here, multiple plaintiffs seek relief in a consolidated action, there occasionally arises some question as to whether the claims constitute multiple suits or a single suit. Potentially dispositive of whether the dismissal of only some plaintiffs' claims is a final judgment, this question can bear directly upon whether the deadline to file an appeal has passed. Whether two actions are consolidated sufficiently to be one suit turns upon the "extent and purposes of the consolidation." *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1048 (11th Cir. 1989) (citing *Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982)). In *Lewis Charters, Inc. v. Huckins Yacht Corp.*, for instance, two independently filed suits remained separate actions because: (1) they were consolidated only for joint hearings and trial, making the consolidation "for limited purposes only" and (2) the

suits retained their separate identities because (a) they were to be pleaded separately, (b) each pleading was to be filed in both actions, and (c) the first action was to be tried by a jury before the second would be resolved by the court. *Id.* at 1048-49. The actions, we concluded, were therefore "essentially severed" rather than "merge[d] into a single cause." *Id.* at 1049. Another factor we have considered in assessing the extent of consolidation is whether the actions could have initially been filed as a single action. *See Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349, 1356 (11th Cir. 2002) (per curiam), *abrogated on other grounds by Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs and Participating Emp'rs*, 134 S. Ct. 773, 778-79 (2014).

Here, Plaintiffs filed their notice of appeal on August 19, 2015. As Sellers notes, thirty days had elapsed since both the district court's order dismissing Plaintiffs' claims and the order disposing of the various motions seeking reconsideration that Plaintiffs filed prior to submitting their Rule 54(b) motion.[2] Plaintiffs did, however, file their appeal within thirty days of entry of judgment pursuant to Rule 54(b), which occurred on July 24, 2015. As a result, the appeal

[2] On August 4, 2015, some Plaintiffs submitted one subsequent motion for reconsideration, which is also at issue on appeal. It was filed, however, both after the court's entry of final judgment pursuant to Rule 54(b) and more than 28 days after the entry of judgment dismissing Plaintiffs' claims. That final Rule 60(b) motion accordingly is not probative of whether Plaintiffs' appeal from the dismissal of their claims was timely. *See* Fed. R. App. P. 4(a)(4)(A)(vi).

was timely only if the order dismissing Plaintiffs' claims was not a final judgment and therefore Rule 54(b) certification was necessary to file an appeal.

This is admittedly an unusual scenario because, prior to the court's Rule 54(b) certification, Plaintiffs moved for relief pursuant to Rules 59(e) and 60(b), which is available only when the court has already entered a final judgment, rendering Rule 54(b) certification unnecessary. *See* Fed. R. Civ. P. 59(e), 60(b); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1132 (11th Cir. 1994); *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1294-95 (11th Cir. 2003). Sellers seizes upon this tension, arguing that the filing of the motions for reconsideration demonstrates that the court's order was indeed a final judgment. That Plaintiffs styled their briefs as motions for relief pursuant to Rules 59(e) and 60(b), however, does not affect the jurisdiction of this Court. *See Lucas v. Fla. Power & Light Co.*, 729 F.2d 1300, 1301-02 (11th Cir. 1984). Rather, whether the order dismissing Plaintiffs' claims was a final judgment is governed by the dictates of Rule 54(b), *i.e.*, whether the order resolved all of the parties' claims. *See* Fed. R. Civ. P. 54(b).

Plaintiffs originally filed two separate complaints—the *Olojo* action and the *Obot* action. The *Olojo* action included claims of both domestic and foreign decedents while the *Obot* action consisted entirely of foreign decedents. On March 28, 2013, the district court consolidated the two actions for "discovery and trial," while administratively closing the *Obot* action. Consolidation Order at 1-2, *Onita-*

Olojo v. Sellers, No. 12-cv-62064-RNS (S.D. Fla. March 28, 2013), ECF No. 21. In the order from which Plaintiffs appeal, the district court dismissed the claims of all foreign decedents while retaining all claims belonging to domestic decedents.

With respect to the *Olojo* plaintiffs, our analysis is relatively straightforward. The district court's order did not dismiss the claims of all of the *Olojo* plaintiffs and accordingly was not a final judgment. Leave to file an appeal, pursuant to Rule 54(b), was therefore necessary and the appeal was timely.

It is admittedly a closer question whether the court's order was a final judgment as to the claims originally filed as part of the *Obot* action. The district court dismissed the claims of all of the *Obot* plaintiffs. Whether the order was a final judgment, therefore, turns on whether the *Obot* suit was consolidated with the *Olojo* suit such that the two should be considered a single action. If so, the *Olojo* plaintiffs whose claims were not dismissed would also preclude the court's order from constituting a final judgment with regards to the *Obot* plaintiffs.

