Florida Real Property and Business Litigation Report

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Manuel Farach

In Re: Daughtrey, Case No. 15-14544 (11th Cir. 2018).

A bankruptcy court's approval of a compromise or settlement under 11 U.S.C. § 9023 is reviewed for abuse of discretion.

NE 32nd Street, LLC v. U.S., Case No. 17-11908 (11th Cir. 2018).

The Quiet Title Act, 28 U.S.C. § 2409a contains a twelve-year statute of limitations, and a 2013 building permit (with strict conservation conditions) is consistent with a 1938 spoilage easement granted by the government, and thus, the landowner's title claims are barred by not bringing suit in 1950, i.e. based on the 1938 easement.

Sowell v. Faith Christian Family Church of Panama City Beach, Inc., Case No. 1D17-3365 (Fla. 1st DCA 2018).

A landowner's failure to pay assessed ad valorem taxes deprives the trial court, under Florida Statute section 194.171, of subject matter jurisdiction to entertain a challenge to the tax assessment.

Super Products, LLC v. Intracoastal Environmental, LLC, Case No. 2D17-3769 (Fla. 2d DCA 2018).

A trial court may not dismiss an action brought by a foreign limited liability company for fraudulently obtaining a certificate of authority from the Department of State, as determining whether a certificate was fraudulently obtained is an executive function.

Hawks v. Libit, Case No. 2D17-4526 (Fla. 2d DCA 2018).

A party seeking to recover costs under Florida Statute section 57.041(1) must meet the "party recovering judgment," and not the "prevailing party," standard to be entitled to an award of costs.

Essenson v. Bloom, Case No. 2D16-4994 (Fla. 2d DCA 2018).

Aligning itself with the Fourth District, the Second District holds that an appellate court may, in advance, prohibit a trial court from awarding appellate costs.

Abt v. Metro Motors Ventures, Inc., Case No. 4D17-1960 (Fla. 4th DCA 2018).

An attorney is not entitled to an award of attorney's fees for enforcing a charging lien previously awarded for unpaid attorney's fees.

Schneider v. First American Bank, Case No. 4D17-2239 (Fla. 4th DCA 2018).

A judgment containing both foreclosure and money judgments may permit execution upon the money judgment if the foreclosure sale is stayed but may not authorize both execution and foreclosure sale to proceed simultaneously.

Newman v. Mayer Brown, LLP, Case No. 4D17-3416 (Fla. 4th DCA 2018).

An assignee of claims against a party is subject to discovery by the party on the claims; it may not use its assignee status as both sword and shield.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-14544

D.C. Docket No. 2:15-cv-00029-JES; 8:13-bkc-14831-FMD

In re: CECIL DAUGHTREY, JR.,
PATRICIA A. DAUGHTREY,

Debtors.

CECIL DAUGHTREY, JR.,
PATRICIA A. DAUGHTREY,

Plaintiffs-Appellants,

versus

LUIS E. RIVERA, II,

Defendant-Appellee.

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

(July 24, 2018)

Before TJOFLAT, ROSENBAUM and SENTELLE,* Circuit Judges.

*The Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

TJOFLAT, Circuit Judge:

In this case, Cecil and Patricia Daughtrey filed a Chapter 7 bankruptcy petition for the sole purpose of preventing the sale of their property in a public auction to be held pursuant to a state court judgment that foreclosed the mortgage on the property. After the public auction was automatically stayed under 11 U.S.C. § 362(a), the trustee of the bankruptcy estate and the judgment creditor, 72 Partners, LLC, entered into a compromise agreement that would grant 72 Partners all of the property except for a portion the Daughtreys would retain as their homestead. The Daughtreys objected to the compromise agreement and moved the Bankruptcy Court to convert their Chapter 7 case to a Chapter 11 proceeding on the representation that the property (with the exception of the homestead) could be sold for a sum substantially in excess of the judgment. The Court, concluding that the Daughtreys could not qualify as Chapter 11 debtors, denied their motion and approved the compromise agreement.

Before us now is the Daughtreys' appeal of the District Court's affirmance of the Bankruptcy Court's decisions denying the motion to convert the case and approving the compromise agreement. We find no merit in their appeal, and accordingly affirm.

I.

The Daughtreys ("Debtors") employed in succession seven law firms in their mortgage foreclosure case and three firms in the bankruptcy proceeding. The litigation has been protracted and contentious. That said, we begin our discussion with the entry of the final judgment in the mortgage foreclosure case and the filing of Debtors' Chapter 7 petition. From there, we follow the strategies Debtors' lawyers took to thwart 72 Partners' ("Creditor") effort to obtain satisfaction of its judgment.

A.

The property consists of 2,500 acres of real estate in Sarasota County, Florida (the "Property"), most of which Mr. Daughtrey inherited from his father.[1] This acreage is used mainly to grow sod and for cattle grazing. On June 8, 2010, Debtors obtained a two-year loan for $2,371,840 from BSLF Holdings, LLC, and secured it with a mortgage on the Property. The mortgage note carried an interest rate of 13.5% per annum payable quarterly. It was a "balloon mortgage," in that the principal, $2,371,840 (plus any unpaid interest), was due at maturity.

[1] Mr. Daughtrey received the Property from his father's estate on November 8, 1991. "Personal Representative's Distributive Deed," Sarasota Cty. Official Records, Book 2343 pp. 500–02, *available at* https://www.sarasotaclerk.com/OfficialRecords.aspx. The record indicates that the Property consisted of a fraction less than 2,500 acres. For convenience, we treat the Property as consisting of 2,500 acres.

Debtors made the first interest payment on September 8, 2010, in the sum of $80,049. After they failed to make the payments due on December 8, 2010 and March 8, 2011, BSLF declared the loan in default and on May 25, 2011 brought suit in the Sarasota County Circuit Court to foreclose the mortgage.[2] On July 20, 2011, while the case was pending, BSLF assigned the note and mortgage to Creditor.

On May 16, 2013, the Circuit Court entered an order scheduling the case for trial on October 14, 2013.[3] When court convened for the trial that day, Debtors failed to appear.[4] The trial therefore proceeded without them,[5] and the Court,

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[2] Verified Complaint, *BSLF v. Cecil Daughtrey, Jr., et al.*, Case No. 2011-CA-4209 NC. Some of the pleadings in the case are contained in the record of the instant bankruptcy case. The clerk's docket for No. 2011-CA-004209 NC is online at sarasotaclerk.com/CaseInfo.aspx. We take judicial notice of the docket entries in this mortgage foreclosure case and of the documents the entries identify in this footnote and in succeeding footnotes.

[3] Order Setting Case for Residential Mortgage Foreclosure Non-Jury Trial, 2011-CA-004209 NC.

[4] Nor did an attorney appear who purported to represent Debtors. Debtors had fired their attorney, Michael J. Owen, on August 19, 2013, less than two months prior to the October 14 trial date**.** Mr. Owen was the sixth attorney to represent Debtors in the case. He noted his appearance as their counsel on May 13, 2013. On August 20, the day after he was discharged, he moved the Court for leave to withdraw. The Court granted his motion on August 29, 2013. Copies of his motion and the Court's order were mailed to Debtors at the address of their residence**.**

[5] Court Appearance Record, 2011-CA-004209 NC. BSLF's verified amended complaint and Debtors' amended answer framed the issues to be tried. The amended complaint contained six counts. Count I sought a judgment of foreclosure; Count II a judgment for the amount due on the note, interest and attorney's fees; Counts III–V the recovery of fraudulent transfers; and Count VI the imposition of a constructive trust. *See* Verified Amended Complaint, 2011-CA-004209 NC. Debtors' amended answer denied that the mortgage loan was in default, asserted eleven affirmative defenses, and contained a six-count counterclaim. When they filed their Chapter 7 petition, Debtors listed "Count VI-Civil RICO" as a personal property asset in the

based on Creditor's submission, entered a final judgment of foreclosure in the sum of $4,267,436.[6] The judgment provided that if Debtors failed to satisfy the judgment, the Property would be sold at a public auction held on November 18, 2013.

On October 24, 2013, Debtors moved the Circuit Court to set aside the judgment of foreclosure and for a new trial.[7] Two weeks later, on November 7, in an effort to stay the public auction and proceeding without counsel, they petitioned the Bankruptcy Court for relief under Chapter 7 of the Bankruptcy Code.[8] Under 11 U.S.C. § 362(a), the filing of the petition operated automatically to stay the public auction scheduled for November 18. Debtors disclosed their assets, income

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appended Schedule B. *See infra* note 8 and accompanying text. Count VI-Civil RICO, brought under the "Civil Remedies for Criminal Practices Act," alleged that BSLF and Creditor conspired to acquire an interest in the Property through a pattern of criminal activity or through the collection of an unlawful debt.

[6] This amount included the defaulted quarterly interest payments. The judgment fixed the post-judgment interest rate at 4.75% per annum. The final judgment of foreclosure adjudicated in Creditor's favor all of the defenses and the six counterclaim counts asserted in Debtors' amended answer.

[7] Debtors' newly engaged attorney, Arthur R. Rosenberg, noted his appearance in the case and filed the motion. The motion sought relief from the judgment of foreclosure because Debtors "lack[ed] knowledge of the pending trial date of October 14, 2013." This was Mr. Rosenberg's only appearance as Debtors' counsel in the foreclosure action. He was replaced by Eric A. Lanigan on February 7, 2014. *See infra* note 19 and accompanying text.

[8] On page 1 of the Chapter 7 petition, Debtors, responding to the question, "Nature of Business," stated: "Development & Water Supply." In estimating respectively the number of creditors, the value of their assets, and the value of their liabilities, Debtors checked boxes for "1-49," "$50,000,001 to $100 million," and "$1,000,001 to $10 million."

On November 8, 2013, a "suggestion of bankruptcy" notation was entered on the Circuit Court's docket for the mortgage foreclosure case.

and expenses, and creditors' claims in the following schedules appended to their petition. Schedule A - Real Property listed the Property as an asset, describing it as "Residential/Commercial," representing that it had a value of $70 million, and claiming that it was subject to a homestead exemption under the Florida Constitution.[9] Schedule B - Personal Property listed the following assets and their current values[10]: "Gilberti Water Company & LandTech Design Engineering Group - Florida," $5.125 million; "Water and Mineral rights on property," $50 million; and "Sarasota Case with RICO counterclaim . . . for predatory loan to steal

[9] Schedule C. Article X of the Florida Constitution provides as follows in Section 4, Homestead; exemptions:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family. . . .

Fla. Const. art. X § 4(a)(1).

[10] The Schedule B form requires the debtor to list the personal property by "Type of Property." The form lists 35 types or categories. For example, type 1 asks whether the debtor has "Cash on hand," 2, "Checking, savings or other financial accounts," 9, "Interests in insurance policies," 10, "Annuities," 12, "Interest in IRA, ERISA, Keogh, or other pension or profit sharing plans," 13, "Stock interests in incorporated and unincorporated businesses," 15, "Government and corporate bonds and other negotiable and non-negotiable instruments," 16, "Accounts receivable," and 18, "[L]iquidated debts owed to debtor including tax refunds." Debtors checked "None" in responding to these types.

Water rights," $15 million.[11] Schedule D - Creditors Holding Secured Claims listed Creditor with a claim of $4,267,436, which was "[i]nvalid" because the judgment on which it was itself based was a "predatory loan";[12] and Gilberti Water Company, with a claim of $10,250,000.[13] Schedules E - Creditors Holding Unsecured Priority Claim, and F - Creditors Holding Unsecured Nonpriority Claims, both listed Creditor with a claim of $4,267,436.[14]

Schedule G - Executory Contracts and Unexpired Leases listed a contract with "LandTech Design Group, Inc," for "Consultanting, [sic] Planning and Civil Engineering permits for Water Supply and Development projects." Schedule I - Current Income of Individual Debtor(s) estimated Debtors' monthly income to be: "Debtor" $2,000, "Spouse" $200. Schedule J - Current Expenditures of Individual Debtor(s), estimated Debtors' average monthly expenses to be $2,200, excluding taxes and insurance premiums.

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[11] Schedule B also listed several personal items, such as a "Dodge SUV." The "Sarasota Case" referred to in the schedule was the mortgage foreclosure action in the Sarasota County Circuit Court.

[12] Debtors refer to the RICO claim in the mortgage foreclosure action. They asserted the invalidity of the loan in the answer and counterclaim they filed in that action. *See supra* note 3.

[13] The Gilberti Water Company's claim was secured by a "Professional lien on entire 7 parcels," which constituted the Property. Joseph Gilberti, the company's owner, recorded the liens with the Clerk of the Sarasota County Circuit Court on December 28, 2012. The liens were inferior to the lis pendens BSLF had recorded on the Property prior to its commencement of the mortgage foreclosure action.

[14] No other creditor having an unsecured priority claim or an unsecured nonpriority claim was identified.

The Bankruptcy Court appointed Luis E. Rivera trustee of the bankruptcy estate (the "Trustee"). Meanwhile, on November 12, Creditor moved the Court to lift the § 362(a) stay pursuant to 11 U.S.C. § 362(d).[15] The Court granted the motion on December 9, 2013.[16] The next day, an attorney, David Lampley, filed a notice of appearance as Debtors' counsel.

The Trustee scheduled an 11 U.S.C. § 341 meeting of creditors for December 12, 2013.[17] Neither Debtors nor their attorney appeared, so the Trustee rescheduled the meeting for January 8, 2014. Again, Debtors and their attorney failed to appear, and the meeting was rescheduled for February 19, 2014.

Meanwhile, on January 10, 2014, the Circuit Court denied Debtors' October 24 motion to set aside the judgment of foreclosure and for a new trial and scheduled the public auction for March 11, 2014.[18] On February 7, 2014, Eric A.

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[15] Debtors did not respond to Creditor's motion, nor did the Trustee (since Creditor was the only creditor Debtors had identified).

On December 11, 2013, the following notation was entered on the docket for the mortgage foreclosure case: "Notice of filing – order granting motion for relief from automatic stay." A second docket entry noted the filing of Creditor's "motion to reschedule foreclosure sale."

[16] The Bankruptcy Court granted the motion pursuant to the Court's Local Rule 2002-4. The rule authorizes the granting of relief from an automatic stay if no party in interest objects.

[17] 11 U.S.C. § 341 provides that "[w]ithin a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors."

[18] On January 10, 2014, docket entries in the mortgage foreclosure case noted: "Order denying Defendant's amended [October 24, 2013] motion to set aside final judgment of foreclosure and grant new trial"; "Order – rescheduling sale"; and "Judicial sale set for

Lanigan noted his appearance as Debtors' counsel in the foreclosure action and filed a notice of appeal to challenge the Circuit Court's judgment of October 14 and its ruling of January 10 in the Florida District Court of Appeal, Second District ("2DCA").[19]

On February 20 Debtors, accompanied by their bankruptcy lawyer, Mr. Lampley, appeared at the meeting of creditors and were examined. During the course of the meeting, it became apparent that the Property was worth nothing close to Debtors' $70 million valuation, but might have some value in excess of the judgment Creditor held. After consulting a real estate agent, the Trustee had reason to believe that the Property had a value in the range of $6 to $12 million. The Trustee, through counsel, therefore moved the Bankruptcy Court to reconsider its December 9, 2013 order granting Creditor relief from the § 362(a) stay.

3/11/2014 at 9:00 am in Online, Jdg: Judicial Sales." Docket entries on January 17, 2014, noted: "Notice of sale." An entry on January 31, 2014 noted: "Proof of publication of sale."

The lifting of the automatic stay enabled the Sarasota County Circuit Court to rule on Debtors' October 24 motion and to reschedule the public auction.

[19] The docket in the mortgage foreclosure case contains these entries. February 7, 2014, "Notice of appearance [by Eric A. Lanigan] – on behalf of Cecil Daughtrey, Jr; Patricia A. Daughtrey"; "Notice of appeal"; "Forward notice of appeal to appellate court." February 11, 2014, "Acknowledgment by appellate court of new appeal case 2D14-595"; "Order from district court of appeals 2D14-595." The 2DCA clerk's docket is online at onlinedocketsdca.flcourts.org. The appeal appears as *Cecil Daughtrey, Jr. and Patricia A. Daughtrey v. 72 Partners, LLC*, Case No. 2D14-595, August 25, 2014. The 2DCA docket for the appeal is available at http://www.onlinedocketsdca.flcourts.org. We take judicial notice of the docket entries and of the documents the entries identified in this and succeeding footnotes.

The Bankruptcy Court heard the motion at a hearing held on March 3.[20] At the conclusion of the hearing, the Court granted the motion and reinstated the stay.[21] The Court also scheduled an evidentiary hearing for April 16 for the purpose of determining the value of the Property and, thus, whether the bankruptcy estate had any equity in the Property. On March 5, Mr. Lampley moved the Court for leave to withdraw as Debtors' counsel.[22]

On April 1, the Trustee objected to Debtors' assertion that the Property, in its entirety, was subject to a homestead exemption, contending that the Florida Constitution, Article X, § 4(a)(1), limited their exemption to 160 acres. Debtors did not respond to the objection, and the Court sustained it, limiting the homestead exemption to 160 acres.

On April 8, the Bankruptcy Court granted Mr. Lampley's motion for leave to withdraw as Debtors' counsel. Three days later, the Court continued the April

[20] Joseph Gilberti was among those attending the March 3 hearing. He identified himself as "the engineer of record for the Daughtrey ranch."

[21] A docket entry in the mortgage foreclosure case reflected the reinstatement with the notation: "foreclosure sale canceled." The reinstatement of the stay precluded Lanigan from prosecuting, and the 2DCA from considering, Debtors' appeal of the October 24, 2013 foreclosure judgment and January 10, 2014 order denying Debtors' motion to set aside the judgment and for a new trial. The 2DCA docket for the appeal does contain an entry showing the reinstatement.

[22] At the close of the March 3 hearing, Mr. Lampley informed the Court that Debtors' schedules needed to be amended, and that he "was still trying to get all the information to amend the schedules." He requested "an additional ten days" to do that. He was apparently unable to obtain the needed information from Debtors, so two days after the hearing adjourned he moved the Court for leave to withdraw. As it turned out, Debtors' schedules were never amended.

16 valuation hearing to June 2, 2014, to enable the Trustee to determine whether the estate would have to pay a significant capital gains tax—due to Debtors' negligible tax basis in the Property because it had been inherited—if the Property were to be sold for a price substantially in excess of Creditor's claim. After consulting multiple real estate brokers, the Trustee found that the Property's value was not in the $6 to $12 million range. The relatively lower valuation was due to the Property's location, which was far from a significant highway, and the extended period of time that would be needed to sell it. He also found that the capital gains tax consequences to the estate made a sale of the Property impracticable. He therefore engaged Creditor in negotiations over a possible tax-free disposition of the Property via a compromise settlement.

