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Manuel Farach

Hernandez v. Acosta Tractors Inc., Case Nos. 17-13057; 17-13673 (1nly 1th Cir. 2018).

While not appropriate in this case because the only failure was to pay arbitration fees (without showing the party had the ability to pay), a district court retains the power to sanction parties for failure to participate in an arbitration in good faith or for using the arbitration process as a method of forum shopping.

Pettway v. City of Jacksonville, Case No. 1D17-2279 (Fla. 1st DCA 2018).

The mailing of the final order of a local administrative agency may, under the rules of the local agency and the municipality, constitute the "filing with the clerk of the lower tribunal" as required for rendition under Florida Rule of Appellate Procedure 9.020(i).

Pijuan v. Bank of America, N.A., Case No. 3D16-1553 (Fla. 3d DCA 2018).

A lender must plead and prove a default under a loan modification agreement in order to foreclose if the court finds that the loan modification agreement was entered into by the parties.

Dimitri v. Commercial Center of Miami Master Association, Inc., Case No. 3D16-2549 (Fla. 3d DCA 2018).

A master association of a development made up of smaller sub-associations is not a condominium "association" subject to the requirements of the 1981 version of Florida Statutes chapter 718 if it is not "the corporate entity responsible for the operation of a condominium" under § 718.103(2).

Jahangiri v. 1830 North Bayshore, LLC, Case No. 3D17-529 (Fla. 3d DCA 2018).

The following provision is too indefinite as to how future rent will be determined, and is thus unenforceable:

> RENEWAL OPTIONS: Upon six months (sic) notice and provided [lessee] is not in default of any provision of this Lease, LESSOR agrees that [lessee] may renew this Lease for two five-year renewal options, each renewal at the then prevailing market rate for comparable commercial office properties.

Bankers Lending Company, LLC v. Jacobson, Case No. 5D17-542 (Fla. 5th DCA 2018).

Generally, a junior lienor cannot compel a redemption pro tanto and must pay the whole amount of the mortgage debt in order to redeem.

Bank of America, N.A. v. Eastridge, Case No. 5D17-2541 (Fla. 5th DCA 2018).

The 2013 amendments to Florida Statute section 95.18(1) (adverse possession without color of title) merely added a "tacking provision" and did not remove the requirement that claimant (including any "tacked on" predecessors) have adversely occupied the property for seven years in order to prevail on a claim of adverse possession.

Simon v. Waters, Case No. 5D17-3355 (Fla. 5th DCA 2018).

A court cannot circumvent the American Rule regarding the award of attorney's fees by granting an equitable lien for attorney's fees, especially when the party granted the equitable lien was not the prevailing party.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 17-13057; 17-13673

D.C. Docket No. 1:15-cv-23486-FAM

JULIO HERNANDEZ HERNANDEZ,
and all others similarly situated under 29 U.S.C. 216(B),

Plaintiff - Appellee,

versus

ACOSTA TRACTORS INC.,
FELIX F. ACOSTA,
ALEX ROS,

Defendants - Appellants.

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

(August 8, 2018)

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

MARTIN, Circuit Judge:

This case asks us to consider whether a District Court can properly enter a default judgment based on a party's failure to pay arbitration fees. Acosta Tractors Inc. and two of its officers, Felix Acosta and Alex Ros (collectively "Acosta") appeal the District Court's entry of a default judgment against them after they failed to pay their required arbitration fees in a dispute with Julio Hernandez, who had worked for them. Mr. Hernandez brought suit against Acosta in federal court on behalf of himself and others similarly situated, seeking unpaid wages under the Fair Labor Standards Act ("FLSA"). Acosta asked the District Court to dismiss the suit and compel arbitration based on an arbitration clause in Mr. Hernandez's employment contract, which the District Court did. But arbitration did not proceed as planned. Acosta eventually stopped paying its arbitration fees and asked the District Court to allow the case to come back to court. The District Court declined. Instead, it entered a default judgment against Acosta based solely on its failure to pay its arbitration fees. After careful consideration, and with the benefit of oral argument, we vacate the District Court's order and remand for further proceedings.

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

I.

Mr. Hernandez worked as a laborer for Acosta Tractors from around May 26, 2009 to August 26, 2015.[1] When Mr. Hernandez began working for Acosta he was given an employee handbook that contained "Assigned Employee Acknowledgements," which he signed. This acknowledgement contained an arbitration clause stating that any dispute relating to wages "will be resolved exclusively through binding arbitration."

On September 17, 2015, Mr. Hernandez filed suit against Acosta. He said Acosta violated the FLSA by failing to pay his overtime wages. More specifically, Mr. Hernandez said he had not been paid for the time he spent loading and unloading trucks each day. He sought compensation for an average of 15 hours of unpaid overtime per week for a period of almost four years. Mr. Hernandez's complaint was nearly identical to two other lawsuits that had been filed by his attorney against Acosta, one in 2012 and one in 2013. Both of those suits, like Mr. Hernandez's, were dismissed pending arbitration.

It was Acosta that moved to dismiss or stay Mr. Hernandez's suit and compel arbitration, based on the arbitration agreement Hernandez had signed. Mr. Hernandez opposed the motion, arguing that the arbitration clause was

[1] Mr. Hernandez was first hired through a labor supplier, Strategic Outsourcing, Inc. Neither party argues that this fact impacts Acosta's liability for his wages under the FLSA.

unenforceable. The District Court granted the motion to compel arbitration and ordered the case closed.

We don't have a clear record of what happened in the arbitration. Both parties have referred to some filings and decisions from the arbitration, but the record was never filed in the District Court or on appeal. Acosta tells us that once Mr. Hernandez's case was sent to arbitration, it moved to consolidate the Hernandez case with the two other cases filed by Mr. Hernandez's attorney on behalf of Acosta employees seeking unpaid overtime. The arbitrator declined to consolidate the cases. Acosta also says the arbitrator allowed extensive discovery to be taken, with 29 depositions conducted in the three separate arbitration proceedings to which it was a party. Acosta says it spent $33,100 in the other arbitrations and then was billed for an additional $43,640. Acosta then got yet another bill for $25,875 in Mr. Hernandez's arbitration. Acosta says this "bring[s] the total estimated forum fees for a simple FLSA issue to over $100,000.00."

About a year after the District Court had closed the case, Acosta moved to re-open it, asked that the stay be lifted, and that Mr. Hernandez's case be consolidated "with earlier and later-filed nearly identical matters" before the District Court. Acosta said "the Arbitration in this matter has failed of its essential purpose." Acosta went on: "Arbitration is meant to be a less costly and efficient substitute for litigation. In these cases, arbitration has instead turned into an overly-expensive,

completely inefficient method of dispute resolution." Acosta said "[t]he arbitrators' fees alone likely exceed the amount in controversy, exclusive of attorneys' fees."

In a one page order, the District Court rejected Acosta's request. Acosta moved for reconsideration. Acosta told the court that since its original motion, the arbitrator had suspended proceedings in the related cases because Acosta had not paid the required fees. Acosta argued that "[t]o allow this matter to remain in arbitration will necessitate duplicate proceedings with the same parties and witnesses with forum fees that exceed the amount in controversy."

Mr. Hernandez responded by seeking entry of a default against Acosta. Mr. Hernandez said Acosta had waived its right to enforce the arbitration agreement. And rather than seeking a lifting of the stay, Mr. Hernandez argued the District Court should enter a default judgment against Acosta because "the Defendants vexatiously caused unnecessary arbitration proceedings" and "in bad faith refused to arbitrate." Mr. Hernandez also asked for a jury trial on his claims for damages and sanctions. The District Court denied both Acosta's and Mr. Hernandez's motions as premature, noting that "[t]he arbitrator ha[d] not formally terminated the arbitration in this matter."