We ultimately conclude that the *Olojo* and *Obot* suits should be considered one action because: (1) they could have been initially filed as one suit; (2) although the district court did not explicitly state that the consolidation was for all purposes, it did specify that the consolidation was for "discovery and trial," *id.*, and did not impose any limitations on the extent of the consolidation; and (3) the suits did not retain their separate identities because the two actions were merged into a single

suit, the *Obot* suit was administratively closed, and all pleadings were to be filed only in the remaining action. The district court's order, therefore, was not a final judgment as to the *Obot* plaintiffs. Those plaintiffs, like the *Olojo* plaintiffs, had thirty days from the court's Rule 54(b) certification to file their appeal and it is also timely.

B.

We now turn to the district court's dismissal based on *forum non conveniens*. *Forum non conveniens* is a common law doctrine that provides district courts with "inherent power to decline to exercise jurisdiction" with the "central purpose" being "to ensure that the trial is convenient." *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983) (citations omitted). In contrast to the doctrine of venue, in which there is a statutory mechanism by which a district court may transfer a matter to a district that is a more convenient forum, there is not an analogous procedure by which a court with proper jurisdiction may nonetheless transfer a matter to a foreign judicial system that is better suited to adjudicate the claims. But under *forum non conveniens*, a district court may at least dismiss the action, which then allows the plaintiff to re-file the case in the alternative forum. This power should not be exercised lightly, however, because it effectively deprives the plaintiff of his favored forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

To successfully move for dismissal based upon *forum non conveniens*, a defendant must demonstrate both that (1) an adequate, alternative forum is available and (2) the public and private factors weigh in favor of dismissal. *Republic of Panama*, 119 F.3d at 951. There is not an exhaustive list of public and private factors, and courts are "free to be flexible." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1381-82 (11th Cir. 2009) (citation omitted).

1.

Demonstrating the availability of a forum is not an especially onerous burden for a defendant seeking dismissal for *forum non conveniens*. A forum is generally deemed available if the defendant is amenable to process in the other jurisdiction. *Piper*, 454 U.S. at 254 n.22.

Here, Sellers agreed to: (1) consent to jurisdiction in Nigeria, (2) accept service of process from a Nigerian court, (3) waive any applicable statutes of limitations defenses; and (4) concede liability in claims re-filed in Nigeria. Indeed, the availability of Nigeria as a judicial forum is not in serious dispute. The district court thus did not abuse its discretion in holding that Nigerian courts are available to resolve these claims.

2.

The parties' principal dispute, rather, is over adequacy. A forum is adequate if it "provides for litigation of the subject matter of the dispute and potentially

offers redress." *King*, 562 F.3d at 1382 (citing *Piper*, 454 U.S. at 255 n.22). To be adequate, however, a forum need not be "perfect." *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (citation omitted).

General allegations of danger are typically insufficient to render a forum inadequate. *See Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1274-75 (S.D. Fla. 2008); *see also Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1075 (C.D. Cal. 2012); *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 337 (S.D.N.Y. 2008). Regarding partiality and inefficiency, moreover, courts are cognizant that plaintiffs can easily allege inadequacy on these grounds. A defendant urging dismissal for *forum non conveniens*, therefore, still has the "ultimate burden of persuasion," but only where there exists "significant evidence documenting the partiality or delay . . . typically associated with the adjudication of *similar claims*." *Leon*, 251 F.3d at 1311-12 (emphasis added) (citation omitted).

Sellers satisfied her initial burden by providing expert testimony in the form of an affidavit submitted by Professor of Law Fagbohun,[3] who opined that the Nigerian judiciary was in a position to offer "wide legal and equitable remedies for wrongful death in ways that are substantially similar" to the relief available in

[3] Professor Fagbohun holds a doctorate degree in law and is a Research Professor with the Nigerian Institute of Advanced Legal Studies (NIALS), where he teaches primarily at the postgraduate level. Before joining NIALS, he was a member of the law faculty at Lagos State University from 1991 to 2009.

United States courts. Appellee's Suppl. App., R. 24-1 at 27, No. 15-13720, Mar. 3, 2016.