On May 29, 2014, the Trustee filed a "Motion and Notice of Compromise of Controversy" with Creditor.[23] In light of this development, the Court cancelled the June 2 hearing and, on June 11, rescheduled the hearing for July 24, 2014. The terms of the compromise, according to the motion, provided that Debtors would retain 160 acres of the Property as their homestead upon Creditor's release of its judgment lien on that acreage. The Trustee would (1) agree to the Court's entry of

[23] Federal Rule of Bankruptcy Procedure 9019(a) provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The Trustee's motion amended the same motion filed earlier in the day in order to omit "Debtors" from the motion's style.

an order lifting the stay so that Creditor could complete the foreclosure via a public auction, (2) give Creditor a quitclaim deed to the remaining 2,340 acres of the Property,[24] and (3) release Debtors' right to appeal the October 14, 2013 judgment of foreclosure. Creditor would give the bankruptcy estate $300,000 for distributions to general unsecured creditors, including Creditor, whose unsecured deficiency claim of $320,000 had been allowed.

On June 23, 2014, Mr. Lanigan entered his appearance as Debtors' attorney and filed an objection to the Trustee's Motion and Notice of Compromise, contending that Creditor's $300,000 payment was "woefully inadequate in light of the property's true market value." Three days later, the 2DCA served Mr. Lanigan with an order requiring that "[Debtors'] initial brief shall be served within 20 days or this appeal will be dismissed. Should [Debtors] move for an extension of time, the motion must be accompanied by a status report on their obligation to pay for record preparation." [25]

At the July 24 hearing, Mr. Lanigan informed the Bankruptcy Court that if the compromise were amended to include in the 160-acre homestead a water well

[24] The Trustee would convey the 2,340 acres to Creditor "subject to any and all liens of record, as well as any and all easements, restrictions and reservations of record, back taxes, if any, and current and subsequent taxes." The liens of record would include liens The Gilberti Water Company had filed to secure claims, which as of November 7, 2013, totaled $10,250,000. *See supra* note 13.

[25] Mr. Lanigan apparently had not informed the 2DCA that the Bankruptcy Court had reinstated the automatic stay, such that the appeal could not go forward.

located on the Property, there was an "extremely high likelihood the whole thing goes away." Debtors' objection would likely be resolved. After stating what to the Court appeared obvious, that Debtors "filed the bankruptcy . . . in order to stop [the foreclosure sale], to get the benefit of the automatic stay," the Court turned to the compromise, which it had stated "sound[ed] like a really good deal." "The Debtor ends up with 160 acres free and clear."[26] "[T]he Debtor really has to look long and hard at this deal." The Court then continued the hearing until August 28 to allow the Trustee and Creditor to consider redrawing the compromise agreement to include the well within the homestead boundaries.

On July 31, the 2DCA dismissed Debtors' appeal "for failure of appellants to comply with this court's order of June 24, 2014, requiring the filing of an initial brief." On August 25, 2014, the July 31 order became "final" and the case was "closed."

The Trustee and Debtor redrew the boundaries of Debtors' proposed 160-acre homestead to incorporate the well and, on August 27, submitted to the Court

[26] Joseph Gilberti attended the July 24 hearing. He informed the Court that he owned a portion of the Property. The Court noted that he acquired his portion of the Property after the foreclosure action and an accompanying lis pendens had been filed. Gilberti's lawyer, Richard A. Johnston, interjected to say that Gilberti recorded a deed to his portion of the Property prior to the entry of the foreclosure judgment. The Trustee's lawyer noted in response that Gilberti had not "even file[d] a proof of claim."

an "Amended Motion and Notice of Proposed Compromise" (the "Compromise").[27]

The August 28 hearing began with the Trustee's attorney presenting the Compromise. The Court then asked Mr. Lanigan whether Debtors objected to the Compromise.[28] He said they did and announced that "we've had some recent developments." "I'm looking to confirm absolutely today that we have a significant investor who . . . is entering into a contract today with Mr. Daughtrey . . . which would ultimately be able to take out the creditor, 72 Partners, in its

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[27] As part of the Compromise, the Trustee, who by operation of law stood in the place of Debtors in the mortgage foreclosure case, abandoned any arguments Debtors may have had for the reversal of the judgment of foreclosure or the January 10 order denying their motion to set aside the judgment and for a new trial. To that end, the Compromise provided the following:

> **Waiver of Defenses to Foreclosure of Remaining Real Property**: The Trustee shall waive any and all defenses to the Creditor's foreclosure of the Remaining Real Property. This waiver includes the appeal previously filed by the Debtors in the Creditor's state court foreclosure action.

The initial motion to which the Compromise was attached stated:

> [T]he Trustee agrees (a) to the entry of an order by the Court granting final stay relief to the Creditor to pursue all remedies necessary in the state court action with respect to the Remaining Real Property; and (b) to waive any and all defenses to the Creditor's foreclosure of the Remaining Real Property. This waiver includes any rights in the appeal previously filed by the Debtors in the Creditor's state court foreclosure action, as such right is held by the Trustee.

In addition, the first supplemented motion for compromise stated:

> The compromise is not simply the transfer of the Real Property but consists of the waiver of the causes of action held by the estate against the Creditor, together with consent to stay relief in favor of the Creditor. [Moreover, t]he Trustee has reviewed the state court foreclosure action and does not believe there is a basis for the appeal of the Judgment.

[28] Mr. Lanigan and the attorney representing Mr. Gilberti appeared at the hearing via a prearranged conference call.

entirety." Lanigan had "spoken directly with all of the parties involved" and "anticipated" that the contract would be signed that day. If it was, he would be moving the Court to convert the case to a Chapter 11 proceeding. After the Court asked how long it would take "this contract to be effectuated" and informed him that its proceeds would have to cover "significant administrative costs . . . the Trustee's quantum meruit compensation and the cost and fees of the Trustee's counsel," Mr. Lanigan said that "[o]nce everybody signs, it would . . . all be done within 30 days." As for the "Trustee's quantum meruit expenses . . . and legal fees," he had a "lengthy discussion with [his] client . . . as to the unequivocal need to pay those . . . [a]nd they acknowledge that."[29] At this point, the Court turned to the Trustee for his thoughts. He expressed concern about Debtors' failure to amend their schedules, especially the Schedule F which lists creditors with unsecured claims. The Trustee had "reason to believe" on the basis of Debtors' testimony (at the 341 creditors' meetings) that "there are [undisclosed] Schedule F creditors that would be entitled to a distribution."

Council for the U.S. Trustee picked up where the Trustee left off with this statement:

> The concern, Your Honor, is the statement the Chapter 7 Trustee Rivera made that he has knowledge of undisclosed creditors that

[29] Mr. Lanigan had "gotten preliminary indication from [the Trustee's attorney] as to what [the Trustee's expenses and the legal fees] may be."

> aren't on notice of this hearing much less any other hearing that has occurred in this case or any other activity in this case. And now we're learning today that Debtors' counsel may want to convert [to Chapter 11]. This seems to be a stalling tactic and a delay mechanism when the creditors that his client knows about still are not being disclosed. Mr. Lanigan [has] been in this case for more than this morning. So if he has knowledge that his client hasn't disclosed everything, that needed to be filed before today.

Mr. Lanigan, in response, acknowledged that "there may be undisclosed creditors." He closed his remarks by saying that he "would like to get this resolved without having to go into a Chapter 11. But . . . if it takes a Chapter 11 to finally resolve these issues, . . . a Chapter 11 could be successfully concluded."

After hearing from the parties, the Court concluded the hearing with this statement:

> All right. Mr. Lanigan, [the Trustee] threw out a concept, which was a structured dismissal concept, which might make more sense if your clients actually have a deal. I am very concerned, the case was filed back last November. It was obviously filed in order to prevent the secured creditor from proceeding with its foreclosure remedies. . . . [W]hat I am inclined to do is roll this over one more time, and that is to the September calendar, which will be September 25th at 10:00 a.m. And, *Mr. Lanigan, you need to get on the phone with [the Trustee's lawyer and Creditor's counsel] and see what can be worked out*. And if the Debtors have a deal, the Debtors have a deal. And if that resolves everything and pays [Creditor], that's great. And if the deal is going to close in 30 days, that's wonderful.

(Emphasis added).[30]

The contract Mr. Lanigan "anticipate[d]" Debtors and the "significant investor" would sign on August 28—one that would provide all of the funds needed to satisfy Creditor's judgment in full and cover the Trustee's expenses and legal fees as well—did not materialize. What did materialize was Debtors' acceptance of an offer they had received two weeks earlier from two limited liability companies, Flint Family Farms, LLC, and Georgiana, LLC (the "LLCs").[31] On August 14, the companies had submitted an offer to purchase 1,449.63 acres of the Property for $3,334,148. The offer had a September 5 expiration date. Debtors accepted the offer on September 1, three days after the August 28 hearing adjourned.[32]

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[30] As indicated *infra*, at the September 25 hearing Creditor's attorney informed the Court that he and the Trustee's lawyer had contacted Mr. Lanigan about the contract with the "investor" he described at the August 28 hearing, but they "heard nothing" from him in response.

[31] Flint Family Farms, LLC was a Florida limited liability company formed January 21, 2011 to pursue "any and all lawful business**."** Robert Jerome Flint, Jr. was the only initial member and is listed as the Manager-Member for every year of the LLC's existence. He signed the October 14, 2014 Agreement with Debtors. Flint Family Farms, LLC was administratively dissolved for failure to file an annual report on September 23, 2016, and remains inactive.

Georgiana, LLC is a North Carolina manager-managed limited liability company formed December 14, 2010. Its initial members were James P. Burch—who signed the October 14, 2014 Agreement with Debtors, and who is also listed as the registered agent and manager—and William E. Burch, both North Carolina residents. Georgiana, LLC's purpose was listed as "Farm" from its inception through March 9, 2016, when the purpose was changed to "Land Investment." Georgiana, LLC is still listed as active.

[32] The companies' obligation to go forward with the purchase was "contingent on financing acceptable to purchaser" and Debtors' production of an insurable title to the property "subject only to easements, zoning and restrictions of record and free and clear of all other

The record is silent on the point, but it is fair to assume that when Mr. Lanigan appeared before the Court on August 28, he was unaware of the companies' offer, and Debtors' intent to accept it. He became aware of it later, however, on September 15, when (according to Debtors' next attorney, Paul DeCailly) Debtors instructed him to offer Creditor $3,334,000 in satisfaction of its judgment. He did not make the offer. Nor did he get on the phone with the Trustee's and Creditor's lawyers to see what could be worked out, as the Court had instructed. Instead, he moved the Court for leave to withdraw as Debtors' counsel on September 22. The same day, Paul DeCailly replaced him as Debtors' attorney[33] and pursuant to 11 U.S.C. § 706(a) filed a "Motion to Convert to a Case Under Chapter 11" (the "Motion to Convert"). The motion stated that "the Debtors now realize that they filed under the wrong chapter, and due to the Debt limits imposed under Chapter 13, the Debtors [sic] only option [is] for reorganization." The motion was perfunctory. It contained no reference to the contract Mr. Lanigan expected Mr. Daughtrey to enter into with a "significant investor" on August 28. Nor did it refer to any proposal that might constitute a feasible plan of

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encumbrances except as stated in this offer." The contract provided that "Purchaser shall be given possession . . . on October 17, 2014." The transaction would close thirty days after "Purchaser's receipt of an abstract showing marketable title in Seller or title insurance binder showing insurable title in Seller."

[33] At the September 25 hearing, the Court noted on the record that Mr. DeCailly had "sat in" on the August 28 hearing as an observer.

reorganization. The motion merely stated that the Debtors had an "absolute right" to the conversion to Chapter 11, and that a conversion "can bring about more value to the estate and pay a dividend to *unsecured creditors* in a more beneficial manner than the Chapter 7 trustee, and further, can accomplish this in a manner more economical than in a [C]hapter 7."[34] (Emphasis added). Joseph Gilberti, represented by Andrew Tapp, also filed a § 706(a) motion to convert the case to Chapter 11.[35]

The September 25 hearing began with a colloquy between the Court and Carmen Dellutri of The Dellutri Law Group.[36] The U.S. Trustee had subpoenaed the firm (which, through David Lampley, had represented Debtors prior to March 5, 2014) for documents that might identity the unsecured creditors Debtors had failed to list in their Schedule F filing, which they had not amended. During the colloquy discussion, Mr. DeCailly intervened and announced that he intended to file amended schedules on behalf of Debtors: "amended schedules D, . . . F, E if

[34] The Motion to Convert referred to "unsecured creditors." Debtors' initial Schedule F listed no unsecured creditors and an amended Schedule F had not been filed.

[35] Mr. Tapp replaced Richard A. Johnston as Mr. Gilberti's attorney. The motion he filed was on behalf of Mr. Gilberti and Land Tech Design Group, Inc.

[36] When the hearing began, Mr. Lanigan was on the telephone listening in. He was there on the phone because the Court had instructed him at the August 28 hearing to get with the lawyers for the Trustee and Creditor to see what could be worked out. The Court had continued the hearing to September 25 to enable him to do that. The Court implied that if they could not come to terms, it would approve the Compromise. As it turned out, Mr. Lanigan and the lawyers never got together, and the scheme Mr. Lanigan posited at the August 28 hearing passed by the boards.

necessary." The Court went one step further and ordered him to "file [the] amended schedules within 14 days" of a hearing scheduled for October 23.[37]

After that, Mr. DeCailly informed the Court that he and the Trustee had discussed the possibility of a "structured dismissal" of the case. He concluded, however, that a structured dismissal was not feasible. Therefore, Debtors would pursue the motion he had filed on September 22 to convert the case to a Chapter 11 proceeding. The Court asked: "The Debtors are going to convert to an 11 and then what?" Mr. DeCailly's answer:

> [W]e do have a buyer—and from my perspective, I don't quite yet know what we're selling. . . . The current buyers, they're getting a survey now. They're spending the money to survey the property so we know exactly what's being sold and what's being kept. But the—this case can go forward in an 11. I understand it's been going on for almost a year. But in the statute, of course, there is no time limit. It just says that we can motion to convert [sic] at any time.[38]

After hearing from Mr. DeCailly, the Court turned to the Trustee's lawyer. She reminded the Court that under the Supreme Court's decision in *Marrama v. Citizens Bank*, 549 U.S. 365, 127 S. Ct. 1105 (2007), a debtor does not have an absolute right to convert a Chapter 7 case to one under Chapter 11. The right to

[37] On October 23, the Court would hear The Dellutri Law Group's motion to quash the U.S. Trustee's subpoena.

[38] Later in the hearing, Mr. DeCailly again stated the parties did not know exactly what was being sold: "Your Honor, I've spoken at length with the Debtor. I've also spoken at length with the prospective buyer who is willing to pay. But again, we still don't know exactly what he's paying for. It's a large parcel of land. Nobody has an exact description. It's being done by the buyer."

convert is subject to a "good faith" requirement. She implied that Debtors were not proceeding in "good faith." Moreover, if the case were converted to Chapter 11, it would wind up back in Chapter 7 due to Debtors' inability to present a feasible plan of reorganization. The lack of good faith and the likelihood that the case would ultimately be disposed of under Chapter 7 militated against conversion: "conversion [was not] in the best interest of the estate."

Creditor's counsel spoke next. After observing that Debtors had been represented by seven lawyers in the foreclosure action and were on their third lawyer in the bankruptcy case, counsel contended that Debtors' attempt to convert the case to one under Chapter 11 was not in good faith; rather, the attempt was "nothing more than abuse of the [bankruptcy] process." He summarized the lack of good faith.

> At the last hearing Your Honor heard that there was a buyer that was imminent. Myself [and Trustee's lawyer], we both contacted Mr. Lanigan: Where's our payoff request? We're ready to make this happen for you. We've heard nothing, Your Honor. And similar to the last several hearings, there is a flurry of activity that occurs the week of the hearing before Your Honor. And, Your Honor, the concern I have at this point is that the if Court grants this conversion, we're going to be right back in front of you in a month, another two months, three months, but ultimately we're going to end up right back here with this compromise because that's the only viable offer on the table at this point to resolve this case.

After the Court announced that the Compromise was "the proposal that's on the table" and Creditor's attorney reiterated that "a judge has already ruled in the state court action that we're entitled to final judgment of foreclosure on the whole parcel," the Court asked Mr. DeCailly if he had "anything else" to say. He did. He explained what he meant when he stated earlier in the hearing that "[w]e do have a buyer."

> Your Honor, . . . there is a buyer out there who I've spoken with who is willing to pay up to $3 million for [1,400 acres of] the property. But he's not—they're not right now in the position to sell it, and he's not in the position right now—he's not willing to turn over the funds in escrow until we determine where this case is going. I haven't had a chance to contact opposing counsel yet regarding that 3 million. I also would like to get the full picture of who's involved in this case. I agree, the schedules need to be looked at and they need to be redone. The Court had concern about filing proofs of claim. Well, as we know, if you convert it to an 11, we get a new proof of claim period. All the periods start over again. We can go forward knowing exactly—and it may end up in the same structured dismissal later on that you've described, then we'll know everybody involved and we will have had an opportunity to propose this sale and get the lienholder together with the buyer.[39]

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[39]Mr. DeCailly never indicated the amount of acreage for which the buyer was "willing to pay up $3 million"; nor did he identify the buyer, referring intermittently to the buyer as "he" and "they." Mr. Tapp was the one who cleared the air and indicated the number of acres involved: "The deal with the $3 million we're talking about, not the Trustee's deal, doesn't sell the full 2500 acres. It sells 1400 acres."

It is reasonable to infer that Mr. Tapp was talking about Debtors' acceptance on September 1 of the offer the limited liability companies made on August 14 to purchase 1,449.63 acres of the Property for $3,334.148, and that Mr. DeCailly was well aware of the offer and acceptance. But, Mr. DeCailly decided to withhold that information from the Court. Instead, he referred to a buyer's offer of "up to $3 million" for the purchase of an amount of acreage yet to be determined. Disclosing the limited liability companies' offer and Debtors' acceptance would have materially contradicted Mr. Lanigan's representation to the Court on August 28—that he

Mr. DeCailly was representing that Debtors' Chapter 11 reorganization plan would provide $3 million. He did not explain how $3 million would be sufficient to satisfy Creditor's judgment of $4,267,436, which was drawing interest at the rate of 4.75% per annum, much less pay the fees of the Trustee and his attorney, other administrative expenses, the capital gains tax the sale of the land would generate, and the unsecured creditors yet to be identified in an amended Schedule F which he had been ordered to file.