A few months later, Acosta was back in court. It filed a new motion to reopen the cases against it, lift the stay, and consolidate the three cases that had been in arbitration. Acosta said "[t]he [arbitrator] has now suspended this matter

also, and Defendants, waiving their right to arbitrate, seek to return to this court for consolidation and trial, so that these aged disputes [may] finally be resolved." The District Court denied Acosta's renewed motion. Soon, the District Court entered a default judgment against Acosta. The court noted that Acosta's "failure to pay the arbitration fees constitutes a default under the Federal Arbitration Act, 9 U.S.C. § 3." The court continued:

> Based on the arbitrator's cancellation of this proceeding, the defendant's admission that it refused to pay the costs because they had escalated, and the precedent stating courts retain the right to enter default, this Court enters default judgment against the Defendants. This remedy is appropriate as the Defendants did not provide evidence establishing their inability to pay the costs of arbitration or showing they attempted to establish a payment plan.

The court directed Mr. Hernandez to file an affidavit setting out the amount of damages due.

Mr. Hernandez filed an affidavit requesting $7,293 in damages for unpaid overtime and liquidated damages, as well as additional attorney's fees. Mr. Hernandez's affidavit estimated that he "was not paid anything for at least an average of (8–9) hours of overtime per week." He said these hours came from "loading/unloading and preparation duties that were not included on the sign-in sheet." Acosta asked for reconsideration of the default judgment. Acosta attached Mr. Hernandez's deposition, taken in a related case, and argued that Mr. Hernandez's sworn testimony in the two documents was contradictory. The District

Court denied the motion for reconsideration. The court also entered a final default judgment, awarding Mr. Hernandez the $7,293 he asked for.

A few weeks later, Mr. Hernandez filed a copy of the order terminating the arbitration, which had been signed by the arbitrator after the District Court entered its default judgment. The order from the arbitrator said the parties had failed to make their required payments by the deadline, and as a result, the arbitration proceeding was terminated. This appeal followed.

II.

Arbitration agreements contained in employment contracts are generally enforceable. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119, 121 S. Ct. 1302, 1311 (2001). We are aware that the inclusion of arbitration agreements in employment contracts is becoming increasingly widespread. See Epic Systems Corp. v. Lewis, 584 U.S. ___, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J., dissenting) (collecting data). The idea is that employers prefer arbitration because it promises "quicker, more informal, and often cheaper resolutions for everyone involved." Id. at 1621 (majority op.). But as this case shows, arbitration does not always live up to this promise.

At root, "arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011) (quotation omitted). And the Federal Arbitration Act ("FAA") requires courts to "place arbitration

agreements on an equal footing with other contracts and enforce them according to their terms." Id. (citations omitted). In keeping with this principle, Section 3 of the FAA requires courts to stay a case that is covered by a binding arbitration clause so it may proceed in arbitration. 9 U.S.C. § 3. But a court is only required to grant a motion for a stay so long as "the applicant for the stay is not in default in proceeding with such arbitration." Id.

Here, Acosta asked the District Court to stay Mr. Hernandez's case so that arbitration could proceed. The District Court obliged. So far, this was how things were supposed to work under the terms of Mr. Hernandez's arbitration agreement and Section 3 of the FAA. Once Acosta defaulted in the arbitration, the District Court would have been within its power to find that Acosta could no longer require Mr. Hernandez to proceed in arbitration. See id. But this District Court went further. The District Court determined that Acosta's default in the arbitration proceedings also warranted the entry of a default judgment against it in federal court. This was error.[2]

The District Court cited Section 3 of the FAA as authority for its decision to

[2] Because the basis upon which the District Court made its decision is not clear, the proper standard of review is debatable. Acosta argues we should review the District Court's decision de novo, citing to Federal Rule of Civil Procedure 55. Mr. Hernandez does not explicitly address the standard of review but discusses the District Court's decision as a sanction based on Acosta's "abuse of the arbitration process." We review sanction orders for abuse of discretion. Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1237 (11th Cir. 2007). Ultimately, because the District Court misapprehended the requirements of Section 3, it erred under either standard.

enter a default judgment against Acosta. But Section 3 only concerns when a court must compel arbitration. It says nothing about what a court should do when the party that first asked the court to compel arbitration now wants to come back to court.

The cases relied on by the District Court in support of its decision to enter a default judgment against Acosta don't give guidance for these facts either. In Pre-Paid Legal Services, Inc. v. Cahill, 786 F.3d 1287 (10th Cir. 2015), the Tenth Circuit held that a failure to pay arbitration fees qualified as a default under Section 3, and allowed the dispute to come back to court. Id. at 1294. The Ninth Circuit reached a similar result in Sink v. Aden Enterprises, Inc., 352 F.3d 1197 (9th Cir. 2003). In Sink, the court held that an employer's failure to pay arbitration fees qualified as a default in arbitration, such that the District Court was not required to compel arbitration again under Section 3. Id. at 1200. But in neither of these cases did the courts equate a default in arbitration with a default judgment to be entered by the court.

We find no basis in the FAA, the caselaw, or anywhere else to support a court's decision to enter a default judgment solely because a party defaulted in the underlying arbitration. The District Court therefore erred in doing so.

We do not rule here that a court has no authority to enter a default judgment based on a party's failure to fulfill its obligations in the arbitration process.

Certainly, the Federal Rules of Civil Procedure give courts authority to enter default judgments or dismissals as sanctions. See, e.g., Fed. R. Civ. P. 11(b)(1), (c) (providing for sanctions based on papers "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"); Fed. R. Civ. P. 37(b)(2)(A)(vi) (providing for the entry of a default judgment against a party who violates a discovery order); Fed. R. Civ. P. 41(b) (providing for dismissal when a plaintiff "fails to prosecute or to comply with these rules or a court order").

And beyond the federal rules, "[c]ourts have the inherent power to police those appearing before them." Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017). This includes the power "to fashion an appropriate sanction for conduct which abuses the judicial process." Id. (quotation omitted). But in order for a court to impose a sanction pursuant to its inherent authority, it must make a finding that the sanctioned party acted with subjective bad faith. Id. at 1224. And such a bad faith finding must be made in compliance "with the mandates of due process," requiring fair notice and an opportunity to be heard. See Kornhauser v. Comm'r of Soc. Sec., 685 F.3d 1254, 1257 (11th Cir. 2012).

On remand, the District Court may well find that Acosta acted in bad faith in choosing not to pay its arbitration fees. After all, Acosta acknowledges it quit paying after the arbitrator failed to consolidate Mr. Hernandez's case with the other

cases brought by other Acosta employees, and because it thought the arbitrator had allowed too much discovery. Acosta also noted that arbitration was set to cost more than Mr. Hernandez's claim was worth. A calculated choice to abandon arbitration after getting adverse rulings from the arbitrator certainly looks like forum shopping. And this type of behavior would surely be a factor the District Court could consider in deciding whether to sanction Acosta by entering a default judgment. At the same time, a party's good faith inability to afford the arbitration fees would be a factor properly considered to weigh against such a sanction. See Tillman v. Tillman, 825 F.3d 1069, 1074 (9th Cir. 2016) (finding that plaintiff's inability to pay arbitration fees was "not culpable and so does not merit a harsh penalty, particularly given the public policy favoring disposition of cases on their merits" (quotation omitted)). Here, we give it to the District Court to make the findings about how to proceed in the first instance.

Acosta also argues the District Court erred in awarding damages without holding an evidentiary hearing and in awarding costs. And anticipating that this Court might vacate the District Court's judgment, Acosta asks that we order the related cases to be consolidated. We decline the invitation. Because we conclude the District Court erred in entering a default judgment against Acosta based solely on Acosta's default in the underlying arbitration, we do not reach these other arguments. On remand, Acosta is free to seek consolidation in the District Court.

VACATED AND REMANDED.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-2279

KEVIN PETTWAY, JENNIFER WOLFE, NANCY MURREY-SETTLE, and FRED POPE,

Petitioners,

v.

CITY OF JACKSONVILLE, a Municipal Corporation, and SALEEBAS-2216 OAK STREET, LLC,

Respondents.

Petition for Writ of Mandamus—Original Jurisdiction.

August 10, 2018

ON MOTION FOR REHEARING AND CLARIFICATION*

PER CURIAM.