Plaintiffs countered that Nigeria is an inadequate alternative forum for three reasons: (1) Nigeria is too dangerous and the legal system is both (2) too corrupt and (3) plagued by delay. Plaintiffs relied upon publications by the U.S. Department of State, primarily travel warnings and "Human Rights Reports" from 2011 and 2012. The Department of State, for instance, warned that "[k]idnappings remain a security concern" and "[v]iolent crimes occur throughout the country." Appellants' Br. at 26, No. 15-13720, Nov. 3, 2015. The 2012 Human Rights Report, moreover, cautioned that "[u]nderstaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately" and that "[t]he executive, the legislature, and business interests . . . exerted undue influence and pressure in civil cases." *Id.* at 25. Plaintiffs also presented the testimony of two expert witnesses. Former Supreme Court Justice Oguntade[4] testified that Nigerian law does not permit a partial disposition of a multiparty tort case and accordingly these claims would require thirty years to litigate. A second

[4] Justice Oguntade received his LLB from the University of London in 1964. He then practiced law in Nigeria from 1965 to 1980 before becoming a Judge of the High Court of Lagos State, Nigeria in September of 1980. In 1987, he was appointed to the Court of Appeal, with appellate jurisdiction over all of Nigeria, where he remained until 2004, when he was appointed to the Supreme Court of Nigeria. He retired from the Supreme Court in 2010.

expert, Justice Odunowo,[5] offered a similar opinion. As to the issue of delay, Sellers responded with an additional affidavit of Professor Fagbohun in which he asserted that Justice Oguntade had not taken into account the recent reforms to the Nigerian judiciary. To illustrate his point, Professor Fagbohun identified twenty cases, among a random survey of actions filed between 2007 and 2012, in which no matter took longer than five years to resolve.

The district court did not abuse its discretion in holding that Nigeria is an adequate forum. Plaintiffs failed to identify any specific dangers related to this particular litigation, *see Licea*, 537 F. Supp. 2d at 1274-75, or evidence of partiality related to this type of claim, *see Leon*, 251 F.3d at 1311-12. While the possibility of delay presented a close question, the district court was within its discretion to afford greater weight to the evidence proffered by Sellers. Critically, Professor Fagbohun, in his affidavit, explicitly considered the relatively recent reforms of the Nigerian judiciary, which have resulted in the judiciary resolving cases more expeditiously. We are particularly reluctant to call into question the district court's reasoning in light of the heightened standard Plaintiffs face in alleging inadequacy upon the basis of delay. *See id.*

[5] Justice Odunowo is a retired justice of the Federal High Court, Lagos Judicial Division. He holds an LLB from the University of London and practiced law in Nigeria from 1962 to 1966 and 1968 to 1973. He served as Chief Magistrate of the Ogun State of Nigeria and Deputy Chief and Chief Registrar of the Court of Appeal in Lagos. He was elevated to the Federal High Court in 1981, where he served until his retirement in 2000.

Plaintiffs also cite other cases in which courts have held that Nigeria is an inadequate forum. Given the fact-intensive nature of the inquiry and the discretion afforded district courts, these authorities, which deal with different factual situations from the instant case, are of limited probative value. They do not assist Plaintiffs, who must demonstrate a nexus between this particular litigation and the alleged bases for deeming Nigeria an inadequate forum. Many of the cases upon which Plaintiffs rely, moreover, are distinguishable from the present matter. *See Costinel v. Tidewater, Inc.*, No. 10-1567, 2011 WL 446297, at *6 (E.D. La. Feb. 3, 2011) (defendant's evidence consisted entirely of one case and one affidavit, neither of which addressed adequacy with sufficient specificity); *Sector Navigation Co. v. M/V Captain P*, No. 06-1788, 2006 WL 2946356, at *4 (E.D. La. Oct. 13, 2006) (substantive limitations in relevant Nigerian law left plaintiffs without an adequate remedy); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003) (defendant "ma[de] no attempt to show the Court that plaintiffs have an adequate remedy in Nigeria").

Plaintiffs finally argue that, with respect to delay, the district court was required to either (1) hold an evidentiary hearing or (2) accept as true their expert testimony. We disagree. Plaintiffs conflate factual allegations and opinion testimony. In ruling upon motions to dismiss based upon *forum non conveniens*, courts routinely find against plaintiffs without holding an evidentiary hearing,

despite conflicting expert opinion testimony. *See Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282-83 (11th Cir. 2001) (dismissing for *forum non conveniens* despite conflicting expert opinion testimony); *Lisa, S.A. v. Gutierrez Mayorga*, 240 F. App'x 822, 824 (11th Cir. 2007) (per curiam).

3.