Having heard from counsel, the Court announced its rulings on Debtors' and Gilberti's Motions to Convert and on the Compromise. The Court said that when it first reviewed the Compromise, "it appeared to be a win-win for everyone because the Debtors were on the verge of losing the [entire] property to foreclosure. They were able to discharge their obligation to 72 Partners, they were able to retain a 160-acre homestead property. That seemed like a great deal." Continuing, the Court observed:

> So here we are months after the original compromise was filed. There's really been no progress made that I can see. There's still a party that's out there waiting in the wings; may be interested in purchasing the property, but there's no offer before this Court. I've

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expected Debtors to enter into a contract that day which would provide funds sufficient to satisfy Creditor's judgment and the expenses incurred in administering the bankruptcy estate, funds far in excess of $3,334,148. The buyer to which Mr. DeCailly referred was not the limited liability companies. He was referring to a buyer who had recently come on the scene and with whom no agreement had been reached. In fact, Debtors were "not right now in the position to sell."

> been hearing about this party since the initial hearing, I think it was back at the July hearing. There are evidently other creditors out there that would share in a distribution to unsecured creditors. And for those reasons, at this time I can't find that the case should be . . . converted to a Chapter 11 case. . . . [T]he *Marrama* case does control.
>
> And when the Debtors have elected to file a Chapter 7 case and now when they're on the eve of losing the property through a sale by the Chapter 7 Trustee, they now seek to convert late in the day, seek to convert the case to a Chapter 11. They're not here with a purchase contract. They're not here with something where they can tell the Court, tell the Trustee, tell [Creditors' counsel], that there is an offer right here on the table today, ready to be closed within 30 days, which is what I believe we talked about at the last hearing. . . . [W]e're now hearing the Debtors should be entitled . . . to convert the case to a Chapter 11 case to propose a Plan. That's a lengthy process. They've had the protection of the automatic stay now for 11 months. They've had plenty of time to figure out what it is they want to do with this property. They've been represented by [different] counsel on at least two prior occasions. And for all those reasons, I think it's appropriate to deny the motion to convert the case to a Chapter 11 and to grant the [Trustee's] amended motion to compromise with the carveout for the Debtors of the well and the . . . 160-acre homestead property.

On October 3, 2014, the Bankruptcy Court entered orders denying Debtors' and Gilberti's Motions to Convert for "the reasons stated orally in open court" on September 25. Four days later, the Court entered an order approving the Compromise "for the reasons stated orally in open court" on September 25. The Trustee and Creditor thereafter consummated the Compromise in part. The Trustee executed, and Creditor recorded with the Clerk of the Sarasota County Circuit Court, a quitclaim deed which carved out of the 2,500 acres of the Property a 160-acre homestead, including the well, and Creditor gave the Trustee

$300,000.[40] What remained to be done was the Court's entry of an order lifting the stay to enable Creditor to move the Sarasota County Circuit Court to set a date for the public auction and the sale of 2,340 acres of the property.

B.

On October 17, 2014, Debtors, through Mr. DeCailly, moved the Court for "reconsideration" of its order denying their September 22 Motion to Convert. The motion asserted that the Motion to Convert had been filed in good faith, contrary to the position the Trustee and Creditor had taken at the September 25 hearing. The Trustee and Creditor had argued that the filing was not in good faith, and instead constituted an abuse of the bankruptcy process.

Although styled a "Motion for Reconsideration," the motion was an entirely new Motion to Convert, for it was based on facts that had not been disclosed either before or after the September 22 Motion to Convert was filed. Instead, the motion for reconsideration was based on the following facts and two documents Debtors were providing to the Court for the first time. Namely, that

> the Debtors had arranged for an offer to the secured creditor a purchase agreement for the property for $3,334,000.00 and had forwarded it to their attorney [Lanigan] on September 15, 2014. . . .

[40] The Trustee also waived any causes of action the bankruptcy estate had against Creditor, and relinquished Debtors' right to appeal the foreclosure judgment. *See supra* note 27.

> Their attorney never acted on the request to present the offer to counsel for 72 partners as instructed. On . . . September 21, 2014 the Debtor[s] terminated the attorney client relationship between prior counsel and them, and retained the services of undersigned [Mr. DeCailly]. The parties met and discussed the best way to proceed, and it was determined that a motion to convert the case should be filed. Counsel drafted and filed a motion.[41]

The two documents, which were attached to the motion, purported to be separate agreements to purchase portions of the Property. The first document, entitled "Agreement to Purchase Real Estate," was in the form of an offer extended to Debtors on August 14, 2014 by "Georgiana, LLC" and "Flint Family Farms, LLC," to purchase 1,449.63 acres of the Property for $3,334,148.[42] The offer was "contingent on financing acceptable to purchaser[s]." If acceptable financing was available, the purchase would close "30 days after Purchaser[s]' receipt of an abstract showing marketable title in Sellers or title insurance binder showing insurable title in Seller[s]." In any event, "Purchaser[s] shall be given possession of the property on October 17, 2014." Debtors accepted the offer on September 1, 2014. It is obvious that the Agreement to Purchase Real Estate was the document

[41] Mr. DeCailly was saying that Debtors instructed Mr. Lanigan to offer Creditor $3,334,000 in full satisfaction of Creditor's judgment of $4,267,436 (plus interest). Apparently, the payment would be funded by the sale of 1,400 acres to the "buyer" Mr. DeCailly referred to at the September 25 hearing. Creditor presumably would release its judgment lien on the remaining 1,100 acres of the Property, which Debtors would retain. Mr. Lanigan did not tender this offer to Creditor's counsel.

[42] Debtors' 160-acre homestead was outside the 1,449.63 acres.

Debtors forwarded to Mr. Lanigan on September 15, 2014, and what Mr. DeCailly was referring to at the September 25 hearing when he said that he had spoken to a buyer "who is willing to pay up to $3 million for [1,400 acres of] the property."

The second document, entitled "Agreement," was entered into on October 14, 2014. The LLCs agreed to purchase the Property (except for the 160-acre homestead) for $4,621,000. The closing was to be held "fifteen days after the entry of the sale order [by the Bankruptcy Court]," and was subject to several other conditions precedent.[43]

On October 21, four days after Mr. DeCailly moved the Court to reconsider its order denying Debtors' Motion to Convert, Mr. Gilberti moved the Court to reconsider its order approving the Compromise.[44]

The Bankruptcy Court heard Debtors' and Mr. Gilberti's motions on November 5, 2014. Before it considered the motions, however, the Court questioned Mr. DeCailly about Debtors' failure to amend their Schedules, especially Schedule F, listing the unsecured creditors. He said that twenty-seven

[43] Mr. DeCailly's motion for reconsideration did not explain why the Court should reconsider its October 3 denial of Debtors' September 22 Motion to Convert based on the September 1 Agreement, the existence of which he had withheld from the Court at the September 25 hearing, and the October 14 Agreement. Neither constituted newly discovered evidence that might support a motion for reconsideration.

[44] Mr. Gilberti filed the motion on behalf of himself and LandTech Design Group, Inc.

creditors needed to be listed, some of whom "were closed." He indicated that an amendment would be forthcoming.

With the unsecured creditor issue out of the way, the Court turned to the Debtors' October 14 Agreement with the LLCs with this comment: "If they have a buyer ready, willing and able to close on the property for $4.621 million, then tell us what the closing date is and work it out." Mr. DeCailly's reply: "I believe we can close within 15 days." With that, the Court turned to the Trustee's lawyer.

The Trustee's lawyer pointed out that in addition to the above payments, given Debtors' very low basis in the Property (most of which had been inherited), a significant capital gains tax would have to be paid. To pay the tax, the Property (less the 160-acre homestead) would have to be sold for $6 to $7 million. It was because a sale at that price was out of the question that the Trustee "entered into this agreement . . . with 72 Partners, because it carved out what was so important to the Debtors . . . their acreage and the well."

The Court asked Mr. DeCailly whether there were "tax consequences to the Debtors." His response: "Yes. And I asked [Mr. Daughtrey to] try to figure out his basis. . . . That's a daunting thing for him right now . . . to figure that out." But, he continued, "[w]e can work around the tax issues." He then revealed what was actually behind the motion for reconsideration—to convert the case to a Chapter 11 and sell the Property (less 160 acres) for $4,621,000.

> The point is these are farmers. This land has been in their family for a long time. And if it must—if it cannot—absolutely cannot stay . . . in their family, then they want to see it stay with the neighbor who's been there generation after generation so it can be used for what it's used for, farming.

The Court's response was that if it did not approve the Compromise, Debtors would be faced with

> [t]he foreclosure of the property, so they would have had nothing. They wouldn't have had their homestead. They wouldn't have had their well. That's why . . . this resolution seemed to be a win-win for everybody, because the Daughtreys get to keep their [160] acres, they get to keep their well, 72 Partners is paid and gone.

The Court next heard from Creditor's attorney. He reminded the Court that the Compromise had been "consummated," and that in recording the Trustee's deed, Creditor had expended "thirty or forty thousand dollars [on] documentary stamp taxes." In addition, having learned that Debtors had been "receiving payments from sod companies . . . stripping the property of sod" and that "[t]here [were] multiple hunting leases that the Daughtreys had been receiving money for," Creditor had taken steps to "secure[] the property." Creditor's attorney also reminded the Court that over the previous eighteen to twenty-four months, "Gilberti ha[d] placed . . . about $70 million in claims liens against the property [and] had the Daughtreys execute various deeds to him." Some were recorded after the lis pendens was recorded in connection with the mortgage foreclosure action; others were filed post-petition. Mr. DeCailly acknowledged the existence

of Gilberti's post-petition liens and that if the case were converted to Chapter 11, proceedings would need to be initiated to nullify the deeds and the liens "[b]ecause no title company is going to back this sale, if it's a sale."

After hearing from Gilberti's attorney, who confirmed that Gilberti had not filed a proof of claim in the case, and instructing the Trustee's attorney to ensure that Debtors filed an amended Schedule F, the Court adjourned the hearing.

On November 18, 2014, the Court denied Debtors' October 17 motion for reconsideration of its October 3 order denying Debtors' Motion to Convert and Mr. Gilberti's October 21 motion for reconsideration of its October 7 order approving the Compromise. The Court also entered an order granting Creditor's motion for relief from the automatic stay.

C.

Debtors, still represented by Mr. DeCailly, appealed the Bankruptcy Court's decisions to the District Court on December 8, 2014. DeCailly filed two notices of appeal. One challenged the Bankruptcy Court's order of October 3, denying Debtors' Motion to Convert, and its order of November 18, denying their motion for reconsideration of that order. The other notice challenged the Court's October 7 order granting the Trustee's amended motion to approve the Compromise. The District Court consolidated the appeals.

The District Court affirmed the Bankruptcy Court's orders of October 3, October 7, and November 18, 2014, finding no abuse of discretion in the Court's decisions. On the conversion issue, the District Court concluded that the Bankruptcy Court, following *Marrama*'s teaching, properly found that Debtors failed to present a feasible plan of reorganization. The District Court reasoned that Debtors provided no time frame for filing and consummating a Chapter 11 Plan. Assuming the proposed October 14, 2014 Agreement between Debtors and the LLCs[45] became the Plan, Debtors would incur a capital gains tax in an amount the sale proceeds could not cover. The Chapter 11 proceeding would fail and the case would be converted to Chapter 7. At that point, Creditor would obtain relief from the automatic stay, the public auction would go forward, and the Property, including the 160 acres Debtors hoped to retain as a homestead, would be sold. The approval of the Compromise eliminated the problems conversion to Chapter 11 would create. Further, it placed Debtors in a better position than they would have occupied had their agreement with the LLCs gone forward.

Debtors disagree with the District Court's analysis and therefore appeal its judgment.

[45] The October 14, 2014 Agreement was a "proposed" agreement because Debtors' interest in the Property was part of the Chapter 7 estate and thus in the Trustee's exclusive control. Similarly proposed for the same reason was Debtors' September 1, 2014 acceptance of the LLCs' offer to purchase part of the Property.

II.

"In the bankruptcy context, this court sits as a second court of review and thus examines independently the factual and legal determinations of the bankruptcy court and employs the same standards of review as the district court." *In re Optical Techs., Inc.*, 425 F.3d 1294, 1299–1300 (11th Cir. 2005) (quotation omitted). We review the legal conclusions of either the bankruptcy court or the district court *de novo*, and the bankruptcy court's factual findings for clear error. *Id.* A factual finding is not clearly erroneous unless, after reviewing all of the evidence, we are left with "a definite and firm conviction that a mistake has been committed." *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir. 1995) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)).

A bankruptcy court's approval of a compromise or settlement is reviewed for abuse of discretion. *Christo v. Padgett*, 223 F.3d 1324, 1335 (11th Cir. 2000). The standard of review applied specifically to a bankruptcy court's denial of a motion to convert, on the other hand, appears to be a question of first impression in this Circuit. The Trustee contends that the proper standard is abuse of discretion.[46]

[46] But we also note that, in its initial appeal to the District Court, the Trustee put it thusly: "This Court reviews the bankruptcy court's legal conclusions de novo and its factual findings for clear error. *Both standards apply to review of the Conversion Denial Order*." (Emphasis added).

Debtors argue we should review the ruling *de novo*. The District Court reviewed it for abuse of discretion.[47]

The weight of authority leans manifestly towards abuse of discretion.[48] The essential point is that whether to convert a Chapter 7 case to one under Chapter 11 is within the "sound discretion of the court" and depends upon whether conversion would "inure to the benefit of all parties in interest." *In re Gordon*, 465 B.R. 683, 692 (Bankr. N.D. Ga. 2012) (internal quotation marks omitted) (quoting S. Rep.

[47] The District Court reasoned that "[w]here a matter is committed to the discretion of the bankruptcy court, the district court must affirm unless it finds that the bankruptcy court abused its discretion." Thus, because "[t]he decision whether to convert is left in the sound discretion of the court, based on what will most inure to the benefit of all parties in interest," *In re Gordon*, 465 B.R. 683, 692 (Bankr. N.D. Ga. 2012) (internal quotation marks omitted) (quoting S. Rep. No. 95–989, at 940 (1978)), abuse of discretion is the appropriate standard of review for a Bankruptcy court's denial of a motion to convert.

[48] *See, e.g.*, *In re Jacobsen*, 609 F.3d 647, 652 (5th Cir. 2010) ("The decision to convert a Chapter 13 case to Chapter 7 under § 1307(c) ['for cause'] is reviewed for abuse of discretion."); *In re Rosson*, 545 F.3d 764, 771 (9th Cir. 2008) ("We review for abuse of discretion the bankruptcy court's ultimate decisions to deny a request for dismissal of a Chapter 13 case under § 1307(b) and to convert a case from Chapter 13 to Chapter 7."); *In re Myers*, 491 F.3d 120, 125 (3d Cir. 2007) ("We review the Bankruptcy Court's decision to dismiss the bankruptcy case as a bad faith filing for abuse of discretion."); *In re Consolidated Pioneer Mortg.*, 264 F.3d 803, 806–07 (9th Cir. 2001) ("The decision to convert the case to Chapter 7 is within the bankruptcy court's discretion. Such a decision 'will be reversed only if based on an erroneous conclusion of law or when the record contains no evidence on which [the bankruptcy court] rationally could have based that decision.'"); *Matter of McDonald*, 118 F.3d 568, 570 (7th Cir. 1997) (reviewing bankruptcy court's dismissal of Chapter 13 case for failure to make timely payments under the plan for abuse of discretion); *In re Schlehuber*, 489 B.R. 570, 573 (B.A.P. 8th Cir. 2013), *aff'd*, 558 F. App'x 715 (8th Cir. 2014) ("We review the conversion of a Chapter 7 case to Chapter 11 under Bankruptcy Code § 706(b) for an abuse of discretion.").

Indeed, our review of precedent yielded only one seemingly contrary authority. The Court in *In re John Franklin Copper* reviewed the denial of conversion from Chapter 7 to Chapter 13 *de novo*. 314 B.R. 628, 630 (B.A.P. 6th Cir. 2004). But a closer look reveals that the Sixth Circuit took care to note that the facts there presented "an issue of statutory construction" that had to be reviewed *de novo*. *In re John Franklin Cooper*, 426 F.3d 810, 812–13 (6th Cir. 2005).

No. 95–989, at 940 (1978)). And where a matter is committed to the discretion of the bankruptcy court, the reviewing court must affirm unless it finds that the bankruptcy court abused its discretion. *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2006).

A bankruptcy court abuses its discretion when it either misapplies the law or bases its decision on factual findings that are clearly erroneous. *In re Mandalay Shores Co-op. Housing Ass'n, Inc.*, 21 F.3d 380, 383 (11th Cir. 1994). In conducting abuse of discretion review, we "recognize the existence of a range of possible conclusions" the trial court may reach and "must affirm unless we find that the court has made a clear error of judgment, or applied the wrong legal standard." *In re Kingsley*, 518 F.3d 874, 877 (11th Cir. 2008) (internal quotation marks and citation omitted) (alteration accepted).

With these principles in hand, we consider Debtors' appeal. We begin with their challenge to the denial of their Motion to Convert. From there, we move to the denial of their motion for reconsideration and then to the approval of the Compromise.

III.

A.

Although Debtors appealed the Bankruptcy Court's orders of October 3, 2014, denying their Motion to Convert, and November 18, 2014, denying their

motion for reconsideration, in their opening brief they lump the challenges together. In his answer brief, the Trustee does the same. We treat the appeals separately.

Debtors argue that they had an "absolute right" under 11 U.S.C. § 706(a) to convert their Chapter 7 case to Chapter 11. Anticipating the Trustee's argument that their Motion to Convert was properly denied because they had filed it in "bad faith," Debtors submit that the Trustee failed to make a "prima facie showing of bad faith." "The Court did not deny [their Motion to Convert] because they committed fraud, or waste, or concealed anything. The Court denied the motion because the case was 11 months old."[49] Absent the Trustee's prima facie showing of bad faith, they argue that the Court, in a proper exercise of discretion, should have granted their Motion to Convert.