"Rendition" of an order, in legal parlance, is the triggering final event that starts the jurisdictional stopwatch for seeking appellate relief. In this case, at issue is whether the City Council of the Consolidated City of Jacksonville has the authority to determine the finality of the City's process for ordinances arising

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* We deny rehearing but grant clarification, substituting this opinion for our original opinion.

from its formal quasi-judicial proceedings, which in this case is a rezoning matter.

Kevin Pettway and others residing in his Riverside neighborhood ("Pettway") opposed the rezoning of nearby property to allow for a new restaurant, to be known as "The Roost." The property owner, "Saleebas-2216 Oak Street LLC" ("Saleebas"), filed rezoning applications that were reviewed first by the Jacksonville Planning and Development Department, which thereafter issued a report with conditions that was sent to the Jacksonville Planning Commission for review. A lengthy public hearing was held, after which the Commission issued its recommendation of approval.

Pursuant to the City's municipal code, Pettway requested a formal quasi-judicial hearing in front of the Land Use and Zoning Committee of the Jacksonville City Council, resulting in another lengthy hearing and ultimately the Committee's recommendation to approve the application. The final step was for the full nineteen-member City Council to consider the Committee's recommendation and to approve an ordinance allowing the rezoning, which it ultimately did on May 24, 2016.

That did not end the City's legislative process for this quasi-judicial matter. The City's rules on the topic—entitled "Final Order"—say that the type of ordinance at issue, involving "Formal Quasi-Judicial Procedures," must be executed by the Council President and Council Secretary and thereafter sent by certified mail to the "applicant and affected parties." JACKSONVILLE, FLA., PROCEDURES GOVERNING QUASI-JUDICIAL ACTIONS Ch. 6, Rule 6.310. According to Dr. Cheryl Brown, the City Council's Secretary, the ordinance was signed by the Council President and herself, after which it was provided to the Office of Legislative Services and made available for public review on May 25, 2016 (and posted online that day). The signed ordinance was then filed in the "Jacksonville ordinance book" by "Legislative Staff" on June 14, 2016. Finally, as City rules require, the "Legislative Staff mailed a certified copy of the enacted ordinance with a cover letter to all property owners within 350 feet" of the rezoned property on June 20, 2016.

Under City Rule 6.310, the "date of rendition of the order shall be the date of mailing" of the ordinance to the applicant and affected parties, thereby establishing the finality of the order on that date. For that reason, Pettway sought review of the ordinance by filing a petition for certiorari with the circuit court on July 20, 2016, the last day within the thirty-day jurisdictional window under Florida appellate rules. Fla. R. App. P. 9.100(c)(2). They were advised by the City Council's Secretary that June 20, 2016, was the date of rendition of the ordinance, and an attorney with the general counsel noted that, due to a delay in the certified mailings being sent, the timing of an appeal would be affected due to the City's rendition rule.

Saleebas moved to dismiss Pettway's petition, claiming it was untimely filed for two reasons, one of which related to a snafu in the circuit court clerk's office that resulted in Pettway's petition being docketed and date-stamped as filed initially on July 20, 2016, but later changed to July 25, 2016, due to the clerk rejecting the petition for lack of an appendix. Pettway's appendix was made a part of the petition that was filed, but the appellate rules require a separately filed appendix. Fla. R. App. P. 9.220(c). For this reason, Pettway's petition was put in a "Pending Queue" and not deemed filed until July 25, 2016, when the matter was straightened out. The clerk, however, had a ministerial duty to accept and file the petition when it was received on July 20, 2016, thereby making that date the correct one for purposes of calculating the time for Pettway to file his petition. *See State v. Johnson*, 139 So. 3d 968, 969 (Fla. 1st DCA 2014) (holding that notice of appeal was timely filed electronically, despite clerk of court placing it in "e-filing portal queue" for correction by filing party). The trial court dismissed Pettway's petition on other grounds, deeming whether it was filed on July 20th or 25th as moot. But, as Pettway points out, the legally correct date of filing was July 20th, when his petition was received by the clerk's office. This matters because Pettway's petition is untimely if deemed filed on the 25th, but—as discussed below—would be timely under City Rule 6.310.

As to the date of the ordinance's rendition, the trial court turned to Florida Rule of Appellate Procedure 9.020(i), which states that an "order is rendered when a signed, written order is

filed with the clerk of the lower tribunal" and concluded that "[i]n the case of a quasi-judicial proceeding, the filing of the ordinance at issue with a government clerk or the person '. . . *who most closely resembles a clerk in functions performed*' determines the date of 'rendition.'" (quoting *Presidents' Counsel of SD, Inc. v. Walton Cty.*, 36 So. 3d 764 (Fla. 1st DCA 2010)). The trial court agreed with Saleebas that rendition of the ordinance occurred on May 25, 2016, because the ordinance was "filed" on that date with "the City's Office of Legislative Services and available for public review on the City's website." The trial court specifically rejected the applicability of City Rule 6.310.

Pettway urges—and we agree—that City Rule 6.310 should be given effect. The City—which sides with Pettway on this procedural point—says that the date upon which certified mail is sent has always been the determinative date of finality for its quasi-judicial proceedings involving required notice to affected parties, such as those potentially impacted by a change in zoning. But it makes little sense for an earlier date of rendition—such as May 25, 2016, when the ordinance was sent to Legislative Services and made available on the City's website—because the applicant and affected parties aren't given actual notice at that time. Starting the thirty-day clock at that point would be premature; affected property owners could easily lose their right to contest final orders about which they are not notified via the certified mail process. In fact, an oversight in this case resulted in a delay in the dispatch of the certified notices until June 20th, which was almost a month after the ordinance had been sent to Legislative Services, creating a likelihood that the thirty-day jurisdictional window could lapse before recipients were notified. The certified letters should have been sent out within ten days, but either way, the date of the certified mailing would control. The applicant and some affected parties may know or become aware of an ordinance at an earlier time, of course, but the date of the certified mailings provides a termination point as well as a degree of predictability and regularity to the process. The City, which is a consolidated governmental body combining county and municipal functions under one roof, has uniform procedures adopted by its legislative branch, the City Council, designed to ensure orderly practices and an endpoint to the Council's actions.

The remaining question is whether giving effect to the City's "Final Order" rule can be harmonized with the Florida appellate rules. It can. Rendition requires three things: an order that is *signed*, *written*, and *filed* with the "clerk of the lower tribunal." Fla. R. App. P. 9.020(i). Under the City's "Final Order" rule, an ordinance arising from a quasi-judicial hearing is *reduced to writing* and then *signed* by the City Council President and Secretary. All that remains for the ordinance to be "rendered" is that it be *filed* in some way with a designated person who performs a clerk-like function. As counsel for Saleebas acknowledged, if the City's rules required that an ordinance be "filed" with the division chief of the City's Parks and Recreation Department, that choice governs and must be honored, even if it makes more sense for some other City official to play that role.

In this regard, the City's rule is simply another way of saying that the date of certified mailing serves the purpose of a "filing" date and thereby sets finality and rendition on that date (an event that becomes part of the ordinance file). The purpose of the word "rendition" in City Rule 6.310 is the same as the word "filed" in the appellate rules: each serves to define the final step that produces finality of the order (here, an ordinance). A more artful way would have been for the City's rule to say that "filing, and thereby rendition, shall be deemed to occur on the date of mailing," thereby more closely paralleling the wording of rule 9.020(i). The City has chosen a somewhat atypical, but nonetheless acceptable, means of establishing when its final quasi-judicial orders are deemed final. *See Kowch v. Bd. of Cty. Comm'rs*, 467 So. 2d 340, 341 (Fla. 5th DCA 1985) ("In the instant case we hold that the letter sent to the parties informing them of the Commissioners' decision constitutes a decision reduced to a writing as provided in Rule 9.020(g)."). Electronic service of orders to affected parties has become commonplace, and the City's certified mailings, though involving ground delivery, parallel that process.