When a forum is both available and adequate, courts proceed to analyze the private and public factors relevant to *forum non conveniens*. The assessment of the private factors begins with a determination as to the proper deference to afford the plaintiff's choice of forum: there is normally a "strong presumption" that a plaintiff has chosen a convenient forum. *Leon*, 251 F.3d at 1314. That presumption "weakens," *La Seguridad*, 707 F.2d at 1308 n.7, however, when the plaintiff is not a United States citizen or resident, *Piper*, 454 U.S. at 255-56. Although there is not an exhaustive list of criteria, the private interests courts may weigh include the "ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing[] witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Leon*, 251 F.3d at 1314 (ellipses in original) (internal quotation marks omitted) (quoting *Gulf Oil Corp. v. Gilbert*, 220 U.S. 501, 508 (1947)).

Here, none of the Plaintiffs or their decedents whose cases were dismissed were United States citizens or residents. The district court properly afforded their choice of forum less deference than that provided to the domestic plaintiffs whose claims were not dismissed. The district court also properly considered the following relevant private factors: (1) most of the liability evidence would be located in Nigeria; (2) much of the damages evidence would be located where each decedent lived prior to the crash, primarily from witnesses who knew the decedent and from the decedent's employment, school, and tax records; and (3) Sellers would likely be prejudiced if the claims remained in the United States, where courts would be unable to compel the cooperation of non-party Nigerian witnesses. There is accordingly no basis to disturb the district court's conclusion that the private factors weighed in favor of dismissal based upon *forum non conveniens*.

4.

The final prong of *forum non conveniens* is the public factors, which include: (1) the administrative difficulties stemming from court congestion; (2) the interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems of conflict of laws, or the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *Piper*, 454 U.S. at 241 n.6.

In the present case, the district court reasonably concluded that: (1) a mass-tort case would cause significant delays to the court's already crowded docket, including, at the very least, multiple damages trials; (2) the burden on the jury-serving public of South Florida would be significant; (3) the court would need to resolve conflict-of-law issues, including potentially having to apply Nigerian customary law; and (4) the compelling interest in Nigeria of resolving these claims considering that they stem from one of the worst aviation disasters in the country's recent history. As a result, we cannot find that the district court abused its discretion either in determining that the public factors also weighed in favor of dismissal or in its overall analysis under the *forum non conveniens* doctrine and conclusion that dismissal of the foreign decedents' claims was warranted.

II.

We finally turn to the appeal from the denial of the August 4, 2015 Rule 60(b) motion. On such a motion, Plaintiffs "must demonstrate a justification for relief so compelling that the district court was required to grant [the] motion." *Maradiaga v. United States*, 679 F.3d 1286, 1291 (11th Cir. 2012) (alteration in original) (internal quotation marks and citation omitted).

In their motion for relief, Plaintiffs invoked Rules 60(b)(3) and 60(b)(6). Rule 60(b)(3) provides for relief from a final judgment for "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an

opposing party" while (b)(6) allows for relief for "any other reason that [so] justifies." Fed. R. Civ. P. 60(b)(3), (6). Under Rule 60(b)(6) a party must demonstrate circumstances that are "sufficiently extraordinary" and "[e]ven then, whether to grant the requested relief is . . . a matter for the district court's sound discretion." *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996) (citation omitted).

Plaintiffs point to two aspects of their case that, they claim, required the district court to grant their motion: (1) the unique procedural posture of the case and (2) Sellers' initial failure to concede liability in Nigeria.[6] Neither merited reconsideration.

A.

Plaintiffs dwell extensively upon the fact that, because their appeal was pending before this Court, the district court's order, although final, was unexecuted because the appeal was still pending. Therefore, Plaintiffs argue, the district court was required to grant the requested relief. We disagree.

Plaintiffs are correct that there was less of a concern here that the principle of finality would be undermined should the district court have granted their Rule 60(b) motion, because their appeal of the court's dismissal for *forum non*

[6] Two plaintiffs in this action also argued that the district court erred in treating them differently than a similarly situated plaintiff, Pamela Norris, who has asserted a claim against Sellers but is not a party to this appeal. Shortly before oral argument, however, we granted the parties' joint motion to dismiss the appeals of these two plaintiffs

conveniens was still pending. That consideration, however, did not require the district court to grant their motion. Plaintiffs rely entirely upon two cases for this proposition. In neither case, however, was the procedural posture the sole, or even primary, factor weighing in favor of relief. Notably, in both cases there was a supervening change in the law that weighed in favor of relief. *See Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 991 (11th Cir. 2010)*; Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987). Thus we cannot conclude that the district court applied the law in an incorrect or unreasonable manner in deciding that the procedural posture did not warrant the requested relief.