In his answer brief, the Trustee disagrees with Debtors' right-to-convert argument for three reasons. First, the Trustee takes issue with the notion that a debtor has an "absolute right" under § 706(a) to convert a Chapter 7 case to Chapter 11. He points out that the right is limited by subsection (d), which

[49] The District Court rejected Debtors' argument that the Bankruptcy Court denied conversion "because the case was 'too old to convert.'" We agree with the District Court. There is nothing in the record to support the argument that the Bankruptcy Court denied conversion because the case was eleven months old. The Court referred to the age of the case on several occasions, but did so only to stress that the case, which should never have been filed under Chapter 7 in the first place, needed to be resolved. Mr. DeCailly admits as much. Debtors, acting on "bad legal advice," should have brought their case under Chapter 11, not Chapter 7.

provides that "a case may not be converted" from Chapter 7 to Chapter 11 "unless the debtor may be a debtor" under Chapter 11. *See* 11 U.S.C. § 706(d). Debtors could not qualify as Chapter 11 debtors, he contends, because they had "no likely prospect of reorganization," *see* 11 U.S.C. § 1112(b)(4)(A), and conversion to Chapter 11 was therefore precluded under *Marrama*.

Second, the Trustee argues that Debtors' eleventh-hour Motion to Convert the case evidenced an absence of good faith. Debtors' sole purpose in seeking conversion was to thwart the approval of the Compromise. Mr. DeCailly admitted as much at the November 5, 2014 hearing. Debtors wanted the LLCs, not Creditor, to receive the Property.

Third, the Trustee avers, denying conversion would not adversely affect Debtors. They would retain a 160-acre homestead under the Compromise. Debtors would be adversely affected, though, if the Compromise was not approved, the case was converted to Chapter 11, and their plan failed confirmation. The case would either be dismissed or converted back to a Chapter 7, the result being that the Property would be sold at public auction, leaving Debtors with nothing.

B.

The Bankruptcy Code provides that a debtor "may convert" a Chapter 7 case to a case under Chapter 11 "at any time." 11 U.S.C. § 706(a). This right is limited

by subsection (d), which provides that "a case may not be converted" from Chapter 7 to Chapter 11 "unless the debtor may be a debtor" under Chapter 11. *Id.* § 706(d). In other words, a debtor's right to convert is "expressly conditioned" on his ability to qualify as a debtor under the Chapter to which he seeks to convert. *Marrama*, 549 U.S. at 372, 127 S. Ct. at 1110.[50]

A court "*shall* convert" a case under Chapter 11 to Chapter 7 "or dismiss [it], whichever is in the best interests of creditors and the estate, *for cause*." 11 U.S.C. § 1112(b)(1) (emphasis added). A *non-exhaustive* list of "causes" includes, among other things, "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," a debtor's "gross mismanagement of the estate," or a debtor's "inability to effectuate substantial consummation of a confirmed plan." *Id.* § 1112(b)(4)(A), (M), (B).

To rule that one's Chapter 11 case "should be dismissed or converted to Chapter 7 . . . is tantamount to a ruling that the individual does not qualify as a debtor under" Chapter 11. *See Marrama*, 549 U.S. at 365, 373–74, 127 S. Ct. at

[50] In *Marrama*, the Supreme Court held that a court may deny a debtor's request to convert a case from Chapter 7 to Chapter 13 where "cause" exists under 11 U.S.C. § 1307(c) to dismiss the case or convert it back to Chapter 7. 549 U.S. at 373, 127 S. Ct. at 1110–11. Chapter 11 contains a provision nearly identical to § 1307(c), except that while Chapter 13 provides that a "court *may*" convert or dismiss a case "for cause," Chapter 11 mandates that "the court *shall*" convert or dismiss such a case. 11 U.S.C. §§ 1123(b)(1), 1307(c) (emphasis added). The Supreme Court's reasoning thus applies with even more force here. Moreover, the Court couched its ruling in language and logic consonantly suitable to conversions to Chapter 11. Therefore, *Marrama*'s holding applies equally to conversions from Chapter 7 to Chapter 11.

1110–11. Thus, § 706(d) "provides adequate authority" to deny a motion to convert to Chapter 11 when "cause" exists under § 1112(b)(4). *Id.* at 374, 127 S. Ct. at 1111. If, as Debtors argue, conversion to Chapter 11 must occur before § 1112(b)(1) comes into play, it means that the bankruptcy court must go through the formality of granting conversion and then, in the next breath, dismiss the case or convert it to a Chapter 7. This would place form over substance and defy common sense.[51]

The Trustee contends that the Bankruptcy Court properly denied Debtors' request to convert to Chapter 11 because "cause" existed to either dismiss the case or convert it back to a Chapter 7, based on "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

We agree. Moreover, as we review below what transpired in this case after the Trustee filed his "Motion and Notice of Compromise" on May 29, 2014, it becomes apparent that other § 1112(b)(4) causes for denying conversion to Chapter 11 were present as well: "failure to comply with an order of the court," "failure

[51] Moreover, in adopting Debtors' position, we would "fail[] to give full effect to the express limitation in" § 706(d). *See Marrama*, 549 U.S. at 372, 127 S. Ct. at 1110; *Corley v. United States*, 556 U.S. 303, 314, 129 S. Ct. 1558, 1566 (2009) (noting that it is "one of the most basic" canons of statutory interpretation that "a statute should be construed so that effect is given to all its provisions") (internal quotation marks and citations omitted); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

timely to provide information or attend meetings reasonably requested by the United States trustee," and "inability to effectuate substantial consummation of a confirmed plan." *Id.* § 1112(b)(4)(E),(H), (M). Also present was a cause not listed in the statute, the lack of good faith. "[A] debtor's lack of 'good faith' may constitute cause for dismissal of a petition." *In re Nat. Land Corp.*, 825 F.2d 296, 297 (11th Cir. 1987) (internal quotation marks omitted). In sum, a bankruptcy court does not abuse its discretion in denying conversion from Chapter 7 to Chapter 11 where "cause" exists that would require the Court to dismiss or reconvert the Chapter 11 case anyway. Multiple bases for "cause" exist here.

C.

The bare facts of what transpired make that pellucidly clear. The Trustee negotiated the first draft of the Compromise with Creditor after consulting several real estate brokers and concluding that due mainly to its location and the time it would take to sell it, the Property's value was not in the $6 to $12 million range discussed at the February 20 meeting of creditors. Moreover, if sold, a significant capital gains tax would be imposed.[52]

[52] Any tax "incurred by the estate" is categorized as an administrative expense under 11 U.S.C. § 503(b)(1)(B)(i), entitled to second priority under 11 U.S.C. § 507(a)(2). *See* Richard Levin & Henry J. Sommer, 4 *Collier on Bankrputcy* ¶ 503.07 (16th ed. 2018) ("[F]or a tax claim to be entitled to administrative expense priority, a court must determine that (1) the tax was 'incurred' by the estate; and (2) the tax claim is not a claim which must be treated as a prepetition priority claim under § 507(a)(8)."). Administrative expenses have priority over all

On June 11, the Court scheduled a hearing for July 24 on the Trustee's Motion and Notice of Compromise. On June 23, Mr. Lanigan appeared as Debtors' attorney and filed an objection to the proposed Compromise. By July 24, however, they were having second thoughts. As Mr. Lanigan expressed it at the hearing, if the boundaries of the 160-acre homestead tract were redrawn to include the well, there would be an "extremely high likelihood that the whole thing goes away." It is easy to understand why Debtors had a change of mind. The chances of the 2DCA vacating the foreclosure judgment were nonexistent, meaning that Creditor's lien was valid and covered all 2,500 acres of the Property. And there were no investors on the horizon ready to step in with a solution better than the one the Compromise provided. The Court told Mr. Lanigan that his clients "really ha[d] to look long and hard at this deal." It continued the hearing to August 28 to give Debtors space to take that hard look and the Trustee and Creditor time to redraw the boundaries of the 160-acre tract to accommodate the well.

The Trustee and Creditor solved the problem, placing the well within the 160-acre tract, and submitted a final version of the Compromise to the Bankruptcy Court on August 27. Meanwhile, Debtors had a change of heart. Two investors

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other expenses and claims except for domestic support obligations, which are not at issue here. *See* 11 U.S.C. § 507(a)(1)–(2).

had appeared, the LLCs, and expressed an interest in purchasing part of the Property. On August 14, in a document headed "Agreement to Purchase Real Estate," they submitted an offer to purchase 1,449 acres for $3,334,149. Debtors had until September 5 to accept it. They would do so, on September 1 (the "September 1 Agreement"). Debtors had convinced themselves that Creditor would be willing to take $3,334,149 in full satisfaction of its judgment. They must have been informed that for this to happen, their Chapter 7 case would have to be converted to one under Chapter 11. As for now, going along with the Compromise proposal was out of the question. Debtors would resist its approval at every turn.

Debtors informed Mr. Lanigan of their position on the eve of the August 28 hearing. But they apparently did not tell him about the offer the LLCs had made and that they were going to accept it on September 1. Instead, they told him something else: they had located an investor willing to provide them with the funds necessary to satisfy Creditor's judgment in full and pay the costs of the bankruptcy proceeding as well.

Mr. Lanigan acted on this information the moment the August 28 hearing began. He told the Court that "a significant investor . . . is entering into a contract today with Mr. Daughtrey"; he had "spoken directly with all the parties involved." They represented that the contract would provide all of the funds needed satisfy Creditor's judgment "in its entirety." The Court informed him that in addition to

paying Creditor in full, the funds would need to cover "significant administrative costs . . . which are the Trustee's quantum meruit compensation and the cost and fees of the Trustee's counsel." Mr. Lanigan said that he had gotten from the Trustee's counsel a "preliminary indication as to what those may be" and then "had a very lengthy discussion with [Debtors] and a very direct discussion as to the unequivocal need to pay those, . . . and they acknowledge that. And within the parameters of what's being done, the funds will be there to do that."

The U.S. Trustee's counsel objected to Mr. Lanigan's plan to convert the case under Chapter 11, arguing that the conversion would be yet another "stalling tactic and a delay mechanism." The Trustee echoed his sentiments. Debtors had been stalling from the start, he said. They "failed to appear for three" of the first four § 341 meetings of creditors and refused to file "amended schedules B, E and F" despite repeated requests for amendments.

The Court accepted Mr. Lanigan's representation that Debtors had located an investor who would provide the funds needed to dispose of the case. It therefore continued the hearing to September 25, directing Mr. Lanigan to "get on the phone" with the lawyers for the Trustee and Creditor "and see what can be worked out." Mr. Lanigan did not follow the Court's instruction. There was nothing to work out. The lawyers contacted him, indicating they were "ready to make this happen for you," but they "heard nothing" in response.

On September 22, Debtors discharged Mr. Lanigan and hired Mr. DeCailly. That same day, Mr. DeCailly moved the Court to convert Debtors' case to a Chapter 11. The motion asserted nothing more than this: Debtors have an "absolute right" to convert their case, and conversion can "bring more value to the estate and pay a dividend to unsecured creditors."

Debtors were financially incapable of prosecuting a plan to confirmation and eventual consummation. According to their Chapter 7 petition and asset schedules, they had no cash on hand, no checking or savings accounts, nothing evidencing liquidity. Their income amounted to only $2,200 per month, derived for the most part from the sale of sod. For a plan to succeed, the liens Mr. Gilberti had recorded to secure claims amounting to $10,250,000 would have to be removed.[53] To remove them, adversarial proceedings would be necessary. Who would finance all of that? For Debtors to go forward under Chapter 11, someone would have to step in and provide the wherewithal. That Debtors lacked an investor willing to provide funds sufficient to underwrite the expense of removing Mr. Gilberti's liens, satisfy Creditor's judgment, cover the Trustee's expenses and legal fees, and pay the

[53] At the November 5, 2014 hearing on Debtors' motion for reconsideration, Creditor's attorney informed the Court that over the previous eighteen to twenty-four months, Mr. Gilberti had recorded liens against the property to secure claims of $70 million. Debtors' Schedule D listed a Gilberti Water Company claim of $10,250,000. *See supra* note 13 and accompanying text.

capital gains tax that would be assessed became crystal clear at the September 25 hearing.

At the outset of the hearing, Mr. DeCailly informed the Court that he had just advised the Trustee that the Compromise was out of the question; his clients wanted their case converted to Chapter 11. They had a buyer "willing to pay up to $3 million" for some of the land. He qualified his remark by saying, "I don't quite yet know what we're selling." If he was referring to the September 1 Agreement, he knew exactly what Debtors were selling because an attachment to the Agreement described it with specificity.

Mr. DeCailly needed more time. He "ha[dn't] had a chance to contact opposing counsel yet regarding the 3 million." And he "would like to get the full picture of who's involved in this case."

> [T]he schedules need to be looked at and they need to be redone. The Court had concern about filing proofs of claim. Well, as we know, if you convert it to 11, we can get a new proof of claim period. All the periods start over again . . . we can go forward [and will] have an opportunity to propose this sale and get the lienholder together with the buyer.

Mr. DeCailly was implying that Debtors' plan of reorganization depended on whether Creditor and Debtors' buyer could work out a deal in which Creditor released its lien on all 2,500 acres of the Property, and settled its claim of $4,267,436 for something "up to $3 million."

The Trustee's lawyer told the Court that Debtors were not proceeding in good faith and that if converted to Chapter 11, the case would wind up back in Chapter 7 due to Debtors' inability to present a feasible plan of reorganization. Creditor's lawyer went a step further, arguing that Debtors were abusing the bankruptcy process.

The Court found no merit in Debtors' motion. Debtors had no plan, "no purchase contract," no "offer . . . on the table today." *Marrama* controlled. Mr. DeCailly's presentation firmly established that his clients were not eligible to be Chapter 11 debtors.

D.

The evidence of "cause" for rejecting Debtors' Motion to Convert is overwhelming. The motion was a sham, farcical on its face, and was filed for the sole purpose of thwarting Creditor's effort to obtain satisfaction of its judgment. Debtors had no plan and none on the horizon. Mr. DeCailly chose not to proffer the September 1 Agreement as a plan because it was patently unenforceable; it was illusory. The "earnest money" the LLCs deposited was "$ 0.00," and they were not obligated to complete the transaction unless they found "financing acceptable to purchaser." The LLCs could take it or leave it at their own whim. Assuming the Agreement's enforceability, Debtors could not deliver a marketable title.

In fact, Debtors' prospects for producing a plan that could be confirmed were nil. Cause for denying the Motion to Convert therefore existed under § 1112(b)(4)(M). Cause existed under (b)(4)(E) and (H) as well. Debtors, either personally or through counsel, failed to comply with Court orders and, despite repeated requests from the Trustee, refused to amend their schedules. Finally, Debtors filed their Motion to Convert in bad faith, which constitutes cause.[54]

The filing was just one more step in Debtors' continuing abuse of the bankruptcy process. Their strategy was to delay the process indefinitely. As Mr. DeCailly said at the September 25 hearing, he needed time "to contact opposing counsel . . . regarding that 3 million," time "to get a full picture of who's involved in this case," and time to look at the schedules because "they need to be redone." And with conversion to Chapter 11, "we get a new proof of claim period. All the periods start over again . . . then we'll know everybody involved and we will have an opportunity to propose this sale and get the lienholder together with the buyer."

Section 105(a) of the Code authorized the Court to prevent this kind of intentional abuse of the bankruptcy system by denying the motion.[55] *See*

[54] The Bankruptcy Court did not rely on bad faith as a cause for denying the motion. For that reason, the District Court did not consider it. We exercise our authority to affirm a district court decision on a ground the court did not rely on, *see Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017) (per curiam), and do so additionally on the ground of bad faith.

[55] 11 U.S.C. § 105(a) provides that:

Marrama, 549 U.S. at 375, 127 S. Ct. at 1112 (concluding that the authority granted to bankruptcy judges under § 105(a) to take any action necessary to prevent an abuse of process "is surely adequate to authorize an immediate denial of a motion to convert filed under § 706").

In addition to Debtors' bad faith, other § 1112(b)(4) causes required the denial of conversion to Chapter 11. Debtors failed to demonstrate a reasonable likelihood of success under Chapter 11. And they deliberately refused to amend their schedules as instructed repeatedly by the Court. They knew all along of the importance of amending their schedules. The unsecured creditors had not been identified. The case could not go forward without disclosing their identities.

IV.

Federal Rule of Bankruptcy Procedure 9023 provided the procedural basis for Debtors' motion for reconsideration. The rule states that Federal Rule of Civil Procedure 59 "applies in cases under the Code. A motion . . . to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

14 days after entry of judgment."[56] On October 17, 2014, Debtors moved the Bankruptcy Court for reconsideration of its order of October 3 denying their Motion to Convert. Although the motion did not cite Rule 9023 or Rule 59, it is apparent that it was brought under Rule 59(e), "Motion to Alter or Amend a Judgment."

> Only three grounds are available to support the motion: (1) manifest error of fact; (2) manifest error of law; or (3) newly discovered evidence. A motion for reconsideration is not a vehicle to re-argue issues resolved by the court's decision or to make additional argument on matters not previously raised by counsel.

In re Inv'rs Fla. Aggressive Growth Fund, Ltd., 168 B.R. 760, 768 (Bankr. N.D. Fla. 1994) (citations omitted).

Debtors' motion was based on two documents that were being disclosed to the Court for the first time, the September 1 Agreement and the October 14 Agreement, both made with the LLCs whose identity was being made known to the Court, the Trustee, the U.S. Trustee, and Creditor also for the first time. Rule 59(e) motions are "aimed at reconsideration, not initial consideration." *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (internal quotation marks omitted). The September 1 Agreement was not "newly discovered evidence." Mr. DeCailly had it in his possession prior to the September 25 hearing, but chose not

[56] Rule 59 does not apply where a party in interest moves "for reconsideration of an order allowing or disallowing a claim against the estate." *See* Fed. R. Bankr. P. 3008.

to disclose it. The September 1 Agreement was worthless. What Debtors wanted the Court to consider was the October 14 Agreement. The Court could have denied the motion for reconsideration on the ground that it was not a motion for reconsideration at all. It was a new motion to convert the case to Chapter 11.[57] But instead of denying the motion, the Court set it for a hearing on November 5.

The proposed plan was the October 14 Agreement. The LLCs would purchase all but 160 acres of the Property for $4,621,000. Mr. DeCailly told the Court that the deal could be closed "within 15 days."[58] He said that even though he had not complied with the Court's order that he obtain Debtors' amendments to their schedules.[59] Nor had he determined Debtors' tax basis in the Property. The

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[57] The filing of the motion constituted an abuse of the bankruptcy process and for that reason could have been stricken pursuant to 11 U.S.C. § 105(a).