Notably, the caselaw takes a pragmatic approach in deciding unanswered questions like the one presented. For example, courts have determined who most resembles the "clerk" for purposes of rule 9.020 under various circumstances. As this Court held in a county government case:

> Although the Department clerk's job title did not expressly identify her as the clerk and she also had other duties, the record establishes that she was the person in charge of such filings and that being the records clerk was a major part of her job responsibilities.

Presidents' Council of SD, Inc., 36 So. 3d at 765. Reviewing courts seek a reasonable resolution, one grounded in the realities of the record presented in each case. In that regard, the trial court here concluded that the Office of Legislative Services is the "clerk" for the purpose of the appellate rules. But the record suggests that the only person who closely resembles a "clerk" for the City is the Council Secretary whose affidavit and letter to Pettway made clear that City Rule 6.310 governs finality, and that June 20, 2016 was the operative date when the certified letters were sent to the applicant and nearby property owners. Under the circumstances presented, the important municipal goals of City Rule 6.310—ensuring finality of its quasi-judicial ordinances and timely notice to affected persons—can coexist with Florida's appellate rules.

In conclusion, we hold that the ordinance at issue was rendered and became final on June 20, 2016, pursuant to the City's "Final Order" rule, which can be squared with the appellate rules, such that mandamus is proper. *Griffin v. Sistuenck*, 816 So. 2d 600, 601 (Fla. 2002) (mandamus proper to reinstate case dismissed for lack of jurisdiction based on untimeliness). Because Pettway's petition was filed with the clerk of the circuit court within thirty days of the rendition of the ordinance, it was timely.

PETITION GRANTED; ORDER QUASHED.

MAKAR, OSTERHAUS, and WINOKUR, JJ., concur.

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

Bryan S. Gowdy of Creed and Gowdy, P.A., Jacksonville, and Barry A. Bobek of Barry A. Bobek, P.A., Jacksonville, for Petitioners.

Craig D. Feiser, Assistant General Counsel of the Office of General Counsel, Jacksonville, for Respondent City of Jacksonville; Paul M. Harden, Jacksonville, for Respondent Saleebas-2216 Oak Street, LLC.

Third District Court of Appeal

State of Florida

Opinion filed August 8, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1553
Lower Tribunal No. 13-5691

Francisco Pijuan, et al.,
Appellants,

vs.

Bank of America, N.A.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Eugene J. Fierro, Senior Judge.

Loan Lawyers, LLC, and Chase E. Jenkins (Fort Lauderdale), for appellants.

Liebler, Gonzalez & Portuondo, and Adam M. Topel, for appellee.

Before LAGOA, LOGUE and SCALES, JJ.

SCALES, J.

Appellants, defendants below, Francisco, Luisa, Francisco Jr. and Sonia Pijuan ("Pijuan")[1] appeal the final foreclosure judgment entered in favor of appellee, plaintiff below, Bank of America ("BOA"). After conducting a bench trial on BOA's foreclosure complaint, the trial court found that BOA's predecessor, Countrywide Home Loans, Inc., had entered into a loan modification agreement ("LMA") that constituted a novation of the original loan documents. Notwithstanding this finding (which BOA has not cross-appealed), the trial court entered a foreclosure judgment against Pijuan that failed to consider the effect of its novation finding on the foreclosure case pled and proven by BOA. We conclude that, under the facts of this case, once the trial court made the finding that the LMA replaced the original loan, then BOA could not prevail without having pled and proven a breach of the LMA.

I. Relevant Facts and Procedural Background

In December of 2006, Countrywide loaned Francisco and Luisa Pijuan $410,000. The loan was memorialized by an adjustable rate promissory note, and was secured by a mortgage encumbering Miami Beach real property owned by

[1] We refer to the four appellants collectively as Pijuan, while noting their different roles in the events underlying this litigation. All four of the Pijuans executed the mortgage; however, only Francisco and Luisa executed the note and LMA.

Pijuan. Pursuant to the terms of the note, Pijuan was required to make monthly principal and interest payments of $2,050.00 to Countrywide.

In March of 2009, Pijuan received a letter from Countrywide notifying Pijuan that Countrywide had approved a loan modification. In order for the modification to be valid, the LMA (enclosed with the letter) would need to be signed by Francisco and Luisa and returned to Countrywide. Pursuant to the LMA, Pijuan's monthly payment was adjusted down from $2,050.00 to $1,630.51, effective with the payment due on May 1, 2009. The LMA required compliance with all other covenants of the original documents not altered or amended by the LMA. The LMA did not alter or amend the condition precedent requirements of the mortgage's paragraph 22.[2]

Francisco and Luisa executed the LMA and, on or about March 12, 2009, mailed it to Countrywide. From approximately April 20, 2009, through October 13, 2010, Pijuan, consistent with the LMA's payment terms, made eighteen monthly payments of $1,630.51, totaling $29,349.36.

Sometime later in 2009, BOA assumed the Pijuan note and mortgage from Countrywide. Notwithstanding Pijuan's return of the executed LMA to BOA, and Pijuan's eighteen monthly payments made pursuant to the LMA's payment terms,

[2] Paragraph 22 of the December 2006 mortgage requires, as a condition precedent to acceleration and foreclosure, the mortgagee to provide notice to the mortgagor specifying, among other things, the specific default and cure amount.

BOA, on December 31, 2010, sent a default letter to Pijuan asserting a November 1, 2009 default date. In this default letter ("BOA's Notice"), BOA instructed Pijuan that BOA must receive a payment of $42,523.45 prior to January 31, 2011, in order to "cure" this asserted default. BOA's Notice did not mention the LMA, much less assert any default under the LMA. Consistent with BOA's Notice, in February 2013, BOA filed the instant suit alleging a default not of the LMA, but of the December 2006 note and mortgage. BOA's verified complaint identified November 1, 2009 as the default date "on the Mortgage Note and Mortgage." Paragraph 9 of BOA's complaint, which was denied by Pijuan, alleged that BOA had performed all conditions precedent to acceleration. As an affirmative defense to BOA's foreclosure action, Pijuan asserted that BOA did not perform a condition precedent because BOA failed to provide proper default notice as required by the mortgage. Pijuan also filed a motion for leave to add an additional affirmative defense specifically relating to the failure of BOA to acknowledge the existence of the LMA. While Pijuan's motion seeking leave to add this affirmative defense was not heard before trial, the issue of whether the LMA constituted a novation of the original loan was tried by the parties' consent.

The bench trial, conducted in May of 2016, focused almost exclusively on whether, by virtue of the March 2009 LMA and subsequent payments consistent therewith, the parties had modified the December 2006 loan documents. BOA

argued that, while it had received the executed LMA from Pijuan and credited Pijuan's account for Pijuan's payments made pursuant to the LMA, neither BOA nor Countrywide ever had approved the modification nor had either entity actually executed the document. BOA argued that the document therefore was ineffective.

At the end of the trial, the court specifically found, as a factual matter, that the parties had entered into the LMA in March of 2009, and that the LMA constituted a novation of the original December 2006 loan documents. The trial court, though, rejected Pijuan's counsel's argument that, upon finding a loan modification existed, BOA's foreclosure case should be dismissed under the authority of Kuehlman v. Bank of America, N.A., 177 So. 3d 1282, 1283 (Fla. 5th DCA 2015) (holding that when a loan is modified a lender can foreclose only by pleading and proving a breach of the modification agreement). Rather, despite no allegation by BOA of any breach of the LMA, nor any allegation or proof that BOA had complied with the conditions precedent for suing Pijuan under the LMA, the trial court found that Pijuan had breached the LMA, and entered the subject foreclosure judgment, simply crediting Pijuan with the $29,349.36 that Pijuan had paid pursuant to the LMA. It is from this judgment that Pijuan timely appeals.