B.

Plaintiffs also accurately note that Sellers initially failed to concede liability in Nigerian court, despite her assurances to the contrary before the district court. The district court treated the concession of liability in Nigeria as a condition precedent to granting Sellers' motion to dismiss. Sellers explained to the district court that counsel representing both her and Dana Airlines in Nigeria inadvertently contested liability on behalf of both parties. Sellers retained new Nigerian counsel, however, who then entered a stipulation conceding liability. Plaintiffs persist in contending that Sellers continues to contest liability, despite her assurances to the contrary. But the district court found that not to be the case, and there is no cause to believe that going forward Sellers will contest liability in Nigeria. As a result,

there is no reason to disturb the district court's denial of reconsideration on this ground.

CONCLUSION

For the reasons stated above, we AFFIRM both the judgment and the order of the district court.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

THE LEILA CORPORATION OF ST. PETE, a Florida corporation; SUSAN J. AGIA, individually and as trustee of the Susan J. Agia Living Trust; and DR. RAYMOND AGIA, Appellants, v. FAREED OSSI; OSSI CONSULTING ENGINEERS, INC., a Florida corporation; and OSSI CONSTRUCTION, INC., a Florida corporation, Appellees.	)	Case No. 2D15-3279

Opinion filed July 21, 2017.

Appeal from the Circuit Court for Hillsborough County; James M. Barton II, Judge.

Arnold D. Levine and Robert H. MacKenzie of Levine & Sullivan, P.A., Tampa, for Appellants.

Stuart Jay Levine and Heather A. DeGrave of Walters, Levine, Klingensmith & Thomison, P.A., Tampa, for Appellees.

ROTHSTEIN-YOUAKIM, Judge.

The Leila Corporation of St. Pete (Leila Corp), Susan J. Agia, individually and in her capacity as trustee of the Susan J. Agia Living Trust (the Trust), and Dr.

Raymond Agia (collectively, the Defendants) appeal from a final judgment in favor of Fareed Ossi, Ossi Consulting Engineers, Inc. (O.C.E.), and Ossi Construction, Inc. (collectively, the Plaintiffs). The Defendants failed to timely appeal with respect to matters included in the original final judgment, which they challenge in Issues I, II, III, VI, and VII of their brief on appeal. Therefore, with respect to those issues, we dismiss the appeal for lack of jurisdiction. The Defendants timely appealed, however, with respect to the award of prejudgment interest included in the amended final judgment, which they challenge in Issues IV and V. With respect to those issues, we affirm the determination of entitlement to prejudgment interest but reverse as to the amount.

FACTUAL HISTORY

The seeds of the dispute underlying this appeal were sown in 1993, when Dr. Agia transferred an undeveloped piece of property to the Trust and began planning with Ossi and Ossi's company, O.C.E., to construct a condominium on it. Dr. Agia and Ossi did not enter into a written contract for Ossi's services.

In 2005, Mrs. Agia and Ossi created Leila Corp.[1] Mrs. Agia held a seventy-five percent interest in Leila Corp, and Ossi held the remaining twenty-five percent. The Trust sold the property to Leila Corp for $5,850,000. Leila Corp funded the purchase, in part, via a promissory note in favor of the Trust in the amount of $2,850,000; the remainder was financed by a bank loan that Ossi personally guaranteed. Leila Corp then entered into an oral contract with Ossi Construction

[1]Having transferred the property to the Trust, Dr. Agia no longer had any legal interest in it; nor does he have any position with or legal interest in Leila Corp. Nonetheless, Dr. Agia is named as a defendant and counter-plaintiff in the pleadings, participated in all of the proceedings in this case, and is named in the final judgment. Neither party addresses this apparent incongruity in this appeal.

(owned by Ossi's son, Robert) for the construction of the condominium. During construction, additional capital contributions were deemed necessary. Ossi could not come up with his proportionate share, so Mrs. Agia paid both her share and Ossi's share.

When construction was complete, Dr. and Mrs. Agia purchased one unit in the condominium for fair market value. Then the bottom fell out of the real estate market. Prospective buyers were unwilling to pay the asking price for the units, and the parties began to squabble.