[58] Under no circumstances could the sale of the Property be closed within fifteen days. The October 14 Agreement's closing provision is contained in the "Addendum to Vacant Land Contract." The provision states the following:

> The Closing Date shall be fifteen (15) business days after the entry of the Sale Order, in such a manner as to allow Seller to deliver to Buyer at Closing good, marketable title to the Property as warranted in this Contract, unencumbered by any claims, including but not limited to those of 72 Partners, LLC, and any claims arising out of the transaction pursuant to which Joseph D. Gilberti, Jr. ("Gilberti") received and recorded a deed to the portion of the Property in Parcel numbers 1009-00-1000 and 1011-00-1010, and any other claims of Gilberti or Gilberti Water Company, or any other party or entity related or associated with any of the parties mentioned above or any other claimants.

The transaction could not close without the cancelation of the deed to Gilberti and the removal of liens he recorded to secure upwards of $70 million of claims. Otherwise, Debtors could not deliver good, marketable title to the Property.

[59] He admitted that twenty-seven unsecured creditors needed to be listed.

Trustee's attorney pointed out that $4,621,000 would not cover Creditor's secured claim, the expenses associated with administering the estate, and the capital gains tax that would be imposed. In addition to this, Debtors would have to finance the litigation Mr. DeCailly acknowledged would be necessary to remove Mr. Gilberti's now $70 million worth of liens on the Property. Debtors lacked the ability to finance that litigation or underwrite the expenditures that would be incurred in bringing their proposed plan to fruition. Implicit in Mr. DeCailly's response to this, therefore, was that a third party, the LLCs or their financier, would provide the necessary funds.

The Court's response was that if conversion was granted, the plan Mr. DeCailly outlined would fail, Debtors would be back in Chapter 7, the Property would be foreclosed upon, and Debtors would be left with nothing: "They wouldn't have . . . their homestead [or] their well." The Court therefore denied Debtors' motion for reconsideration.

Assuming the Court was treating the motion for reconsideration as a new effort to convert the case to a Chapter 11, there were ample reasons to deny it. All of the causes that warranted the denial of the Motion to Convert were present. Thus, the District Court properly affirmed the Bankruptcy Court's orders of October 3 and November 18.

V.

Debtors begin their challenge to the Bankruptcy Court's Compromise ruling with a question. "The Trustee disposed of $10,000,000.00 worth of prime Florida farm land for $300,000.00 to pay a $2,100.00 unsecured claim, and thousands in administrative expenses, just to give back to the party who paid the $300,000.00 more than 75% of the original money paid. Why?" Debtors' answer:

> It is simple, had the Court just lifted the stay and allowed the secured creditor to proceed with the foreclosure sale, the secured creditors spoils would have been strictly limited to the amount of its judgment, however, by buying $10,000,000.00 worth of property for $300,000.00 the creditor's spoils far exceeds what they were actually entitled to under their judgment. It was a brilliant scheme between the Trustee and the Creditor. That is how the Creditor received its windfall, the Trustee also unjustly financially benefited due to the fact that he created a $300,000.00 estate to pay one unsecured creditor with a $2,100.00 claim. Now, the trustee fees are based upon the disbursements to creditors, not on gross assets collected. Therefore, the Trustee traded $10,000,000.00 worth of real estate for $300,000.00 but only had one $2,100.00 unsecured creditor to pay, so he and the creditor cooked up the kickback by including in the compromise a $240,000.00 unsecured claim kick back to the Creditor who paid the $300,000.00. Now the Trustee can pay his administrative fees, attorney fee, take his bloated trustee fee and give back a large portion of the $300,000 back to the Creditor.

What Debtors seem to be saying is this: in approving the Compromise, the Court allowed Creditor to acquire the property (2,500 acres less 160 set aside for the homestead) for $240,000, i.e., $300,000 less $60,000 for payments to unsecured creditors. Creditor presumably acquired the Property under the Trustee's quitclaim

deed.[60] Instead of approving the Compromise, Debtors continue, the Court should have rejected it and allowed the foreclosure sale to go forward. This, in Debtors' mind, would have "strictly limited" Creditor's "spoils" to "the amount of its judgment." At the sale, a third party, like the LLCs, would have submitted a bid in an amount in excess of Creditor's judgment, thus satisfying the judgment in full.[61] The Clerk, in turn, would have given the successful bidder a deed to the Property, all 2,500 acres, rather than carving out 160 acres for the homestead. As the Bankruptcy Court stated at the November 5 hearing, if it did not approve the Compromise, Debtors would be faced with "[t]he foreclosure of the property, so they would have had nothing. They wouldn't have had their homestead. They wouldn't have had their well." The District Court agreed.

The Court did lift the stay, but it did so as provided in the Compromise. Creditor could not obtain clear title to the 2,340 acres described in the Trustee's

[60] The Trustee's quitclaim deed would convey to Creditor the estate's interest in the 2,340 acres, but the land would be subject to The Gilberti Water Company liens, which at latest count secured claims of $70 million, *see supra* notes 13 and 24. In exchange, Creditor would pay the Trustee $300,000 for distribution to general unsecured creditors, including Creditor.

[61] As Mr. DeCailly informed the Court at the November 5, 2014 hearing, Debtors wanted the Property (less 160 acres) to go to the LLCs, who were willing to pay $4,621,000 for it—that if the Property "cannot stay . . . in their family, then they want to see it stay with the neighbor who's been there generation after generation."

quitclaim deed unless the foreclosure sale went forward.[62] At the sale, Creditor would presumably bid the amount of its judgment, and if a third party such as the LLCs appeared to bid a sum in excess of that amount, Creditor would wind up with the 2,340 acres conveyed via a deed from the Clerk. At the end of the day, Creditor or a third party would acquire the 2,340 acres, and Debtors would have their homestead. As a matter of conscience if nothing else, the Bankruptcy Court, in the exercise of its discretion, had to approve the Compromise. And the District Court had to approve its decision.

VI.

For all the reasons above, the judgment of the District Court is

AFFIRMED.

[62] As the Compromise provided, Creditor's judgment lien would be lifted with respect to the 160 acres set aside for Debtors' homestead. Thus, the public foreclosure sale would involve only 2,340 acres of the property.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11908

D.C. Docket No. 9:16-cv-80802-RLR

NE 32ND STREET, LLC,
c/o Mr. William Swain as agent for the Frank Sawyer Revocable Trust
5455 Via Delray
Delray Beach, FL 33484
as agent for the Frank Sawyer Revocable Trust,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

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

(July 23, 2018)

Before WILLIAM PRYOR and MARTIN, Circuit Judges, and HALL,[*] District Judge.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether a conservation restriction imposed in 2013 on a property owned by the Frank Sawyer Revocable Trust restarted the 12-year statute of limitations of the Quiet Title Act, 28 U.S.C. § 2409a, so that NE 32nd Street, LLC, as agent for the trust, can sue to extinguish a spoilage easement granted to the federal government in 1938. The trust owns a piece of land on the Intracoastal Waterway in Florida. In 1938, its predecessor in interest granted a spoilage easement that allows the government to deposit dredged material on the property. And in 2013, the government granted the trust a building permit that imposes strict conservation requirements on the land. Three years later, NE 32nd filed an action against the government to extinguish the 1938 spoilage easement. It argued that the 2013 permit restarted the statute of limitations, but the district court disagreed and dismissed the complaint. Because the statute of limitations bars a challenge to the eighty-year-old easement and the 2013 permit did not change the terms of that easement to the detriment of the trust, we affirm.

[*] Honorable James Randal Hall, United States District Judge for the Southern District of Georgia, sitting by designation.

I. BACKGROUND

The Frank Sawyer Revocable Trust owns a piece of property on the Intracoastal Waterway in Florida. In 1938, its predecessor in interest granted the United States "the perpetual right and easement to deposit upon the [property] material that may at any time be dredged in the construction and maintenance of the . . . Waterway." Three quarters of a century later, the government issued the trust a permit to fill and build on part of the property. The 2013 permit also imposed strict conservation restrictions on much of the property. For example, the permit requires the trust to "maintain the [relevant] areas . . . in their natural state in perpetuity," forbids the "[d]umping or placing [of] soil or other substance or material as landfill or [the] dumping or placing of trash, waste[,] or unsightly or offensive material," prohibits many kinds of "[s]urface use," and demands that "only clean fill material" be used on the property.

Three years later, NE 32nd Street, LLC, as agent for the trust, sued the government under the Quiet Title Act, 28 U.S.C. § 2409a, and "request[ed] entry of a judgment . . . cancelling the [1938 easement] and releasing [the property] from all burdens and obligations created thereunder." NE 32nd underscored that when the government issued the 2013 permit with its strict conservation requirements, the government "committed an act wholly inconsistent with its future use and enjoyment of the [1938 spoilage easement]." NE 32nd argued that this tension

between the 1938 easement and 2013 permit required the district court to extinguish the easement.

The government moved to dismiss for lack of jurisdiction based on a provision of the Act that states that an action against the government "shall be barred unless it is commenced within twelve years of the date upon which it accrued." *Id.* § 2409a(g). It argued that this limitations period is jurisdictional. The government maintained that the challenged easement was granted in 1938 and that the "predecessor in interest [of the trust] knew or should have known of the claim of the United States [to the easement] since [this date]."

The district court initially denied the motion, but it later granted a motion for reconsideration and dismissed the complaint. It explained that the "adverse interests were present in this case in 1938" and that the issuance of the 2013 permit "did not abolish [the] preexisting notice [that the trust had] of the United States'[s] asserted interest."

II. STANDARD OF REVIEW

We review *de novo* both "a district court's application of a statute of limitations," *F.E.B. Corp. v. United States*, 818 F.3d 681, 685 (11th Cir. 2016) (citation and internal quotation marks omitted), and its "grant of [a] motion[] to dismiss for lack of subject matter jurisdiction," *Broward Gardens Tenants Ass'n v. U.S. Envtl. Prot. Agency*, 311 F.3d 1066, 1072 (11th Cir. 2002).

III. DISCUSSION

The Act provides that an action to quiet title brought by a private party against the United States "shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g). This limited "waiver of sovereign immunity . . . is jurisdictional," *F.E.B.*, 818 F.3d at 685, and we "must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended," *id.* at 686 (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983)) (internal quotation marks omitted). Indeed, the Supreme Court has underscored that the Act represents a "careful and thorough remedial scheme" that litigants cannot "circumvent[] by artful pleading." *Block*, 461 U.S. at 285 (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976)).

The running of the statute of limitations starts "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). We define this "claim" in terms of a property interest of the United States that is actually "adverse[]" to the interest asserted by the plaintiff. *Werner v. United States*, 9 F.3d 1514, 1519 (11th Cir. 1993). It is not enough that the government asserts "some interest—any interest—in the property." *Id.* Indeed, if the interests asserted by the parties are capable of peaceful coexistence—such as if the plaintiff asserts that he owns a fee simple subject to an

easement while the government claims the complementary easement—then the clock will not run. In contrast, adversity arises if the government asserts a *new* interest that is fundamentally incompatible with the interest asserted by the plaintiff or "seeks to expand [a preexisting] claim." *Id.*

For example, in *Werner* we explained that the Act did not bar former users of a road over government property from "seeking a declaration that they had acquired an easement of necessity" after the government installed a gate blocking the road within 12 years of the suit. *Id.* at 1515; *see also id.* at 1516. Although the government had held "some interest" in the underlying property for a much longer period of time because it had owned the land since 1821, *id.* at 1519; *see also id.* at 1515, we explained that the "government's claim" for the purpose of the litigation was its decision to "*expand* [its preexisting] claim" when it built the gate and excluded the plaintiffs, *id.* at 1519 (emphasis added); *see also Kane Cty. v. United States*, 772 F.3d 1205, 1216 (10th Cir. 2014) ("As a public right-of-way can generally peaceably coexist with an underlying ownership interest, the United States must provide a county or state with sufficient notice of the United States'[s] claim of a right to exclude the public." (citations and internal quotation marks omitted)); *Michel v. United States*, 65 F.3d 130, 132 (9th Cir. 1995) (explaining that the plaintiffs' "claim of access to roads and trails across [government property] did not accrue until [they] knew or should have known the government

claimed the exclusive right to deny their historic access to the trails and roads"). In short, a claim arises when the government puts its interest in conflict with that of the plaintiff.

NE 32nd contends that the statute of limitations does not foreclose its suit to extinguish the 1938 spoilage easement. Although NE 32nd does not dispute that the trust and its predecessor in interest have "known of" the easement since 1938, 28 U.S.C. § 2409a(g), it argues that the "spoil[age] easement did not become adverse . . . until the conflicting . . . [p]ermit was issued in 2013 and the conservation easement was recorded by the [government] in direct conflict therewith." It asserts that the fee simple interest held by the trust peacefully coexisted with the spoilage easement until 2013, and it concludes that the issuance of the conservation permit restarted the statute of limitations.

We disagree. The property right of the government that NE 32nd wants to challenge—the 1938 spoilage easement—is the same property right that the predecessor in interest of the trust granted the government. And 1938 was a lot more than 12 years ago. The 2013 permit did nothing to "expand" the 1938 easement in a manner adverse to the trust. *Werner*, 9 F.3d at 1519.

NE 32nd responds that adversity arose only in 2013 when the government issued a conservation permit that is in tension with the 1938 easement, but this argument overlooks that any limitations that the permit imposes on the future use

of the spoilage easement by the government have no negative impact on the interest held by the trust. To be sure, the government conceded for the purpose of the motion to dismiss that the extensive 2013 conservation restrictions are inconsistent with the 1938 easement. But any tension between two interests that both benefit the government hardly creates new adversity between the interests of the government and the trust. *See F.E.B.*, 818 F.3d at 692 ("[T]he statute of limitations is . . . triggered by . . . only a claimed interest that is inconsistent with . . . *the plaintiff's* asserted interest." (emphasis added)); *Werner*, 9 F.3d at 1519 (explaining that the "inquiry" was whether the government "expand[ed] [its] claim" to the detriment of the plaintiff). If anything, the events of 2013 *benefitted* the trust by suggesting that the government is now more reluctant to dump spoilage on the property. And NE 32nd acknowledges as much when it asserts that "the government itself, by [the 2013 permit], . . . restricted *its own access* and created the conflict with its own spoil[age] easement." In short, the fee simple held by the trust is no more encumbered by the spoilage easement than it was in 1938.

NE 32nd invokes the legal principle that "easement interests and fee simple ownership interests can peacefully coexist with one another without adversity," and it contends that its fee simple interest was somehow not inherently adverse to the spoilage easement in 1938 but instead became adverse to the easement in 2013. But whether certain kinds of easements can coexist with certain kinds of fee

simples is irrelevant to this appeal. More specifically, although a fee simple and an easement can coexist when the landowner defines his interest as a fee simple *encumbered* by an easement, *see Kane Cty.*, 772 F.3d at 1216; *Michel*, 65 F.3d at 132, NE 32nd has asserted a fee simple *unencumbered* by the 1938 easement. This kind of unencumbered fee simple necessarily has been adverse to the spoilage easement since the moment that the easement was created in 1938, and the 2013 permit did nothing to exacerbate this conflict.

To be sure, the recent decision by NE 32nd to redefine the property interest as an unencumbered fee simple has created a dispute about the 2013 easement, but this conflict provoked by NE 32nd cannot restart the clock because only an "expan[sion]" *by the government* can create the necessary adversity. *Werner*, 9 F.3d at 1519. The plain text of the Act dictates this conclusion when it provides that the statute of limitations begins to run when the landowner has notice of "the claim *of the United States*." 28 U.S.C. § 2409a(g) (emphasis added). When the private party decides to challenge the claim of the United States has nothing to do with when adversity arises. A plaintiff cannot restart the clock whenever he decides to reinvent his interest. Indeed, the ability to manufacture adversity through "artful pleading" would nullify the statute of limitations. *Block*, 461 U.S. at 285 (quoting *Brown*, 425 U.S. at 833).

Finally, NE 32nd suggests that the district court lacked sufficient reason to revisit its initial ruling and grant the motion for reconsideration, but this argument is meritless. The statute of limitations is jurisdictional, *see F.E.B.*, 818 F.3d at 685, and a jurisdictional question demands review at any point in litigation, *see* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Indeed, we have underscored that "because a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction," it should "raise the question of subject matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises." *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001). The district court wisely reconsidered its ruling.

IV. CONCLUSION

We **AFFIRM** the dismissal of the complaint.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-3365

DAN SOWELL, as Property Appraiser of Bay County, Florida,

Petitioner,

v.

FAITH CHRISTIAN FAMILY CHURCH OF PANAMA CITY BEACH, INC.,

Respondent.

Petition for Writ of Prohibition—Original Jurisdiction.

July 25, 2018

PER CURIAM.

This is a petition for writ of prohibition seeking review of the circuit court's denial of Petitioner's motion to dismiss an amended complaint challenging the denial of an ad valorem tax exemption for three pieces of property owned by the Respondent, a church, for the 2015 and 2016 tax years. For the reasons explained below, we grant the petition and order that the challenge to the 2015 and 2016 tax years be dismissed.

The Respondent, Faith Christian Family Church of Panama City Beach, Inc. ("Faith Christian"), filed suit on November 30, 2015, challenging the property appraiser's denial of an ad valorem tax exemption for the 2015 tax year and raising a civil rights claim pursuant to 42 U.S.C. § 1983 ("Section 1983"). The Section 1983 claim was later dismissed. Faith Christian filed an amended complaint on April 17, 2017,* challenging ad valorem denials for 2015, 2016, and 2017, and adding a claim for slander and a restated Section 1983 claim. The property appraiser filed a motion to dismiss, and the circuit court granted the motion as to counts two and three of the amended complaint (the slander and Section 1983 claims), but denied the motion as to count one (the claim for declarative and injunctive relief as to the denial of the ad valorem exemption for 2015 and 2016).

The property appraiser argues the trial court lacks subject matter jurisdiction to consider the challenge to the 2015 and 2016 years pursuant to section 194.171, Florida Statutes, because Faith Christian failed to pay the taxes due and owing for the 2016 tax year prior to delinquency. Section 194.171 provides in relevant part:

> (5) No action to contest a tax assessment may be maintained, and any such action shall be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent.