II. Discussion

The trial court found that the LMA constituted a novation;[3] that is, the original loan documents had been modified by the subsequent LMA. This finding has not been challenged on cross appeal by BOA. We follow the persuasive precedent of our sister courts in holding that, when a loan modification agreement has been reached, a lender can foreclose only by both pleading and proving a breach of the modification agreement. Nowlin v. Nationstar Mortg., LLC, 193 So. 3d 1043, 1046 (Fla. 2d DCA 2016); Kuehlman, 177 So. 3d at 1283.

In this case, BOA pleaded a default under the December 2006 loan documents, and its trial proofs, including its evidence of compliance with all required contractual conditions precedent to acceleration and foreclosure, were based exclusively on Pijuan's alleged breach of the December 2006 loan documents. BOA vigorously contested the effectiveness of the LMA, and certainly never pleaded or attempted to prove a default thereunder; nor did BOA plead or prove that BOA had complied with the conditions precedent to sue Pijuan under the LMA.[4] Therefore, when the trial court concluded that the LMA constituted a novation, and that the LMA replaced the inconsistent provisions of the original note, BOA's

[3] A novation is a separate and new agreement, discharging an existing obligation and substituting a new one. See Ades v. Bank of Montreal, 542 So. 2d 1013, 1014 (Fla. 3d DCA 1989).

[4] Indeed, such proof would have undermined BOA's principal argument that the LMA was ineffective.

foreclosure case – premised entirely on BOA's allegations and proof that Pijuan breached the December 2006 loan documents, rather than the LMA – failed. Nowlin, 193 So. 3d at 1046.[5] As argued by Pijuan's counsel, upon finding that the LMA constituted a novation of the December 2006 loan documents, the trial court should have involuntarily dismissed BOA's case.

We reverse the trial court's final foreclosure judgment for BOA and remand with instructions to enter an involuntary dismissal of BOA's case.

Reversed and remanded, with instructions.

LAGOA, J., concurs.

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[5] Citing dialogue between Pijuan's counsel and the trial court, the dissent argues that, in trying the novation issue by consent, Pijuan necessarily (or impliedly) waived both (i) BOA's obligation to plead and prove compliance with all conditions precedent related to a breach of the LMA, and (ii) Pijuan's affirmative defense asserting that BOA did not provide proper default notice to Pijuan. Waiver is the voluntary and intentional relinquishment of a known right. Caraffa v. Carnival Corp., 34 So. 3d 127, 130 (Fla. 3d DCA 2010). The language of waiver must be clear and unequivocal. See, e.g., Rodriguez v. Ocean Bank, 208 So. 3d 221, 225 (Fla. 3d DCA 2016). From our review of the record, it does not appear that Pijuan, at any time, expressly or impliedly waived the requirement that BOA plead and prove compliance with conditions precedent. Indeed, in our view, the record reflects just the opposite: immediately after the trial court announced its novation determination, Pijuan's counsel argued that dismissal was required based on Kuehlman precisely because of BOA's default notice infirmities.

LOGUE, J. (dissenting)

I respectfully dissent. Although the trial court entered a final judgment of foreclosure after a full trial on the merits, the majority reverses because the Bank's complaint alleged only a default of the original loan—not a default of the loan modification. While the majority is correct that the Bank did not allege a default of the loan modification, it ignores the Borrowers' failure to raise the loan modification as an affirmative defense which, as explained below, was their burden.

More importantly, the majority's focus on the pleadings misses the point. The Bank and the Borrowers consented by word and act to try both the issue of whether a modification existed and whether the Borrowers had breached the modification. Indeed, it was the Borrowers who offered into evidence their payments under the loan modification and the fact that they stopped payments. The Borrowers' position at trial was that they were excused from making payments during the foreclosure litigation. Because the trial court rightly rejected that defense, the final judgment of foreclosure should be affirmed.

At the beginning of trial, the trial court asked both the Bank and the Borrowers to frame the issues to be tried. The parties agreed the focus of the trial should be whether there was a loan modification and whether there was a default under the loan modification. The following exchange took place:

> The Court: Okay. Counsel, do you see the issues—any other issues other than those raised?
>
> Bank's Counsel: I do not, Judge. In fact, I think the only real issue is going to be the application of payment on some alleged loan modification.
>
> Borrowers' Counsel: That's correct, Your Honor. I think that's the heart of the issue.

(Emphasis added.) At the end of the exchange, Borrowers' counsel again confirmed that the two issues to be tried concerned whether there was a modification and "how much was paid towards it and whether those payments were properly applied":

> The Court: So is the issue, as counsel framed it, a question of how much?
>
> Borrowers' Counsel: Whether there's a modification and how much was paid—how much was paid towards it and whether those payments were properly applied.

(Emphasis added.)

At trial, the Bank maintained there was no loan modification because the Bank never signed a modification contract. To prove the Bank agreed to the unsigned modification, the Borrowers presented evidence that they made eighteen payments from April 2009 to October 2010 in the amount specified in the loan modification and the Bank accepted those payments.

Without objection, the Borrowers also admitted to stopping payments after October 2010. They stopped payments because they believed they did not have to pay during the foreclosure litigation:

> The Court: Now, six years, no payments?
>
> Pijuan: Yes, sir.
>
> Court: No taxes?
>
> Pijuan: Nothing.
>
> The Court: No insurance?
>
> Pijuan: Nothing.
>
> . . . .
>
> The Court: I want to know why you sat there for six years with no payment living there, no taxes, no insurance.
>
> Pijuan: Well, I was told that, you know, that's how it was going to—you know, they were going to be paying everything for now until the case was resolved.

Based on this unobjected-to testimony, the trial court noted that "there's two wrongs here," and "this is not good for either of you." He ruled against the Bank and found that a loan modification existed, pointing to the Bank's acceptance of eighteen payments in the amount of the loan modification. He then found the Borrowers had defaulted under the loan modification based upon their own admission. The court then entered a final judgment of foreclosure that fully credited the Borrowers for all payments made under the original loan and the loan modification.

If the parties had not tried by consent the issue of the loan modification, the judgment of foreclosure would still be proper. The Borrowers' main defense was the loan modification, but they never raised it as an affirmative defense.[6] It was the Borrowers' "burden to plead the existence of a modification or forbearance agreement as an affirmative defense." Rouffe v. CitiMortgage, Inc., 241 So. 3d 870, 873 (Fla. 4th DCA 2018). Since they failed to raise the loan modification as an affirmative defense, they technically waived it. Bank of New York Mellon for Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2005-BC5 v. Bloedel, 236 So. 3d 1164, 1167 (Fla. 2d DCA 2018) ("The effect of a modification to a legal agreement, to the extent it would constitute an avoidance of all or part of a defendant's liability under the agreement, is an affirmative defense that must be pled and proven by the defendant.").

The Borrowers are saved from their technical waiver of the defense of a modification; but only because the issue of the modification was tried by consent. "The essence of the broad test generally applied to determine whether an issue has been tried by implied consent is whether the party opposing introduction of the issue into the case would be unfairly prejudiced thereby." Smith v. Mogelvang, 432 So.

[6] While Pijuan filed a motion for leave to add an additional affirmative defense relating to the Bank's failure to acknowledge the parties' loan modification agreement, that motion was never heard and never ruled upon.

2d 119, 122 (Fla. 2d DCA 1983). The Borrowers were not only on notice of the issues relating to the loan modification (it was their main defense), they expressly agreed to try these issues and provided the evidence of the payments and default under the loan modification. They cannot now be heard to argue the issues were not raised in the pleadings. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fla. R. Civ. P. 1.190(b).

These facts bring this case out of the ambit of the cases relied upon by the majority. In Nowlin v. Nationstar Mortgage, LLC, 193 So. 3d 1043 (Fla. 2d DCA 2016), the borrowers raised the modification as an affirmative defense and denied breaching the modification. In Kuehlman v. Bank of America, N.A., 177 So. 3d 1282, 1283 (Fla. 5th DCA 2015) the Fifth District expressly held the breach of the loan modification was not tried by consent.

Accordingly, the final judgment should be affirmed.

Third District Court of Appeal

State of Florida

Opinion filed August 8, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2549
Lower Tribunal No. 15-9251

Benedetto Dimitri,
Appellant,

vs.