In 2009, Ossi and O.C.E. filed a complaint in Hillsborough County against Leila Corp, Mrs. Agia, individually and in her capacity as trustee of the Trust, and Dr. Agia; the Defendants filed an answer and affirmative defenses and a counterclaim. Meanwhile, a separate foreclosure action with multiple attendant cross-claims had been filed in Pinellas County. By agreement of the parties, Ossi Construction's cross-claim against Leila Corp and Leila Corp's cross-claims against Ossi Construction were severed, transferred to Hillsborough County, and subsumed within this suit.[2] A nonjury trial was held on all claims in July 2012. The trial court denied everyone's claims based on unclean hands, and everyone appealed. This court reversed. See Leila Corp. of St. Pete v. Ossi, 138 So. 3d 470 (Fla. 2d DCA 2014).

[2]The initial pleadings in the Hillsborough County action, including the amended complaint and the amended counterclaim, repeatedly referred to actions undertaken by Ossi Construction, although Ossi Construction was not a party to those proceedings. The pleadings also contain several instances of a repeated scrivener's error in which "Ossi Construction" appears where "Ossi Consulting Engineers" was clearly intended. In any case, Ossi Construction was eventually added as a party when the cross-claims from the Pinellas County action were severed and transferred to the Hillsborough County case.

On September 30, 2014, the trial court rendered a final judgment after remand that, in short, awarded lost profits to Ossi per Count I of the first amended complaint in the Hillsborough County action, awarded O.C.E. payment for its construction administration services per Count V of that complaint, and awarded Ossi Construction its unpaid construction charges per Count II of its cross-claim in the Pinellas County action. The court denied any relief on all other claims, counterclaims, and cross-claims before it in the two actions.

On October 9, 2014, the Plaintiffs moved to amend or correct the final judgment to include prejudgment interest and to correct an apparent scrivener's error, specifically, that the judgment failed to identify Mrs. Agia individually as a judgment debtor with respect to Ossi's award of lost profits in the "conclusion" section of the judgment. The Plaintiffs identified in their motion the trial exhibits that supported their position concerning the dates from which prejudgment interest should be calculated. The Defendants replied and objected to the motion and, on October 13, 2014, moved for rehearing of the final judgment. On November 7, 2014, the trial court entered orders denying the Defendants' motion for rehearing and granting the Plaintiffs' motion to include prejudgment interest and to correct the scrivener's error. On the same date, the trial court entered an amended final judgment that included awards of prejudgment interest and inserted Mrs. Agia's name in the appropriate paragraph in the "conclusion" section of the final judgment.

On November 20, 2014, the Defendants moved to vacate and for rehearing of the amended final judgment. In that motion, they argued that the trial court should not have awarded prejudgment interest without first holding a hearing at which

they could have contested the dates governing the amount of interest awarded. The Plaintiffs responded that an evidentiary hearing was unnecessary because the computation of prejudgment interest is merely mathematical. They again identified the evidentiary bases for the dates on which they relied and also included tables setting forth the statutory interest rates in effect at the relevant times within those dates. On July 7, 2015, the trial court denied the Defendants' motion to vacate and for rehearing.

On July 17, 2015, the Defendants filed their notice of appeal from the November 7, 2014, amended final judgment and from the July 7, 2015, denial of their motion for rehearing.

JURISDICTION

On appeal, the Defendants raise seven arguments, five of which (raised in Issues I, II, III, VI, and VII) are directed to findings of fact and conclusions of law that were included in the September 30, 2014, final judgment after remand. We conclude, however, that we lack jurisdiction to consider the Defendants' challenges to any issues addressed in that original final judgment because their notice of appeal was untimely as to those issues. Although the Defendants contend that their November 20, 2014, motion to vacate and for rehearing of the November 7, 2014, amended final judgment tolled the time for filing a notice of appeal as to matters adjudicated in the original final judgment, we disagree. The only substantive difference between the original final judgment and the amended final judgment was the addition of the awards of prejudgment interest,[3] and, like an award of attorney's fees, "the issue of prejudgment

[3]In the body of the final judgment, the trial court explicitly determined that Ossi was entitled to relief on his claim against Mrs. Agia. Thus, we readily conclude

interest does not alter the substance of the underlying final judgment." Westgate Miami Beach Ltd. v. Newport Operating Corp., 55 So. 3d 567, 575 (Fla. 2010) (explaining that although prejudgment interest is not incidental to final judgment like attorneys' fees and costs, they are all matters for judge, rather than finder of fact, to calculate and award and are all calculated at completion of case). Thus, where only prejudgment interest is added in an amended judgment, an appeal from that judgment does not "reach back to the original judgment" but perfects an appeal only from the award of prejudgment interest. See Janelli v. Pagano, 492 So. 2d 796, 797 (Fla. 2d DCA 1986) ("[W]here only attorney's fees are added in an amended judgment, an appeal from that judgment does not reach back to the original judgment but only brings the propriety of the attorney's fees up for review.").