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* Faith Christian's amended complaint was filed in the circuit court on January 13, 2017. At a hearing on April 17, 2017, Faith Christian made an *ore tenus* motion for leave to file an amended complaint. The court granted the motion at that hearing. An amended complaint is "deemed filed as of the date the motion for leave to amend was filed." *Russ v. Williams*, 159 So. 3d 408, 409 n.1 (Fla. 1st DCA 2015) (*citing Rayner v. Aircraft Spruce–Advantage, Inc.*, 38 So. 3d 817, 819 (Fla. 5th DCA 2010)). Thus, we deem the amended complaint to have been filed on April 17, 2017.

> (6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

§§ 194.171(5), (6), Fla. Stat. (2016). Prohibition is an appropriate vehicle for review of the denial of a motion to dismiss which raises a claim that a trial court lost subject matter jurisdiction over a tax challenge pursuant to subsections 194.171(5) and (6). *See Nikolits v. Hanna*, 92 So. 3d 299 (Fla. 4th DCA 2012); *Higgs v. Armada Key West Ltd. Partnership*, 903 So. 2d 303 (Fla. 3d DCA 2005); *Markham v. Hinckley*, 544 So. 2d 1139 (Fla. 4th DCA 1989).

As of May 11, 2017, Faith Christian had not paid the taxes due and owing on the subject property, and the taxes on those parcels became delinquent by operation of law on April 1, 2017, pursuant to section 197.333, Florida Statutes (2016). Taxes become "delinquent on April 1 following the year in which they are assessed or immediately after 60 days have expired from the mailing of the original tax notice, whichever is later." § 197.333, Fla. Stat. (2016); *see also* Fla. Admin. Code R. 12D-13.004(1) (2016).

When Faith Christian's 2016 taxes became delinquent by operation of law, the trial court lost subject matter jurisdiction over Faith Christian's challenge to not only the 2016 tax year, but also the 2015 tax year. "[I]f a challenge to the assessment is attempted, that challenge will not relieve the challenger of the obligation to pay successive years' taxes." *Bystrom v. Diaz*, 514 So. 2d 1072, 1074 (Fla. 1987) (*quoting Marshall v. Perkins*, 494 So. 2d 506, 507 (Fla. 2d DCA 1986)); *see also Washington Square Corp. v. Wright*, 687 So. 2d 1374 (Fla. 1st DCA 1997); *Wilkinson v. Clarke*, 91 So. 3d 897 (Fla. 2d DCA 2012); *Nikolits*, 92 So. 3d at 299; *Higgs*, 903 So. 2d at 305. As the Florida Supreme Court has observed:

> Although subsections 194.171(5) and (6) appear to be somewhat harsh, their meaning is clear. Subsection 194.171(5) plainly states that a taxpayer may not

> maintain a suit contesting a tax assessment, an action "shall be dismissed, unless all taxes on a property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent." Subsection (6) expressly declares that these requirements are jurisdictional and that "[a] court shall lose jurisdiction of the case when the taxpayer has failed to comply with the requirements of subsection (5)." The statute does not allow a court to retain jurisdiction once taxes become delinquent.

Bystrom, 514 So. 2d at 1074-75.

Section 194.171(2), Florida Statutes, requires a taxpayer to contest a tax assessment within "60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the value adjustment board if a petition contesting the assessment had not received final action by the value adjustment board prior to extension of the roll under s. 197.323." Faith Christian did not file a petition for the 2016 tax year with the Value Adjustment Board, and the 2016 tax year roll was certified on October 5, 2016. Accordingly, the statutory deadline for a challenge to the 2016 tax year assessment was December 4, 2016. Faith Christian did not file its amended complaint until April 17, 2017, 194 days after the 2016 tax roll was certified for collection.

Faith Christian argues that its April 2017 amended complaint was timely because it related back to the 2015 original complaint. We do not find this argument to be persuasive; "[e]ven if treated as relating back, the amended pleading did not and could not assert the crucial fact that the [2016] taxes were paid *before* they became delinquent as required by section 194.171(5)." *Bystrom*, 514 So. 2d at 1074 (emphasis in original). Although it is possible for an amended complaint to relate back to the original complaint for purposes of the sixty-day jurisdictional time frame set forth in section 194.171(2), this is generally limited to situations in which the taxpayer makes a payment *before* the taxes become delinquent and files an amended

complaint so reflecting. *See, e.g., Cowart v. Perkins*, 445 So. 2d 654 (Fla. 2d DCA 1984).

Here, Faith Christian did not pay the 2016 taxes before they became delinquent, and it did not timely challenge the 2016 tax assessment. The lack of payment or a timely challenge prior to delinquency resulted in the lower tribunal's loss of subject matter jurisdiction. "[I]t is well established that a challenge concerning entitlement to a tax exemption is a challenge to an assessment of taxes, for purposes of section 194.171." *Nikolits*, 92 So. 3d at 301. "A timely challenge is therefore necessary to satisfy the jurisdictional requirement of that section." *Nikolits v. Ballinger*, 736 So. 2d 1253, 1255 (Fla. 4th DCA 1999).

The petition for writ of prohibition is granted. In accordance with section 194.171, Florida Statutes, the lower tribunal is directed to dismiss the Respondent's challenge to the 2015 and 2016 tax years.

PETITION GRANTED.

LEWIS, BILBREY, and M.K. THOMAS, JJ., concur.

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

Loren E. Levy of The Levy Law Firm, Tallahassee, for Petitioner.

William E. Corley, III, Panama City Beach, for Respondent.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SUPER PRODUCTS, LLC, a Delaware Company,

Petitioner,

v.

INTRACOASTAL ENVIRONMENTAL, LLC, a Florida limited liability company,

Respondent.

Case No. 2D17-3769

Opinion filed July 25, 2018.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Chet A. Tharpe, Judge.

Arthur S. Weitzner of Arthur S. Weitzner, P.A., Sarasota, for Petitioner.

Adam Hersh of Hunter Business Law Tampa, for Respondent.

NORTHCUTT, Judge.

Super Products, LLC, a Delaware company, seeks certiorari review of an order indefinitely staying proceedings in its pending breach of contract action against Intracoastal Environmental, LLC. We grant the petition and quash the order.

Super Products filed a complaint seeking damages for Intracoastal's alleged failure to pay under an equipment rental agreement. Pursuant to Intracoastal's

motion, the circuit court dismissed the complaint without prejudice because Super Products had failed to comply with section 605.0904(1), Florida Statutes (2014-17). That statute provides that a foreign limited liability company doing business in Florida "may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state." Super Prods., LLC v. Intracoastal Envtl., LLC, 210 So. 3d 240, 241 (Fla. 2d DCA 2017) (quoting § 605.0904, Fla. Stat. (2014)). Section 605.0904(3) states:

> A court may stay a proceeding commenced by a foreign limited liability company or its successor or assignee until it determines whether the foreign limited liability company or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign limited liability company or its successor obtains the certificate.

Because a certificate of authority is a condition only to maintaining a lawsuit, not to filing one, and because the remedy of dismissal is not provided for in the statute, this court reversed the dismissal and instructed the circuit court to reconsider whether a stay was appropriate. 210 So. 3d at 242.

Following our mandate, Super Products obtained a certificate of authority and filed a copy of it with the circuit court. Thereafter, on Intracoastal's motion, the court entered an order finding that Super Products had fraudulently obtained the certificate because of an alleged misstatement on its application regarding the date upon which it began doing business in Florida. The court declared that the certificate was invalid. Further, "[s]ince Super Products has failed to obtain the proper Certificate of Authority[,] the proceedings before this Court are stayed pursuant to Fla. Stat. § 605.0904(3) until

Super Products, obtains an appropriate certificate of authority." Super Products filed this timely petition for a writ of certiorari.

Certiorari is available to review a nonfinal order that causes a material injury that cannot be corrected on appeal. This is otherwise described as irreparable harm. Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 351 (Fla. 2012). Orders staying proceedings are reviewable by certiorari. See Paley v. Cocoa Masonry, Inc., 354 So. 2d 945, 946 (Fla. 2d DCA 1978); Stein v. Bayfront Med. Ctr., Inc., 287 So. 2d 401, 401 (Fla. 2d DCA 1973); State v. Antonucci, 590 So. 2d 998, 999-1000 (Fla. 5th DCA 1991). In the present case, the stay is indefinite; without certiorari review, Super Products would be stuck in limbo with no way to pursue its lawsuit or to challenge the circuit court's ruling. The stay causes irreparable harm for that reason.

A petitioner for certiorari must also demonstrate that the circuit court's ruling departs from the essential requirements of law. Citizens Prop. Ins., 104 So. 3d at 351. This requires a determination that the lower court's order departed from "clearly established law," which may derive from a variety of legal sources, including statutes. Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003). That is what happened here.

The process for obtaining a certificate of authority from the Department of State is described in section 605.0902, Florida Statutes (2014-17). The effect of the certificate is set forth in section 605.0903, Florida Statutes (2015-17), as follows:

> (1) Unless the department determines that an application for a certificate of authority of a foreign limited liability company to transact business in this state does not comply with the filing requirements of this chapter, the department shall, upon payment of all filing fees, authorize the foreign

> limited liability company to transact business in this state and file the application for a certificate of authority.
>
> (2) The filing by the department of an application for a certificate of authority authorizes the foreign limited liability company that files the application to transact business in this state, subject, however, to the right of the department to suspend or revoke the certificate of authority as provided in this chapter.

(Emphasis added.) Thus, issuing a certificate of authority to do business in Florida is a purely executive function. Only the Department is empowered to determine whether an application for a certificate complies with the requirements, and only the Department may suspend or revoke a certificate. Super Products having obtained and filed a certificate of authority issued by the Department, the circuit court was not authorized to declare the certificate invalid and stay the proceedings on that account.

The order under review exceeded the court's authority. As such, it departed from the essential requirements of law, resulting in a material injury that is not remediable on direct appeal. Accordingly, we grant the petition and quash the order.

Petition granted; order quashed.

MORRIS and LUCAS, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ANTHONY HAWKS, Appellant, v. JEANNE ELLEN LIBIT, Appellee.	)	Case No. 2D17-4526

Opinion filed July 25, 2018.

Appeal from the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Anthony Hawks, pro se.

John J. Waskom of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellee.

KHOUZAM, Judge.

Attorney Anthony Hawks, pro se, timely appeals the circuit court's final judgment awarding costs to his former client, Jeanne Ellen Libit. Relying on this court's en banc opinion in Wolfe v. Culpepper Constructors, Inc., 104 So. 3d 1132 (Fla. 2d DCA 2012), Hawks argues that the trial court erred by awarding costs to Libit as the "prevailing party" and failing to award costs to Hawks as the "party recovering

judgment." We agree. Accordingly, we reverse and remand for costs to be awarded in Hawks' favor.

I. Facts

Hawks represented Libit in a family trust dispute. When he was discharged before the suit was resolved, he filed a notice and claim of attorney's charging lien pending final resolution of the underlying action. Hawks claimed that Libit owed him $159,431.20 for legal services and costs pursuant to a written engagement letter.

A settlement agreement was reached in the underlying action. Before the agreement was approved by the court, Libit filed a petition to set aside $225,200 in a restricted depository "to ensure that attorney Hawks [would] not be prejudiced by Court approval of the settlement agreement." The court granted Libit's petition and approved the depository.

After the settlement was approved and the suit was dismissed with prejudice, Hawks filed a petition for attorney's fees and motion to enforce charging lien, seeking payment of $159,431.20. The court granted Hawks' petition and motion but found that Hawks was entitled to fees in the amount of $37,053.42. This court has affirmed the award. See Hawks v. Libit, No. 2D17-2230 (Fla. 2d DCA Feb. 9, 2018) (table decision).

Hawks filed a motion for $3254.99 in costs pursuant to section 57.041(1), Florida Statutes (2016). Libit opposed the motion and filed her own motion seeking costs as the prevailing party under the same statutory section. The court denied Hawks' motion and granted Libit's, finding that Libit was the prevailing party in Hawks'

fee claim because he was awarded significantly less than the amount he sought. The court relied on the interpretation and application of section 57.041(1) found in Wyatt v. Milner Document Products, Inc., 932 So. 2d 487, 490 (Fla. 4th DCA 2006), abrogated on other grounds in Westgate Miami Beach, LTD. v. Newport Operating Corp., 55 So. 3d 567 (Fla. 2010). Moreover, the court concluded that it had discretion to award costs to Libit because Hawks' fee claim was equitable in nature. Ultimately, the court ordered Hawks to pay Libit $7418.80 in costs. Hawks moved to alter or amend the final judgment, arguing that the court erred in failing to follow Wolfe. After the court denied his motion to amend, Hawks appealed.

I. Analysis

Hawks and Libit both sought costs pursuant to section 57.041(1), which provides that "[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment." In the 2012 Wolfe opinion, this court, sitting en banc, held that the plain language of this section requires that the "party recovering judgment"—as opposed to the "prevailing party" (though oftentimes a party will be both)—is entitled to an award of costs. Id. at 1137. This court relied on the Florida Supreme Court's decision in Hendry Tractor Co. v. Fernandez, 432 So. 2d 1315 (Fla. 1983):

> In Hendry Tractor, the supreme court reviewed the operation of section 57.041(1), Florida Statutes (1979), which then, as now, provided that the party "recovering judgment" recover all legal costs and charges. The court found the statute's language to be clear. "The statute expressly demands that the *party recovering judgment* be awarded costs. This unambiguous language need not be construed. Rather, it should be applied as is to the given situation." Hendry Tractor, 432 So. 2d at 1316. In guiding the lower courts in the application of the statute, the court

> stated "that a plaintiff in a multicount personal injury action who recovers money judgment on at least one but not all counts in the cause of action, is the 'party recovering judgment' for purposes of section 57.041(1), Florida Statutes (1979), and therefore is entitled to recover costs." Id.

Wolfe, 104 So. 3d at 1136 (footnote omitted). This court also explicitly aligned itself with the First District's holding in Bessey v. Difilippo, 951 So. 2d 992 (Fla. 1st DCA 2007), in which the First District held:

> Section 57.041(1), Florida Statutes (2005), does not authorize reduction or apportionment of costs on grounds that the plaintiff recovered—on the only count sued on—less than all of the damages the complaint prayed for. The statute does not leave the award to the trial court's discretion, but entitles the party in whose favor judgment is entered to an award of all taxable costs, as a matter of law. See Tacher v. Mathews, 845 So. 2d 332, 334 (Fla. 3d DCA 2003) ("The award of these costs is not discretionary.").

Id. at 993.

In Wolfe, this court also receded from its prior holding in Spring Lake Improvement District v. Tyrrell, 868 So. 2d 656 (Fla. 2d DCA 2004), which had applied the "prevailing party" standard set forth in Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807, 810 (Fla. 1992), to costs awards under section 57.041. We explained:

> In 2004, this court construed and applied section 57.041(1) in Spring Lake, 868 So. 2d 656, which the Wolfes rely upon to argue that the trial court did not err in denying Culpepper its fees and costs. We held in Spring Lake that the statutory language—"[t]he party recovering judgment shall recover all his or her legal costs"—meant that to recover costs, the party must meet the standard of a "prevailing party" as set forth in Moritz[, 604 So. 2d at 810]. Spring Lake, 868 So. 2d at 658. On closer inspection, we conclude that the opinion in Spring Lake erred in applying Moritz to the situation there. Instead, we rely upon the plain language of the statute and the decision in Hendry Tractor . . . to guide our conclusion that Culpepper is entitled

to an award of its costs in this litigation.

. . . .

> The supreme court's later opinion in Moritz is distinguishable from the instant case, and from Hendry Tractor, on its facts. In Moritz, cited as controlling in Spring Lake, the issue presented was the entitlement to attorney's fees as a prevailing party—not costs. In Moritz, the court was reviewing a Fourth District holding that the defendant/home builder was entitled to attorney's fees as the prevailing party under circumstances where the plaintiffs/home owners had breached the construction contract but were still entitled to a judgment for the majority of the funds held on deposit. 604 So. 2d at 808. The court concluded, agreeing with Hensley v. Eckerhart, 461 U.S. 424, 433[] (1983): "We agree that the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." Id. at 810. The opinion in Moritz addressed neither section 57.041(1) nor costs.

Wolfe, 104 So. 3d at 1136 (footnote omitted). In the instant case, the circuit court relied on Wyatt, in which the Fourth District agreed with Spring Lake that costs under section 57.041(1) are governed by the "prevailing party" standard set forth in Moritz. Because this court has since rejected this line of reasoning, the circuit court's reliance on Wyatt was misplaced.

Libit argues that the standard set forth in Wolfe does not apply to this case because it involves a claim sounding in equity and "[t]raditionally, equity courts have had the discretion to apportion costs." Shlachtman v. Mitrani, 508 So. 2d 494, 495 (Fla. 3d DCA 1987). But both Hawks and Libit sought costs pursuant to section 57.041(1). Since Wolfe was decided in 2012, this court has applied the "party recovering judgment" standard—not the "prevailing party" standard—to costs motions filed pursuant to this section. See Wanda Dipaola Stephen Rinko Gen. P'ship v.

Beach Terrace Ass'n, 173 So. 3d 1014, 1015 (Fla. 2d DCA 2015) (reversing the trial court's denial of costs "because the trial court incorrectly applied the prevailing party standard instead of section 57.041, Florida Statutes (2012), which awards costs to the party that recovers a judgment"); Pelham v. Walker, 135 So. 3d 1114, 1119 (Fla. 2d DCA 2013) (stating that the party that recovered partial judgment was entitled to costs pursuant to section 57.041(1)). Libit has not cited, and we have been unable to locate, any authority from this court suggesting that section 57.041(1) or the holding in Wolfe should apply differently to equitable claims. Moreover, the court did not set forth an equitable reason for departing from the general rule set forth in Wolfe; rather, the court simply applied the incorrect rule.

Accordingly, we conclude that the court erred in failing to apply Wolfe, under which Hawks would be entitled to costs as the "party recovering judgment"[1] and Libit would not be entitled to costs. We reverse the court's order on costs and remand for the entry of a costs award in Hawks' favor.

Reversed and remanded with instructions.

LUCAS and ATKINSON, JJ., Concur.

[1]We note that Hawks did not challenge in either his motion to amend or alter the final judgment or in this appeal the court's exclusion of $582.63 originally requested for witness travel expenses.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

In re Guardianship of Leon Bloom, an incapacitated person.

JAMES L. ESSENSON,

Petitioner,

v.

DOROTHY B. BLOOM; MARSHALL BLOOM; and ROBERT M. ELLIOTT, as Trustee of the Leon Bloom Revocable Living Trust u/a/d 11/18/1988, as Restated on 10/22/2009,

Respondents.