Commercial Center of Miami Master Association, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge.

David B. Israel (Davie), for appellant.

Dieguez & Associates, LLC and Anthony Dieguez; Thais Hernandez, for appellee.

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

LUCK, J.

We are faced, again, with an issue that has vexed the Florida Supreme Court, this court, and our sister district courts: is the master association of a

development made up of smaller sub-associations a condominium "association" subject to the requirements of Florida Statutes chapter 718. See Heron at Destin W. Beach & Bay Resort Condo. Ass'n, Inc. v. Osprey at Destin W. Beach, 94 So. 3d 623, 630 n.* (Fla. 1st DCA 2012) ("Whether a master association is controlled by chapter 718 is an admittedly confusing area of law."); Downey v. Jungle Den Villas Recreation Ass'n, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988); Siegel v. Div. of Fla. Land Sales & Condos., Dep't of Bus. Regulation, 453 So. 2d 414 (Fla. 3d DCA 1984), quashed, 479 So. 2d 112 (Fla. 1985); Raines v. Palm Beach Leisureville Cmty. Ass'n, Inc., 413 So. 2d 30 (Fla. 1982). Because we agree with the trial court that the master association in this case is not a condominium "association" as defined by the legislature in 1982 when it was incorporated, and a later amendment to the definition does not apply retroactively, we affirm the summary judgment in favor of the master association.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Commercial Center of Miami Master Association was formed in 1982 under the recorded "Declaration of Covenants, Restrictions and Easements for The Commercial Center of Miami." Its articles of incorporation state it was created as a "corporation not for profit under Chapter 617." Commercial Center operates as a master association for a group of buildings, each with its own sub-association.

Benedetto Dimitri owns six commercial condominium units located in one of the sub-associations.

On March 30, 2015, Dimitri sent the master association a letter requesting the inspection and production of specific documents pursuant to section 718.111(12).[1] Months later, Dimitri filed the operative complaint seeking declaratory and injunctive relief (counts one and two) and damages (count three). Dimitri alleged that the master association violated section 718.111(12) when it refused to respond to his request for association documents. He requested the trial court enter an order determining that the master association was subject to chapter 718 – the state's condominium association statute – and requiring it to "cease and desist from further acts of violation of Section 718.111(12)." In response, the master association asserted that it was not a condominium association subject to the disclosure requirements of chapter 718.

Both parties filed motions for summary judgment with the trial court. After a hearing, the trial court reached two conclusions: (1) the current definition of condominium "association," which was last amended in 1991, did not apply retroactively; and (2) based on the definition that applied when the master

[1] Section 718.111(12) provides, in part, that an association maintain its official records and that the records be available for inspection or copying by an association member. Access to the records must be provided within ten working days of receipt of the request and "[a] unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply." § 718.111(12)(c), Fla. Stat. (2014).

association was formed, the master association was not a condominium "association" subject to chapter 718. This appeal followed.

STANDARD OF REVIEW

"A trial court's final summary judgment is subject to a de novo review when it is based upon a conclusion of law." Dominguez v. Hayward Indus., Inc., 201 So. 3d 100, 101 (Fla. 3d DCA 2015). "The question of whether a statute applies retroactively or prospectively is a pure question of law; thus, our standard of review is de novo." Bionetics Corp. v. Kenniasty, 69 So. 3d 943, 947 (Fla. 2011)

DISCUSSION

There have been two definitions of condominium "association" in the last forty years. In 1982, when the master association was incorporated and the declaration was executed, a condominium "association" was "the corporate entity responsible for the operation of a condominium." § 718.103(2), Fla. Stat. (1981). In 1991, the legislature amended the definition of condominium "association" in section 718.103(2) to mean,

> in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.

Ch. 91-103, § 1, Laws of Fla. As the trial court found, there was no genuine dispute that if the 1991 definition applied retroactively, then the master association

would be a condominium "association" and subject to the chapter 718 disclosure requirements.

Dimitri contends that the 1991 definition applies retroactively to the master association declaration, and even if it doesn't, the master association still is a condominium "association" under the 1982 definition. The master association responds that the 1991 definition does not apply retroactively, and it is not a condominium "association" under the plain language of the 1982 definition. We address both issues – which definition applies, and whether the master association is a condominium "association" under the applicable definition – below.

Which Definition of Condominium
"Association" Applies: 1982 or 1991?

An association declaration is a contract, see Cohn v. Grand Condo. Ass'n, Inc., 62 So. 3d 1120, 1121 (Fla. 2011) ("A declaration of condominium possesses attributes of a covenant running with the land and operates as a contract among unit owners and the association, spelling out mutual rights and obligations of the parties thereto." (quotations omitted)), and normally, the statutes in effect at the time a contract is executed govern substantive issues arising in connection with that contract,[2] see Sans Souci v. Div. of Fla. Land Sales & Condos., Dep't of Bus.

[2] As the trial court correctly noted, later amendments to chapter 718 may alter the rights and duties of the parties to an existing declaration if the declaration specifically incorporates these amendments. See, e.g., Kaufman v. Shere, 347 So. 2d 627, 628 (Fla. 3d DCA 1977) ("[T]he provisions of the Condominium Act as presently existing, or as it may be amended from time to time, including the

Regulation, 421 So. 2d 623, 628 (Fla. 1st DCA 1982) ("Thus, the law on the date of filing of the [declaration and master lease] engrafts the law of Florida into the documents, as if it were expressly stated in the documents."), cited in Cohn, 62 So. 3d at 1122; see also Shavers v. Duval Cty., 73 So. 2d 684, 689 (Fla. 1954) ("It has long been firmly established that the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein."); Fla. Beverage Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Reg., 503 So. 2d 396, 398 (Fla. 1st DCA 1987) ("The laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it."). There are times, however, that the legislature intends for a new statute to be applied retroactively to contracts entered into prior to the enactment of the statute. See Menendez v. Progressive Exp. Ins. Co., 35 So. 3d 873, 876 (Fla. 2010) ("The dispositive issue before this Court is whether section 627.736(11), Florida Statutes (2001), can be applied retroactively to an insurance policy issued prior to the enactment of the statute."). Dimitri

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definitions therein contained, are adopted and included herein by express reference"). The master association declaration in this case does not contain a provision incorporating later amendments to the state condominium statute.

contends that the 1991 definition of condominium "association" should be applied retroactively to the master association declaration.

The Florida Supreme Court uses "a two-prong test" to determine whether a statute should be applied retroactively to an existing contract. Id. at 877. "First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles." Id.

Under the first prong, we look to the terms of the statute to determine legislative intent as to retroactivity. Biometics, 69 So. 3d at 949. In Biometics, the Florida Supreme Court looked to the effective date of the enacting legislation to determine if there was a clear intent for the statute to apply retroactively. Id. There, "the enacting legislation simply provide[d] that '[t]his act shall take effect July 1, 2002." Id. (quoting Ch. 02-77, § 2, at 909, Laws of Fla.) (second alteration in original). "Due to the lack of evidence of legislative intent to apply the statute retroactively," the Court said, "we conclude that the [new statute] applies prospectively." Id. Because the legislature did not express an intent to apply the new statute retroactively, the Court explained it "need not consider the second interrelated inquiry as to whether retroactive application [was] constitutionally permissible." Id.

Looking to the effective date of the 1991 definition for condominium "association," here too the legislature said that it "shall take effect January 1, 1992," six months after the act was signed by the governor. Ch. 91-103, § 28, Laws of Fla. ("Except as otherwise provided herein this act shall take effect January 1, 1992."). Indeed, other sections of the same new law took effect earlier, but the legislature decided to have the new definition of condominium "association" apply later. Compare id., with id. § 27 ("Effective upon becoming a law, there is hereby appropriated . . . ."). Just as in Biometic, having the new definition take effect months in the future is not a clear expression of the legislature's intent to have it apply retroactively. Without an express intent to have the statute apply retroactively, we need not reach the second prong of the retroactivity test.