It follows, therefore, that a motion for rehearing of the amended final judgment does not reach back to matters adjudicated in the original final judgment.[4] Thus, the matters adjudicated in the original final judgment were ripe for appeal upon the trial court's November 7, 2014, denial of the Defendants' motion for rehearing of the original final judgment, see Fla. R. App. P. 9.020(i)(1), and, as to those matters, the Defendants' July 17, 2015, notice of appeal was plainly untimely, see Janelli, 492 So. 2d

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that the omission of Mrs. Agia's name from the conclusion section of the original final judgment was, in fact, merely a scrivener's error.

[4]That is especially true where, as here, the party seeking rehearing of the amended final judgment has already unsuccessfully sought rehearing of the original final judgment. See Matamoros v. Infinity Auto Ins. Co., 177 So. 3d 682, 684 (Fla. 3d DCA 2015) (observing that prohibition against successive motions for rehearing is "well-established and unassailable").

at 796-97. Accordingly, we dismiss the Defendants' appeal for lack of jurisdiction except as to Issues IV and V pertaining to the awards of prejudgment interest.

PREJUDGMENT INTEREST

The original final judgment awarded the following damages: (1) $662,500 in lost profits to Ossi (per Count I of the first amended complaint in the Hillsborough County action); (2) $322,050 in unpaid construction-administration-services costs to O.C.E. (per Count V of the first amended complaint in the Hillsborough County action); and (3) $204,687.15 in unpaid construction costs to Ossi Construction (per Count II of the cross-claim in the Pinellas County action). The amended final judgment added to those damages awards the following awards of prejudgment interest: (1) $310,040.92 to Ossi's award of lost profits; (2) $106,648.04 to O.C.E.'s award of unpaid construction-administration-services costs; and (3) $73,073.45 to Ossi Construction's award of unpaid construction costs.

The Defendants challenge the awards of prejudgment interest on due process and equitable grounds. We review the awards de novo. See Wood v. Unknown Pers. Representative of Estate of Burnette, 56 So. 3d 74, 76 (Fla. 2d DCA 2011).

A. Due Process

As an initial matter, the Defendants assert that the Plaintiffs failed to plead entitlement to prejudgment interest. The record, however, squarely rebuts this assertion—Ossi and O.C.E. demanded interest in the first amended complaint, and Ossi Construction demanded prejudgment interest in connection with its cross-claim from the Pinellas County action. See Napp v. Carman, 576 So. 2d 361, 362 (Fla. 4th DCA 1991)

(explaining that plea for "interest" can only refer to prejudgment interest "as the matter of postjudgment interest is governed by statute and need not be pled"). And regardless: "prejudgment interest is merely an element of damage. It does not need to be specially pleaded." See RDR Comput. Consulting Corp. v. Eurodirect, Inc., 884 So. 2d 1053, 1055 (Fla. 2d DCA 2004), implicitly overruled on other grounds by Lamb v. Matetzschk, 906 So. 2d 1037 (Fla. 2005), as recognized in Easters v. Russell, 942 So. 2d 1008, 1009 n.1 (Fla. 2d DCA 2006). "[W]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss." Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985).

The Plaintiffs' timely motion to amend or correct the final judgment to include prejudgment interest preserved the trial court's jurisdiction to award it. See Jaye v. Royal Saxon, Inc., 900 So. 2d 634, 635 (Fla. 4th DCA 2005) (noting that specific reservation of jurisdiction to address attorney's fees in final order is not required so long as timely motion for fees is filed); Emerald Coast Commc'ns, Inc. v. Carter, 780 So. 2d 968, 970 (Fla. 1st DCA 2001) ("[T]he failure to award prejudgment interest is an error which can be corrected by a motion for rehearing."), abrogated on other grounds by Westgate Miami Beach, 55 So. 3d 567. Although the amended final judgment did not include any findings as to the dates of loss, we assume that the trial court accepted the dates set forth in the Plaintiffs' motion to amend or correct the final judgment to include prejudgment interest. In that motion, the Plaintiffs asserted that (1) the date of loss applicable to Ossi's award of lost profits was September 21, 2007, which was the date on which the parties' increased, extended loan would have matured and after which the

parties would have realized their profit upon paying off the loan; (2) the date of loss applicable to O.C.E.'s award of unpaid construction-administration-services costs was December 19, 2008, which was the date on which O.C.E. had submitted a claim for payment to Dr. Agia; and (3) the date of loss applicable to Ossi Construction's award of unpaid construction costs was September 24, 2008, which was the date on which Ossi Construction had filed a valid claim of lien for unpaid "labor, services, or materials and related work for construction" of the condominium project.