Case No. 2D16-4994

Opinion filed July 27, 2018.

Petition for Writ of Certiorari to the Circuit Court for Sarasota County; Charles E. Williams, Judge.

James L. Essenson, Barbara J. Welch, and Matthew J. Kelly, of the Law Firm of James L. Essenson, Sarasota, for Petitioner.

Allan F. Baily of the Law Offices of Baily & Baily P.A., Sarasota; and Marc J. Soss, Lakewood Ranch, for Respondent Dorothy B. Bloom.

No appearance for remaining
Respondents.

ROTHSTEIN-YOUAKIM, Judge.

In this certiorari proceeding, Attorney James L. Essenson seeks review of a trial court order granting Dorothy B. Bloom's (Dorothy) motion to compel production of Essenson's billing records in connection with his representation of Marshall Bloom (Marshall) in the underlying proceeding relating to the guardianship, estate, and trust of Leon Bloom (Leon).[1] This court stayed this certiorari proceeding pending the outcome of a related appeal, and Essenson has filed a notice of voluntary dismissal because his petition has become moot in light of subsequent proceedings on remand from that appeal. Before this court stayed the proceeding, however, Dorothy had filed a "motion for attorney's fees and costs on appeal." Consequently, along with his notice of voluntary dismissal, Essenson has also filed a "motion to preclude costs on appeal."

We accept Essenson's notice of voluntary dismissal, dismiss Essenson's petition, and deny Dorothy's motion for appellate attorney's fees without further comment, but we explain why, pursuant to Florida Rule of Appellate Procedure 9.400(a), we strike Dorothy's motion for appellate costs and grant Essenson's motion to preclude the trial court from taxing appellate costs in favor of Dorothy.

Background

This court's opinion in In re Guardianship of Bloom, 227 So. 3d 165 (Fla. 2d DCA 2017), details the procedural history of Marshall's and Dorothy's involvement in Leon's guardianship and trust proceedings and, following Leon's death, his probate

[1]Dorothy is Leon's wife, and Marshall is Leon's nephew.

proceedings. During the pendency of Dorothy's claim for reimbursement from Leon's trust for funds she allegedly had used to care for Leon, Marshall successfully removed the successor trustee of Leon's trust. Based on the successful removal, Marshall sought an award of attorney's fees and asserted three bases for relief. The trial court denied the fee motion but in doing so only addressed two of Marshall's three bases for relief. Marshall's appeal of the order denying fees was the subject of Bloom, 227 So. 3d 165.

While that appeal was pending, Dorothy moved to compel Essenson to produce billing records that she claimed were relevant to Marshall's previously denied request for attorney's fees. Essenson objected, arguing, in part, that his billing records were not relevant because the court had denied Marshall's fee motion. He acknowledged, however, that they would become relevant if Marshall's appeal were successful and if the trial court were to determine on remand that he was entitled to fees. Essenson represented that were that to happen, then he would produce the requested billing records without objection. Nonetheless, the court granted Dorothy's motion to compel and ordered Essenson to produce his billing records, as redacted for attorney-client and work-product privileges. Essenson timely sought certiorari review.

In his petition, Essenson contends that the trial court departed from the essential requirements of law by compelling production of billing records that were not relevant to anything in the proceeding in light of that court's determination that Marshall was not entitled to an award of attorney's fees. Essenson acknowledged, however, that if this court reversed the trial court's determination on entitlement and if the trial court ultimately determined that Marshall was entitled to fees, this certiorari proceeding would

become moot, and he again represented that, in such a case, he would willingly produce the records that Dorothy had requested. Accordingly, this court stayed this certiorari proceeding pending the outcome of Marshall's appeal of the order denying entitlement to fees.

Thereafter, in Bloom, 227 So. 3d at 170, this court remanded for the trial court to consider Marshall's previously overlooked third basis for fees, and we continued the stay of this certiorari proceeding. On remand, the trial court determined that Marshall was entitled to attorney's fees.

As promised, Essenson acknowledges that his billing records are now relevant, and he has filed a notice of voluntary dismissal of his certiorari petition as moot. But pursuant to rule 9.400(a), he also moves for this court to preclude the trial court from awarding Dorothy costs related to the certiorari proceeding. Dorothy opposes the motion.

Discussion

Essenson argues that we should preclude the trial court from granting Dorothy her costs in this proceeding because the mootness of his petition did not resolve whether the trial court had departed from the essential requirements of law in compelling the production of documents that, at the time that it ordered the production, were irrelevant in light of that court's prior determination that Marshall was not entitled to attorney's fees. Acknowledging that appellate costs are to be awarded to the party prevailing in the proceeding in this court, Essenson argues that the only reason Dorothy prevailed in this court is because this court stayed his certiorari proceeding and allowed his petition to become moot.

Generally, if a party to an appeal[2] files a motion in this court for an award of costs on appeal, this court will strike the motion because such costs are properly sought in the first instance in the trial court. See Superior Prot., Inc. v. Martinez, 930 So. 2d 859, 860 (Fla. 2d DCA 2006) (" 'Costs shall be taxed by the lower tribunal on motion served within 30 days after issuance of the mandate.' Thus, the motion for appellate costs cannot be filed in the district court but must be filed in the lower tribunal after jurisdiction has been returned to that body by our mandate." (quoting Fla. R. App. P. 9.400(a) (2006))). The trial court determines who prevailed on appeal—as opposed to who prevailed in the underlying litigation—and then awards appellate costs upon proof by the prevailing party. See Fla. Power & Light Co. v. Polackwich, 705 So. 2d 23, 25 (Fla. 2d DCA 1997) ("[T]he trial court must determine which party prevailed on the significant issues on appeal, not at trial."). Although "[a] trial court's decision on issues involved in a motion to tax appellate costs is largely discretionary," id. (citing Gen. Capital Corp. v. Tel Serv. Co., 239 So. 2d 134 (Fla. 2d DCA 1970)), it must tax those costs in favor of the prevailing party upon a timely motion "unless the [district] court orders otherwise," Fla. R. App. P. 9.400(a). See also Perez v. Fay, 198 So. 3d 681, 683 (Fla. 2d DCA 2015) (noting generally that "[t]he circuit court does not have discretion to refuse to award appellate costs when the appellate court has not ordered that costs be denied"); Polackwich, 705 So. 2d at 25 n.1 (noting in dicta that "[i]n a very unusual case, an appellee who received an unfavorable outcome in a district court might file a motion for rehearing requesting that the costs either not be taxed or that taxation be deferred to

[2]For purposes of this opinion, the terms "appellate" and "appeals" include original proceedings in this court.

a later time in the case" but explaining that no such motion had been filed); Am. Med. Int'l, Inc. v. Scheller, 484 So. 2d 593, 594 (Fla. 4th DCA 1985) ("[T]he district court of appeal—this court—must order otherwise in order for a trial court to refuse to tax costs in the named categories.").

In his "motion to preclude costs on appeal," Essenson requests that this court "order[] otherwise." And although the rule clearly states that we may do so, there is little authority addressing how a party should request such an order and the circumstances in which a district court might issue one. Accordingly, we discuss both below.

As an initial matter, we conclude that Essenson properly moved for an order precluding costs before Dorothy even served her motion for costs in the trial court following disposition of this certiorari proceeding. We address the timing of Essenson's motion because we can infer from previous decisions no consistent position regarding when a district court can consider whether to "order[] otherwise." Compare Spector v. Spector, 226 So. 3d 256, 262 (Fla. 4th DCA) (suggesting that the district court could consider whether to preclude costs before the prevailing party moved for costs in the trial court when it explained, "unless we specifically state otherwise, our denial of a motion to tax appellate costs filed in this court is presumed to be without prejudice to refile the motion in the circuit court"), review denied, No. SC17-1085 (Fla. Nov. 13, 2017), with Okeelanta Corp. v. Bygrave, 727 So. 2d 950, 951 (Fla. 4th DCA 1997) (suggesting that a request for order disallowing costs should be made in conjunction with motion seeking review of trial court's order taxing costs pursuant to rule 9.400(c) because "[t]he first time we have the opportunity to address the taxation of costs is by

motion for review of the order taxing appellate costs, as the motion for assessment of such costs is made to the trial court, not the appellate court" (citing Stearman v. Intergraph Corp., 585 So. 2d 466, 467 (Fla. 2d DCA 1991))).[3]

The notion that we may preclude costs before a party even moves for costs in the trial court, however, is consistent with dicta in Polackwich, 705 So. 2d at 25 n.1, contemplating that "an appellee who received an unfavorable outcome in a district court might file a motion for rehearing requesting that the costs either not be taxed or that taxation be deferred to a later time in the case." Essenson's motion to preclude costs, which accompanied his notice of voluntary dismissal acknowledging the mootness of his certiorari petition, is akin to such a request on rehearing. Thus, consistently with Spector and Polackwich, we hold that we can consider Essenson's motion at this juncture; we need not wait for him to seek review of a trial court order taxing costs under rule 9.400(c).

With Essenson's motion properly before us, we must determine what we should consider in deciding whether to preclude the trial court from taxing costs in favor of Dorothy. The Fourth District has interpreted rule 9.400(a) to grant a district court the discretion to order that costs not be taxed immediately but rather deferred to the end of

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[3]Stearman only concerned the proposition that the party seeking costs must first apply below; it did not concern a party who opposed costs seeking an order from this court precluding costs. Stearman, 585 So. 2d at 467-68. This court and others routinely strike motions for appellate costs filed in this court at the first instance. See, e.g., B.K. v. S.D.C., 122 So. 3d 980, 983 (Fla. 2d DCA 2013) ("We strike the motion for costs without prejudice to S.D.C. filing a motion in the circuit court in accordance with Florida Rule of Appellate Procedure 9.400(a)."); Garcia v. Collazo, 178 So. 3d 429, 430 (Fla. 3d DCA 2015) ("[W]e strike Collazo's request for costs on appeal, which she first filed in this Court, without prejudice to Collazo's right to file a timely motion pursuant to rule 9.400(a) in the circuit court . . . .").

the litigation. See Okeelanta, 727 So. 2d at 951 ("[B]ecause it has not been established which members of the class might ultimately be liable for these costs, we reverse the order [taxing costs] and direct that it be deferred until the conclusion of the case."). Then-Judge Pariente would have "adopt[ed] a broader interpretation of [the court's] discretion" and would have ordered that the award of costs be conditioned on ultimately prevailing in the underlying litigation. Id. at 951-52 (Pariente, J., concurring specially); see also Stringer v. Katzell, 695 So. 2d 369, 370 (Fla. 4th DCA 1997) (Pariente, J., dissenting) ("[T]he language 'unless the court orders otherwise' vests discretion in the court to award appellate costs conditioned upon the party's ultimately prevailing at the conclusion of the litigation.").

In light of the absence of limiting language in the rule, we agree with then-Judge Pariente that that discretion is broader than merely as to timing, but we do think that that discretion must be informed by the purpose of the rule itself, which is to tax costs in favor of the party that prevailed on the significant issues litigated on appeal, see N. Am. Van Lines, Inc. v. Ferguson Transp., Inc., 662 So. 2d 1275, 1276 (Fla. 4th DCA 1995). We also think it should be exercised only in exceptional circumstances when presented with "a very unusual case." Cf. Polackwich, 705 So. 2d. at 25 n.1 (giving an example of "a very unusual case" in which a district court might order that costs not be taxed or that taxation be deferred to a later time).

The rule itself provides no guidance for this court's exercise of its discretion, but the first part of the rule vests in the trial court the responsibility for determining in the first instance who prevailed on the significant issues in this appellate proceeding. See id. at 25. As the phrase "unless the court orders otherwise" merely

provides an exception to awarding costs to the prevailing party, we think that our exercise of discretion to preclude such an award cannot be predicated upon deciding ourselves who qualifies as the "prevailing party"; such an analysis would invade the province of the trial court. Instead, this court must predicate its analysis on the assumption that the trial court would have determined that the party opposing the motion to preclude costs is the prevailing party,[4] and each case will require this court to examine factors external to that determination. For example, if directed to whether appellate costs should be taxed at all rather than when they should be taxed, we think the analysis might focus on why that party would be determined to have prevailed on the significant issues litigated on appeal.

In this case, Dorothy would be the prevailing party only by virtue of Essenson's voluntary dismissal, which Essenson filed in light of the outcome of Marshall's related appeal and the trial court's decision on remand, because but for our having stayed this proceeding—specifically pending the outcome of those proceedings—we would have granted Essenson's petition. See, e.g., Eagle FL VI SPE, LLC v. Cypress Creek Plaza, LLC, 128 So. 3d 950, 952 (Fla. 2d DCA 2013) ("The trial court's order departs from the essential requirements of the law because it compels extensive discovery when there is no pending claim or defense."); Tampa Pipeline Corp. v. CF Indus., Inc., 693 So. 2d 580, 582 (Fla. 2d DCA 1997) (recognizing generally that production of irrelevant materials does not necessarily cause irreparable harm but general rule will not "prevent appropriate curtailing of overbroad discovery orders

[4]In making such an assumption, we do not actually decide whether Dorothy was the prevailing party. That is a decision for the trial court to make in the first instance, and one that this court would subsequently review pursuant to rule 9.400(c).

entitling a party carte blanche to discovery which has been affirmatively established to be irrelevant, or which will not lead to the discovery of relevant information" (citing Allstate Ins. Co. v. Langston, 655 So. 2d 91, 95 (Fla. 1995)). And, as a third-party to the underlying litigation, Essenson had no choice but to seek certiorari review; he could not wait for a negative outcome in Marshall's appeal before challenging the discovery order. See Rappaport v. Mercantile Bank, 17 So. 3d 902, 905 (Fla. 2d DCA 2009) (citing Price v. Hannahs, 954 So. 2d 97, 100 (Fla. 2d DCA 2007)).[5]

Given the circumstances in which this proceeding arose and the external-though-related proceedings that were integral to our sua sponte decision to stay this proceeding and that, in turn, resulted ultimately in the mootness upon which Dorothy's presumed status as the prevailing party necessarily would have to be based, we conclude that this is one of the rare and exceptional circumstances that warrants exercising our discretion to preclude any subsequent award of costs to Dorothy as the prevailing party. Therefore, we preclude the trial court from awarding Dorothy costs that she incurred in this certiorari proceeding.

Conclusion

Based on the foregoing, we accept Essenson's notice of voluntary dismissal, dismiss Essenson's petition, deny Dorothy's motion for appellate attorney's

[5]Interestingly, and though contrary to Rappaport and other opinions from this court, the First District and Third District have suggested that orders compelling nonparties to produce discovery are final, appealable orders because a decision on the discovery issue concludes judicial labor between the nonparty and the parties to the underlying litigation. See, e.g., United Servs. Auto. Ass'n v. Law Offices of Herssein & Herssein, P.A., 233 So. 3d 1224, 1230 n.6 (Fla. 3d DCA 2017); Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 520-21 (Fla. 1st DCA 2012). Regardless, the posture in which Essenson sought review does not affect the ultimate disposition of either this proceeding, see Fla. R. App. P. 9.040(c), or Essenson's motion.

fees, strike Dorothy's motion for appellate costs, grant Essenson's motion to preclude costs, and order that the trial court shall not award Dorothy appellate costs related to this certiorari proceeding.

SALARIO, J., Concurs.
KHOUZAM, J., Concurs specially.

KHOUZAM, J., Concurring specially.

I agree with the majority's conclusion to strike Dorothy Bloom's motion for appellate costs and to grant James Essenson's motion to preclude the trial court from awarding her appellate costs in this proceeding. I write only to explain that but for Dorothy's action in filing her premature motion to compel, which was erroneously granted by the trial court, Essenson would not have filed his petition for writ of certiorari with our court. And but for our court's issuance of a stay on the writ of certiorari, Essenson would have been the prevailing party, as there was no basis for the trial court to grant Dorothy's motion to compel the billing records where there was a denial of entitlement to fees. For these reasons, I concur with the decision reached by the majority.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARY ABT and **ROBERT ABT**,
Appellants,

v.

METRO MOTORS VENTURES, INC. d/b/a **GREICO NISSAN**
and
STEINGER, ISCOE & GREENE, P.A.,
Appellees.

No. 4D17-1960

[July 25, 2018]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Janet Carney Croom, Judge; L.T. Case No. 562014CA002287.

Julie H. Littky-Rubin of Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin, LLP, West Palm Beach, and Bradford L. Jefferson of Bradford L. Jefferson, P.A., Fort Pierce, for appellants.

Alfred R. Bell, Jr., and Sean J. Greene of Steinger, Iscoe & Greene, P.A., Port St. Lucie, for appellee Steinger, Iscoe & Greene, P.A..

KUNTZ, J.

Mary Abt ("Former Client") appeals a judgment imposing an attorney's charging lien in favor of her former law firm Steinger, Iscoe & Greene, P.A. ("Law Firm") for work performed while representing her in a personal injury matter. She argues that the court erred in awarding the Law Firm amounts incurred in the prosecution of the charging lien. We agree.

The Law Firm was retained on a contingency fee basis. Before completing the case, the Former Client discharged the Law Firm, and the Law Firm filed a charging lien. Although the personal injury litigation settled, the court retained jurisdiction over the Law Firm's lien and found that the charging lien amounted to $59,649.61. This included $21,079.61 incurred in prosecuting the lien.

As argued by the Former Client, our decision in *Tucker v. Tucker*, 165

So. 3d 798, 800 (Fla. 4th DCA 2015), resolved this exact issue. In *Tucker*, the circuit court's order imposing a charging lien in the amount of $9,251 which included "$1,400.00 in attorney's fees plus $1,137.50 in expert witness fees accrued in enforcing the charging lien." *Id.* at 800. Relying on *Rudd v. Rudd*, 960 So. 2d 885 (Fla. 4th DCA 2007) and *Cole v. Kehoe*, 710 So. 2d 705, 706 (Fla. 4th DCA 1998), we concluded that "the actions of an attorney in enforcing a charging lien does nothing to contribute to a positive judgment or settlement for the client." *Tucker*, 165 So. 3d at 800. Thus, we affirmed the court's imposition of the charging lien, but remanded the case for the court to "eliminate from the order the $2,537.50 incurred in the prosecution of the charging claim." *Id.*

Here, the circuit court's order states that the Law Firm "has a valid charging lien against [the Former Client's] recovery and is entitled to recovery of $38,570.00 for attorney's and legal assistant fees, plus expert witness fees and prevailing party costs which will be determined at a later time." The court entered judgment in the amount of $59,679.61, an increase of $21,079.61. However, in her initial brief the Former Client states that "the trial court awarded an astonishing $20,158.22" in costs, and in the reply brief the Former Client states that we "should reverse the judgment awarding the [Law Firm] almost $19,000 in costs in the prosecution of its $38,570 lien." On remand, the court should eliminate the amounts incurred in the prosecution of the charging lien from the judgment.