Is the Master Association a
Condominium "Association" Under the 1982 Definition?

Having concluded that the 1991 definition of condominium "association" does not retroactively apply to the master association declaration, we next decide whether the master association was a condominium "association" under the 1982 definition. Dimitri argues that it is.

As we noted above, condominium "association" was defined in 1982 as "the corporate entity responsible for operation of the condominium." § 718.103(2), Fla. Stat. (1981). "[O]peration of the condominium" is a term of art, defined as "the

administration and management of the condominium property." Id. § 718.103(15). And "condominium property" is "the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connect with the condominium." Id. § 718.103(11).

Reviewing the master association declaration in this case, the master association does not administer and manage property subject to condominium ownership. The building sub-associations have the duty "to maintain, repair, replace and restore the Unit Property and all Buildings located thereon as may be subject to their respective control or jurisdiction in a neat, sanitary and attractive condition." The master association is instead responsible to "maintain, or provide for the maintenance" of all common property not owned and controlled by the sub-associations within the larger development, such as the private streets and landscaping. Because it does not administer and manage condominium property, the master association cannot be a condominium "association" under the 1981 definition.

The Florida Supreme Court reached the same conclusion under similar facts in Siegel. There, as here, there were four buildings in a larger property, each with its own sub-association. Id. at 113. Each sub-association "operate[d] the building and its 'common elements,' consisting of parking lots, terraces, recreational

amenities, a swimming pool, balconies, and air conditioning equipment." Id. The master homeowners' association for the entire development "operate[d] the 'common properties,' which include[d] a health spa, marina, restaurant, and tennis courts," and had "the power to assess for the expenses of these properties." Id. The department of business regulation found that the master homeowners' association was not a condominium "association" subject to the requirements of chapter 718 because it was "not the entity responsible for the operation of any condominium property." Id. at 114. The building sub-associations instead had "the duty to maintain the condominium property at its sole cost and expense." Id. The Court agreed with the department that the "homeowners' association [was] not a condominium association under the provisions of chapter 718" because it had "the authority to impose assessments upon properties that [were] not condominium property within the meaning of chapter 718." Id.

Here, as in Siegel, the master association was responsible for common properties that were not owned and controlled by the individual sub-associations. The master association had the authority to impose assessments only for the maintenance and administration of these common properties, and could not assess the sub-association's property. The pre-1991 version of "chapter 718 reveals no legislative intent to include this type of community 'management association' within its scope." Id. (quotation omitted); see also Raines, 413 So. 2d at 32

("Although the association has broad powers, it is not 'the corporate entity responsible for the operation of a condominium.' The individual condominium associations fit within this definition, but the respondent association does not." (citation omitted)).

Dimitri responds that despite this plain reading of the 1981 definition, we should use instead the "constituency" and "function" tests to determine whether the master association is a condominium "association" subject to chapter 718. The constituency test asks whether "the Association's membership is comprised of only condominium units owners, and only condominium unit owner have rights in the property administered by the Association." Siegel, 453 So. 2d at 417. The function test asks "whether the entity operated a condominium or has sufficient powers that constitute condominium operation." Id. (footnote omitted).

We decline Dimitri's invitation for two reasons. First, the Florida Supreme Court did not find the tests to be persuasive or helpful in Siegel. In that case, our court applied the constituency and function tests to reverse the department of business regulation's decision that the master homeowners' association was not a condominium "association" as defined by section 718.103(2). Id. at 420 ("Applying, appropriately, both the constituency test advanced by appellant, and the function test embraced by appellees, we conclude that the Homeowners' Association is a condominium 'association' within the meaning of Section

718.103(2), subject to ultimate control by unit owners in accordance with Section 718.301."). The Florida Supreme Court quashed our decision, and applied the same 1982 version of the statute to "find that this homeowners' association [was] not 'the corporate entity responsible for the operation of the condominium.'" Siegel, 479 So. 2d at 114 (quoting § 718.103(2), Fla. Stat. (1979)). The Court did not use the constituency and function tests to analyze whether the master homeowners' association was a condominium "association," and it did not distinguish our court's application of these tests. The Court didn't even mention the constituency and function tests on its way to quashing our decision and approving the ruling of the department that the master homeowners' association was a condominium "association."

Second, the constituency and function tests are administrative interpretations of section 718.103(2) adopted by the department of business regulation. See Siegel, 453 So. 2d at 420 ("Appellant contends that whether any master association is in fact a statutorily controlled condominium association is determined by examining the Homeowners' Association's constituency, relying on the Division's declaratory statements . . . . The Division counters that . . . [t]he litmus test . . . is not a constituency test but a function test, i.e., whether the entity operates a condominium or has sufficient powers that constitute condominium operation."). Where statutory language is plain and unambiguous, as it is here, the Florida

Supreme Court has said we need not give agency interpretations the usual level of deference.[3] See GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007) ("[I]f the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute. However, when a statutory term is subject to varying interpretations and that statute has been interpreted by the executive agency charged with enforcing the statute, this Court follows a deferential principle of statutory construction . . . ."); Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1153 (Fla. 2000) ("We recognize the general rule that the interpretation of a statute by the administrative agency or body charged with its enforcement is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute. However, because we conclude that the term 'marital status' is not ambiguous, either by itself or in conjunction with the other provisions within the Civil Rights Act, we are less constrained to accept the Commission's interpretation of the statute." (quotation omitted)); Fla. Dep't of Educ. v. Cooper, 858 So. 2d 394, 396 (Fla. 1st DCA 2003) ("First, the court must look to the plain language of the statute. Where the language is clear and unambiguous, it must be given its plain and ordinary meaning. . . . [I]f the

[3] This is consistent with federal administrative agency principles. The federal courts "do not apply Chevron deference . . . when a statutory command of Congress is unambiguous . . . . Where the statutory language is clear, agency regulations have no effect." Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1320 (11th Cir. 2011).

statutory language is ambiguous, the interpretation given the statute by the agency charged with its enforcement is entitled to great deference and should not be overturned unless it is clearly erroneous." (citations omitted)).

CONCLUSION

We conclude that the 1991 amendment to the definition of section 718.103(2) does not apply retroactively to the master association declaration executed in 1982; the master association is not a condominium "association" under the 1982 version of section 718.103(2); and, therefore, the master association is not subject to the disclosure requirements of chapter 718. We affirm the summary judgment in favor of the master association.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed August 8, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-529
Lower Tribunal No. 16-11280

Masoud Jahangiri and Leyli Jahangiri, individually and as members of La Bottega on the Bay, LLC,
Appellants,

vs.

1830 North Bayshore, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

Fischer Redavid PLLC and Jordan Redavid, for appellants.

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

Before ROTHENBERG, C.J., and FERNANDEZ and LUCK, JJ.

LUCK, J.

"Man is an animal that makes bargains: no other animal does this – no dog exchanges bones with another." Adam Smith & Edwin Cannan, The Wealth of

Nations, New York, N.Y: Bantam Classic (2003). If the individuals making bargains require the assistance of the courts in enforcing them, however, they must present the court with a definite and certain agreement. The Jahangiris – renters of a market and deli in Miami – have failed to do this and for that reason we affirm the trial court's summary judgment in favor of the landlord, 1830 North Bayshore, LLC.

Factual Background and Procedural History

La Bottega on the Bay, LLC, through its principals, Massoud Jahangiri and Leyli Jahangiri, entered into a written lease for commercial property located at 1800 N. Bayshore Drive, Suite CP-2, Miami, Florida. The space was to be used as a market and deli. The lease was for five years ending on May 31, 2016. The rental rate for the initial term was $5,500 for the first two years, and $6,000 for the remaining three years. Section twenty-seven of the lease read:

> **RENEWAL OPTIONS:** Upon six months notice and provided [lessee] is not in default of any provision of this Lease, LESSOR agrees that [lessee] may renew this Lease for two five-year renewal options, each renewal at the then prevailing market rate for comparable commercial office properties.