The Defendants argue that the trial court denied them due process by awarding the Plaintiffs their requested prejudgment interest without conducting a hearing at which the Defendants could challenge the asserted dates of loss. The Plaintiffs' motion to amend, however, identified the specific trial exhibits that established those dates, and, notwithstanding their repeated protestation that they were denied an opportunity to be "heard," the Defendants never actually challenged those dates despite opportunities to do so in their reply and objection to the Plaintiffs' motion to amend or correct the final judgment and in their motion to vacate and for rehearing of the amended final judgment. Indeed, they do not even do so on appeal. Accordingly, they have failed to establish a denial of due process on that basis.

B. Equitable Reduction of Prejudgment Interest

As noted above, on October 11, 2012, the trial court rendered judgment denying relief to all parties, and this court subsequently reversed and remanded for further proceedings, resulting in the September 30, 2014, judgment for the Plaintiffs. In their amendment to their motion to vacate and for rehearing of the amended final judgment, the Defendants argued, as they argue on appeal, that the trial court should

have excluded from the prejudgment-interest calculus the period between rendition of the original judgment and rendition of the final judgment after remand. The Defendants argued that such equitable relief was warranted because until that judgment on September 30, 2014, there had been no judgment in favor of the Plaintiffs and because, during that approximately two-year period, the Defendants (and everyone else) had been powerless to conclude the litigation by obtaining a trial court judgment.

The Plaintiffs suggested that such equitable relief was unavailable, and the trial court denied the amendment without elaboration. Consequently, it is not clear to us that the trial court understood that it did, in fact, have the discretion to reduce the awards of prejudgment interest based on equitable considerations. Although the Plaintiffs argue that such considerations are inconsistent with the "loss theory" of damages employed in Florida courts, the supreme court has explained:

> [T]he general rule concerning the payment of prejudgment interest [is]: "[O]nce damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss." **This general rule is not absolute**. . . . **"[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." We did not recede from this principle in Argonaut Insurance or Kissimmee Utility Authority [v. Better Plastics, Inc., 526 So. 2d 46 (Fla. 1988)]**. Further, in Ball v. Public Health Trust, 491 So. 2d 608 (Fla. 3d DCA 1986), the Third District Court of Appeal allowed prejudgment interest but restricted the date it commenced to the date of demand or the commencement of the lawsuit, whichever occurred first. The district court did so on equitable grounds, relying on our decision in First State Bank v. Singletary, 124 Fla. 770, 169 So. 407 (1936). **As noted by these decisions, the law is not absolute and may depend on equitable considerations**.

Broward County v. Finlayson, 555 So. 2d 1211, 1213 (Fla. 1990) (third alteration in original) (emphases added) (citation omitted) (first quoting, in part, Kissimmee Util. Auth., 526 So. 2d at 47; and then quoting, in part, Flack v. Graham, 461 So. 2d 82, 84 (Fla. 1984)). The First District Court of Appeal most recently recognized this exception in Arizona Chemical Co. v. Mohawk Industries, Inc., 197 So. 3d 99 (Fla. 1st DCA 2016):

> As an exception to the general rule set forth in Argonaut, courts sometimes calculate prejudgment interest from a date later than the date of the plaintiff's actual loss, where unique facts and considerations of fairness militate against calculating prejudgment interest from the date of actual loss. The trial court in this case did not address the question of whether equitable considerations might justify moving the prejudgment interest date forward. Therefore, we cannot tell whether the court determined that the equities were not in Arizona's favor or whether the court declined to recognize an equitable exception to the general prejudgment interest rule.

Id. at 105 (citations omitted); see also Volkswagen of Am., Inc. v. Smith, 690 So. 2d 1328, 1331 (Fla. 1st DCA 1997) ("The Argonaut decision did not establish an inflexible rule that requires trial judges to assess prejudgment interest in every case regardless of the circumstances. Depending on the equities of a given case, an award of prejudgment interest may be a windfall to the plaintiff and an unfair burden on the defendant.").

CONCLUSION

Accordingly, we vacate the awards of prejudgment interest and remand for the trial court to consider whether the Defendants have set forth an equitable basis for reducing the awards. Having so considered, the trial court may reinstate the vacated awards or may reduce them in the manner that the Defendants request or in any manner it deems just and equitable.

Dismissed in part; affirmed in part; vacated in part; remanded.

CASANUEVA and CRENSHAW, JJ., Concur.