Reversed and remanded with instructions.

TAYLOR and MAY, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LAURENCE SCHNEIDER,
Appellant,

v.

FIRST AMERICAN BANK, as successor by merger to Bank of Coral Gables, LLC, **UNKNOWN TENANT #1, UNKNOWN TENANT #2** and **THE OAKS AT BOCA RATON PROPERTY OWNER'S ASSOCIATION, INC.,**
Appellees.

No. 4D17-2239

[July 25, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Susan R. Lubitz, Senior Judge; L.T. Case No. 502016CA009292XXXXMB.

Ryan D. Gesten of The Law Offices of Ryan D. Gesten, P.A., Fort Lauderdale, for appellant.

Henry H. Bolz, III and Sheyla Mesa of Keller & Bolz, LLP, Coral Gables, for Appellee First American Bank.

TAYLOR, J.

Laurence Schneider appeals a final judgment of foreclosure and a separate amended final judgment awarding damages to First American Bank (the "Bank") for breach of a credit agreement. We reverse to the extent that the judgments improperly allowed the Bank to simultaneously execute on the money judgment and foreclose on appellant's property.[1] On all other issues, we affirm.

It is well-settled that "to collect money owed on a note, a mortgagee may pursue its legal and equitable remedies simultaneously, until the debt is satisfied." *Royal Palm Corp. Ctr. Ass'n v. PNC Bank, NA*, 89 So. 3d 923, 929 (Fla. 4th DCA 2012). "[T]he reason that an action at law on a note may be pursued simultaneously with the equitable remedy of foreclosure

[1] A foreclosure sale on the property has not yet been held, however, as the trial court granted a stay pending appeal.

is that the two remedies are not inconsistent." *Id.* at 932. Accordingly, a trial court may enter a final judgment of foreclosure that allows for immediate execution of the damages award, so long as the trial court withholds the setting of the foreclosure sale of the property until the plaintiff certifies that its money judgment has not been satisfied. *Id.* at 926, 928, 933.

A trial court may not, however, simultaneously allow a foreclosure plaintiff to execute on the money judgment and foreclose on the subject property. *Id.* at 933; *see also Farah v. Iberia Bank*, 47 So. 3d 850, 851 (Fla. 3d DCA 2010) (striking "for which let execution issue" language from final judgment of foreclosure).

Here, we find that the trial court erred in entering two judgments—a money judgment and a foreclosure judgment—that together allowed the Bank to simultaneously execute on the money judgment and foreclose on appellant's property. To remedy this error, we reverse only the foreclosure judgment. On remand, the trial court shall modify the foreclosure judgment so as to withhold the setting of the foreclosure sale of the property until the Bank certifies that its money judgment remains unsatisfied. *See Royal Palm*, 89 So. 3d at 928. This procedure assures that, while the Bank was free to pursue both remedies, it will not obtain a recovery that exceeds the amount of the debt. *Id.* at 933. Moreover, once the Bank "has obtained a foreclosure sale of the property, it cannot collect on the note other than to pursue the appropriate deficiency amount." *Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P.*, 222 So. 3d 647, 652 (Fla. 2d DCA 2017).

Affirmed in part, Reversed in part, and Remanded.

WARNER and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DANIEL S. NEWMAN, etc., et al.,
Petitioners,

v.

MAYER BROWN, LLP, et al.,
Respondents.

No. 4D17-3416

[July 25, 2018]

Petition of writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joseph Murphy, Judge; L.T. Case No. 10-49061.

Leo B. Reus, Scot C. Stirling and Robert O. Stirling of Beus Gilbert PLLC, Phoenix, and Stuart Z. Grossman and Rachel W. Furst of Grossman Roth Yaffa Cohen, P.A., Coral Gables, for petitioners.

Eugene K. Pettis and Debra P. Klauber of Haliczer, Pettis & Schwamm, Fort Lauderdale, for respondents.

FORST, J.

Petitioner Daniel Newman ("the Receiver") seeks certiorari review of a non-final order that granted Respondent Mayer Brown, LLP's motion to compel discovery with respect to thirty-eight nonparties. Below, Newman was appointed as a receiver for these thirty-eight investor entities and individuals ("Assignors"), which all contractually assigned their claims against Mayer Brown to the Receiver. The latter is the plaintiff, and Mayer Brown is one of the defendants in the underlying action.[1] During discovery, Mayer Brown moved to compel the Receiver to produce documents and comply with deposition requests concerning the Assignors. The trial court granted the motion and the Receiver filed the instant petition for writ of certiorari, arguing that the trial court erred in compelling discovery because the Assignors were nonparties and thus could not take part in discovery without a subpoena. As set forth below,

[1] Ernst & Young was also a defendant in the case, but the instant petition does not involve it.

we deny the petition.

Background

In May 2009, Newman was appointed by the United States District Court for the Middle District of Florida as a receiver for claims of securities fraud filed by four hedge funds ("Founding Partners") and for the Founding Partners Capital Management Co. ("FPMC").[2] The federal court order appointing the Receiver gave him authority to assert claims "for the benefit and on behalf of" the four funds and "their investors and other creditors," i.e., the Assignors.[3] Newman filed suit against Mayer Brown, a law firm, which allegedly facilitated the fraud.[4] The suit was filed by Newman both in his capacity as Receiver for the funds and as the "Assignee" of claims belonging to thirty-eight individual or entity investors in the funds.

Both parties filed discovery requests. At issue is Mayer Brown's request for the production of privilege logs by the nonparty Assignors and its request that the Assignors appear for deposition. The Receiver refused to comply with these discovery requests, arguing that he did not represent the Assignors and that they are not parties to this action. He further claimed he was not in custody, possession or control of the Assignors' documents and could not force the Assignors to produce documents or appear for depositions.

Mayer Brown filed a motion to compel compliance with its discovery requests, arguing at the subsequent hearing that "a defendant who is sued on an assigned claim may not be subjected to a greater discovery burden than if the claim had not been assigned." The assignment agreements entered into by the Receiver with each of the thirty-eight Assignors are central to Mayer Brown's contention that the assignments provide benefits to the Assignors, as each assignment states that "any recoveries made on [the Receiver's] Claims [related to the individual assignor's investment in the funds] shall benefit <u>all</u> creditors and investors . . . to the extent determined appropriate by the Receiver or directed by the Court . . . ."

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[2] The four hedge funds are (1) Founding Partners Stable-Value Fund, L.P.; (2) Founding Partners Stable-Value Fund II, L.P.; (3) Founding Partners Hybrid-Value Fund, L.P.; and (4) Founding Partners Global Fund, Ltd.

[3] The Assignors are individuals, IRAs, trusts, LLCs, partnerships, and other entities.

[4] The complaint contends Mayer Brown is guilty of (1) professional malpractice; (2) aiding and abetting breaches of fiduciary duty; (3) aiding and abetting fraud; (4) aiding and abetting breaches of statutory duties; (5) negligent misrepresentation; and (6) fraud.

Mayer Brown furthermore noted that the Assignors "agree[d] to provide reasonable cooperation and assistance to the Receivers' (sic) legal counsel and/or the Receiver in connection with the Claims" and set forth details of this cooperation and assistance, including an agreement to appear for deposition and "delivering a sworn or written statement of facts known to Assignor."

Newman responded that the Assignors were not parties and Mayer Brown should therefore use subpoenas and "discovery devices that are appropriate for non-parties."

The trial court granted Mayer Brown's motion to compel. The order states that the Assignors "shall be treated as parties to the case *for discovery purposes* in producing documents and appearing for deposition . . . with the same protections and obligations applying to the Assignors as apply to [the] parties." (emphasis added). The Receiver filed the instant petition seeking certiorari review of the order.

Analysis

"[R]eview by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). The critical inquiry for jurisdictional purposes is whether the order "creates material harm irreparable by postjudgment appeal." *Bared & Co. v. McGuire*, 670 So. 2d 153, 156-57 (Fla. 4th DCA 1996) (quoting *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995)).

The Receiver makes several arguments in his petition, the main one being that because the Assignors are nonparties, the trial court departed from the essential requirements of the law by compelling them to respond to discovery requests without notice. He contends that Florida Rule of Civil Procedure 1.351 mandates that only a subpoena can compel discovery of nonparties.[5] The Receiver cites to *Parker v. James*, 997 So. 2d 1225 (Fla. 2d DCA 2008), and *Graham v. Dacheikh*, 991 So. 2d 932

[5] Rule 1.351 states in relevant part that "[a] party may seek inspection and copying of any documents or things within the scope of rule 1.350(a) from a person who is not a party by issuance of a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things." Fla. R. Civ. P. 1.351(a).

(Fla. 2d DCA 2008), among others, to assert the general proposition that an order requiring production of nonparties without notice "departs from the essential requirements of the law and causes irreparable injury to the privacy rights of nonparties who have been given no notice and no opportunity to be heard in this proceeding." *Graham*, 991 So. 2d at 933.

Mayer Brown answers that the cases relied upon by the Receiver involve traditional nonparties who lack a direct stake in the litigation. The assignors in the instant case, by contrast, retain a financial interest.

We agree that the cases cited by the Receiver are distinguishable. First, the Assignors are not traditional "nonparties" under Rule 1.351. As noted above, the Receiver entered into a contractual agreement with each of the thirty-eight Assignors, in which the Receiver agreed that any recovery in litigation brought by the Receiver "shall benefit all creditors and investors . . . to the extent determined appropriate by the Receiver or directed by the Court." As the Receiver's attorney admitted at the hearing on the motion to compel, the Assignors stand to gain "something in the hundreds of millions of dollars" should the Receiver prevail in the underlying action.

Though we can find no Florida case on point, various federal courts have held, under the similarly-worded Federal Rules of Civil Procedure,[6] that because assignors retained substantial, financial interests in their assigned claims, they could be treated as de facto parties for purposes of discovery "when to do otherwise would frustrate discovery, regardless of whether this frustration is intentional or not." *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *9 (N.D. Fla. Jan. 13, 1992) (citing *Natta v. Hogan*, 392 F.2d 686, 691 (10th Cir. 1968)). *See also Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-4394, 2016 WL 4613390, at *3 (S.D.N.Y. Aug. 31, 2016) (holding that "an assignee, pressing the rights of its assignors . . . must also assume the discovery obligations of those assignors."); *JPMorgan Chase Bank v. Winnick*, 228 F.R.D. 505, 506 (S.D.N.Y. 2005) ("It is both logically inconsistent and unfair to allow the right to sue to be transferred to assignees . . . free of the obligations that go with litigating a claim."); *Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 148 (S.D.N.Y. 1997) (holding that it would be "anomalous" for an assignor bank that had a "substantial interest" in the underlying case, to assign its claims and "to frustrate [the defendant's] right to discover documents in [the assignor's] possession.").

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[6] Federal Rule of Civil Procedure 34 requires, just like Rule 1.351, that a court first issue a subpoena before compelling certain discovery of nonparties. FED. R. CIV. P. 34.

These federal cases recognize, as do we, that it would be patently unfair to allow assignors to use the assignment contract as both a shield and a sword, allowing them on the one hand to evade good faith discovery requests by adverse parties, and on the other ultimately reap the benefits of any damages awarded to them by way of their assigned actions. *See, e.g.*, *JPMorgan Chase Bank*, 228 F.R.D. at 506 ("If the plaintiff's theory carried the day, the assignor would be able to assign a claim more valuable than it could ever have, because its claim, if pursued by the assignor, would entail certain obligations that, when assigned, would magically disappear."). *See also In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343, 2014 WL 129814, at *2 (E.D. Tenn. Jan. 10, 2014) (holding that "it would be wholly unfair for Plaintiffs to step into the shoes of the assignors for the purposes of bringing their claims and not also assume a claimant's attendant discovery obligations.").

Not only do the Assignors in this case have a financial interest in the litigation, but they also agreed in the assignment contracts entered into with the Receiver to contribute to discovery matters during the course of litigation, including "delivering . . . sworn or written statements of facts known to Assignor," reviewing documents, "answering questions and providing information dealing with Assignor and the claims," and appearing for depositions. By agreeing to submit themselves to discovery, the Assignors have essentially waived their Rule 1.351 argument, thereby failing to establish that the trial court's discovery order departed from the essential requirements of the law and/or caused irreparable harm. In fact, for the most part, the order that is challenged in this petition did little more than compel the Assignors to do what they previously agreed to do in their agreements with the Receiver, and the order expressly states that the Assignors have the "same protections obligations" that apply to parties.

As a final point, there is no evidence in the record or in the briefs filed in this action indicating that Mayer Brown has failed to accommodate any genuine issues presented by the Receiver or any of the Assignees with respect to discovery requests. "Procedural due process requires both fair notice and a real opportunity to be heard." *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001). Here, the record evidence demonstrates that the Receiver is in an adequate position to reasonably apprise the Assignors of any impending discovery requests, and that it has done so. The fact that the Assignors entered into an assignment contract, in which they explicitly agreed to comply with any discovery requests sent to them by the Receiver, further obviates any notice concerns.

Conclusion

Because the trial court's discovery order did not depart from the essential requirements of the law, and because the Receiver and the Assignors have failed to show the order to compel will cause material injury or irreparable harm, we deny the petition. The assignment contract requires the Assignors to assist in discovery, and so Rule 1.351 is inapplicable to the facts of this case. Furthermore, there are no notice or due process violations here. The record shows that the Receiver can adequately contact the Assignors to produce discovery, and has in fact already done so. Accordingly, Mayer Brown is entitled to discovery from the Assignors, just as if the Assignors had brought this action themselves on their own claims.

Petition denied.

GERBER, C.J., concurs.
WARNER, J., dissents with opinion.

WARNER, J., dissenting.

I would grant the petition, as the trial court departed from the essential requirements of law in asserting jurisdiction over persons who were not brought before the court in accordance with the rules or statutes. However, based upon the agreement between the non-parties who assigned their claims in this litigation to the Receiver, the trial court can compel the Receiver to produce the assignors, the failure of which could result in the striking of the recalcitrant assignor's claim.

As noted in the majority, in the proceedings, Mayer Brown sought discovery from the Assignors. Specifically, it propounded to Receiver requests to produce documents of assignors and also attempted to schedule their depositions without the necessity of subpoenas. Receiver argued the Assignors were non-parties. Therefore, Mayer Brown was required to comply with the Rules of Civil Procedure for the production of documents or depositions from non-parties. Mayer Brown moved to compel the Receiver to produce the documents and to arrange for depositions of the individual assignors. Should the Receiver fail to do so, Mayer Brown requested that Receiver not be allowed to pursue the assignors' claims. Only the Receiver was served with notice of the motion and hearing on it.

The trial court granted Mayer Brown's motion, but it vastly expanded it to hold that Assignors were "parties" to the proceeding for discovery purposes. The court ordered:

> Assignors shall be treated as parties to the case for discovery purposes in producing documents and appearing for deposition, and shall respond to notices of deposition and document requests directed to the Assignors as if the Assignors were parties to the case, with the same protections and obligations applying to the Assignors as apply to parties.

Receiver filed this petition for certiorari contending that the court had departed from the essential requirements of law, causing irreparable harm not remediable on appeal, as the assignors were never brought before the court before being declared parties to the proceeding for discovery.

I would hold that the trial court departed from the essential requirements of law. Assignors were never brought before the court by subpoena and had no notice of the motion to compel. As such, without notice or opportunity to be heard, they have been subject to the jurisdiction of the Florida courts. This is a denial of due process. *See Dep't of Children & Families v. T.S.*, 154 So. 3d 1223, 1226 (Fla. 4th DCA 2015) ("Notice and an opportunity to be heard are the hallmarks of due process.")

The Rules of Civil Procedure provide for the production of documents and depositions of non-parties. *See generally* Fla. R. Civ. P. 1.310, 1.350. Depositions of non-parties require the service of a subpoena. *See* Fla. R. Civ. P. 1.410. A non-party who disobeys a subpoena can be held in contempt. *See* Fla. R. Civ. P. 1.410(f). A subpoenaed non-party can also be liable for costs and attorney's fees for failing to comply with discovery. *See* Fla. R. Civ. P. 1.380(a)(4). However, there is no provision in the rules to make non-parties subject to the jurisdiction of the court, and thus, its authority to sanction, without some service of process or subpoena.

The trial court relied on federal cases which have treated assignors as parties so as not to frustrate discovery. *See Natta v. Hogan*, 392 F.2d 686, 691 (10th Cir. 1968); *see In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *9 (N.D. Fla. Jan. 13, 1992); *see Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 34 (S.D.N.Y. 1984). These cases all allowed discovery because the courts found that the assignors were the real parties in interest in the litigation.

There is no statute or rule in Florida which permits the trial court to deem real parties in interest, not joined as actual parties in an action, as subject to the jurisdiction of the court for purposes discovery. In *North Ridge Medical Plaza v. Tenet Healthcare Corporation*, 719 So. 2d 1014, 1015 (Fla. 4th DCA 1998), we held that a beneficial owner of property or a real party in interest must be subpoenaed for deposition. The trial court's ruling is directly contrary to *North Ridge.*

We are not at liberty to change our rules and statutes to achieve a desired result. Therefore, the trial court's order deeming these assignors as subject to the court's jurisdiction departs from the essential requirements of law.

The court would have been within its jurisdiction to grant the relief that Mayer Brown requested in its motion. Each assignor had agreed in its assignment to cooperate with the Receiver with respect to discovery, including production of documents and appearing at a deposition and trial. Thus, there was a contractual relationship between the Receiver and Assignor with respect to discovery in the case. Mayer Brown sought to compel the Receiver to produce documents from the assignors and to depose the assignors. Given the Receiver's obligation to provide discovery as a party and the assignor's contractual obligation with the Receiver, the trial court could compel the Receiver to produce documents or the assignor for deposition, and if the Receiver failed to do so, the assignor's claim may be dismissed from the suit. This would be consistent with the rules and with due process. The assignor would not be personally subject to sanctions, costs, or attorney's fees without due process of law, yet Mayer Brown would have a method to enforce discovery obligations against the Receiver.

For the foregoing reasons, I dissent from the denial of the petition for writ of certiorari.

* * *

Not final until disposition of timely filed motion for rehearing.