Throughout the initial five-year term, the lessee timely paid its rent and was otherwise in compliance with the terms of the lease. Beginning in November of 2015, via letters and electronic mail, the lessee notified the landlord[1] of its intent to

[1] Ownership of the property was ultimately transferred during the rental period to appellee, 1830 North Bayshore, LLC.

exercise the first of the two-renewal terms. The landlord refused to renew the lease. The lessee filed this lawsuit seeking a declaration it properly invoked the renewal clause in the lease, and an injunction prohibiting the landlord from evicting the lessee from the property.

Following amendments and cross-pleadings, the landlord moved for summary judgment contending the renewal provision was unenforceable because it failed to state an essential term, i.e., the amount of rent to be paid upon renewal. The lessee opposed the motion arguing that the renewal provision was enforceable because it provided a method for arriving at the renewal rental amount. The trial court found the renewal provision to be "too indefinite" and "legally unenforceable." It ordered appellants to vacate the premises, but stayed the order pending appeal on the condition that appellants pay double the rent in the interim.

Standard of Review

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. As such, our standard of review is de novo. Generally, interpretation of a document is a question of law rather than of fact." Bucacci v. Boutin, 933 So. 2d 580, 582-83 (Fla. 3d DCA 2006) (citations omitted).

Discussion

"[T]he amount of rental is an essential element of a lease, if not the basis for a lease, and an agreement to make a lease, or to renew or extend a lease, that fails to specify either the amount of the rental or a definite procedure to be followed to establish the amount of the rental, is too indefinite to be legally binding and enforceable." Edgewater Enters., Inc. v. Holler, 426 So. 2d 980, 983 (Fla. 5th DCA 1982) (footnotes omitted); see also LaFountain v. Estate of Kelly, 732 So. 2d 503, 505 (Fla. 1st DCA 1999) (same). The issue here is whether "renewal at the then prevailing market rate for comparable commercial office properties," as provided in this lease, is a definite procedure to be followed to establish the amount of rent. If it is, as the lessee contends, then it is an enforceable renewal provision (and we must reverse the trial court's judgment). If it is not a definite procedure, as the landlord contends, then it is too indefinite to be legally binding (and we must affirm).

Three Florida cases guide our analysis. Edgewater, first, set out the rule for renewal provisions. There, the lease could be renewed under the following terms:

> RENEWAL OF LEASE
>
> 16. Tenant shall have the option to take a renewal lease of the demised premises for the further term of three (3) years from and after the expiration of the term herein granted at a monthly rental to be arbitrated, negotiated and determined among the parties to this lease at said time.

Edgewater, 426 So. 2d at 981. At the end of the initial term of the lease, the lessee notified the landlord that it was exercising the option to renew. Id. The negotiations, however, "as to the rental to be paid during the rental period were unsuccessful." Id. The lessee sought a declaration "to have the trial court determine a reasonable rental for the renewal period and to specifically enforce the renewal provision." Id. The issue, as here, was "whether [the] renewal provision in a lease, which specifies the length of the term of the renewal but leaves the amount of the monthly rental during the renewal period to be negotiated, [was] sufficiently definite to be legally enforceable." Id.

The Fifth District Court of Appeal set out the split of authority. Id. "Some jurisdictions," the court said, "reason that the renewal option is for the benefit of the lessee for which he gave consideration; that the parties intended the clause to have some meaning; that the lessee should not be deprived of his right to specifically enforce the contract; and therefore, if the parties cannot agree upon a rent figure, that the court has authority to determine a 'reasonable rent' and specifically enforce the contract." Id. at 981-82 (footnote omitted). Other jurisdictions reason "that rent is an essential element to be agreed upon in the future; therefore, when the parties cannot subsequently agree, an essential element is missing and since the parties have not agreed upon a method for solving this

impasse, the contract is indefinite as to an essential term and is unenforceable." Id. at 982.[2]

The Fifth District adopted the second view as consistent with Florida law because "when contracting parties do not agree on an essential provision there is no 'meeting of the minds' that is the essence of a contract, and in that situation it is

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[2] As support for the rule it ultimately adopted that indefinite renewal clauses are unenforceable, the Edgewater decision followed this quote with a footnote citing to twenty-five out-of-state decisions:

> Jurisdictions that have held such clauses indefinite and unenforceable are: George Y. Worthington & Son Mgmt. Corp. v. Levy, 204 A.2d 334 (D.C.1964); Lutterloh v. Patterson, 211 Ark. 814, 202 S.W.2d 767 (1947); Beasley v. Boren, 210 Ark. 608, 197 S.W.2d 287 (1946); Candler v. Smyth, 168 Ga. 276, 147 S.E. 552 (1929); Streit v. Fay, 230 Ill. 319, 82 N.E. 648 (1907); State v. Jordan, 247 Ind. 361, 215 N.E.2d 32 (1966); Puetz v. Cozmas, 237 Ind. 500, 147 N.E.2d 227 (1958); Beal v. Dill, 173 Kan. 879, 252 P.2d 931 (1953); Walker v. Keith, 382 S.W.2d 198 (Ky.1964); Metcalf Auto Co. v. Norton, 119 Me. 103, 109 A. 384 (1920); Giglio v. Saia, 140 Miss. 769, 106 So. 513 (1926); State ex rel Johnson v. Blair, 351 Mo. 1072, 174 S.W.2d 851 (1943); Rosenberg v. Gas Service Co., 363 S.W.2d 20 (Mo. App. 1962); Sammis v. Huntington, 104 Misc. 7, 171 N.Y.S. 965, aff'd., 186 App.Div. 463, 174 N.Y.S. 610 (1918); Young v. Sweet, 266 N.C. 623, 146 S.E.2d 669 (1966); R.J. Reynolds Co. v. Logan, 216 N.C. 26, 3 S.E.2d 280 (1939); Jamison v. Lindblom, 92 Ohio App. 324, 49 Ohio Ops 379, 110 N.E.2d 9 (1951); Karamanos v. Hamm, 267 Or. 1, 513 P.2d 761 (1973); Slayter v. Pasley, 199 Or. 616, 264 P.2d 444 (1953); Vartabedian v. Peerless Wrench Co., 46 R.I. 472, 129 A. 239 (1925); Schlusselberg v. Rubin, 465 S.W.2d 226 (Tex.Civ.App.1971); Salem Lodge v. Smith, 94 W.Va. 718, 120 S.E. 895 (1924); Batavian Nat'l. Bank v. S & H, Inc., 3 Wis.2d 565, 89 N.W.2d 309 (1958); Leider v. Schmidt, 260 Wis. 273, 50 N.W.2d 233 (1951); Ratcliff v. Aspros, 254 Wis. 126, 35 N.W.2d 217 (1948).

Edgewater, 426 So. 2d at 982 n.5.

not the province of the court to make the contract or to supply material terms or provisions omitted by the parties." Id. Because "the amount of rental is an essential element of a lease," the renewal provision must include one of two things: "either [1] the amount of the rental or [2] a definite procedure to be followed to establish the amount of the rental." Id. at 983.

We and our sister court have applied the Edgewater rule in Lubal Development Co. v. Farm Stores, Inc., 458 So. 2d 781 (Fla. 3d DCA 1984) and LaFountain. In Lubal, the lease provided "for negotiation and agreement between the parties at the time of the extension, or, in the event the parties could not agree on a new rental price, that [lessee] would be given the right of first refusal of any bona fide offer received by the landlord." Id. at 782. When the parties couldn't negotiate the rent for the extension, and the landlord "refused to offer the property for rent so that [the lessee] could exercise its right of first refusal as provided for in the lease," the lessee sought declaratory relief. Id. We agreed that the renewal provision was "valid and enforceable" because

> while there was no price term specified in the extension provision itself, there was a method provided by which a rental price could be established in the event the parties could not reach an agreement. The right of first refusal provision would allow the parties to ascertain the fair rental value of the property and thereafter to make a decision based on the offers (if any) received by the landlord. With this requisite in the lease, the extension provision, which otherwise would be void for indefiniteness, becomes valid and enforceable.

Id. (footnote omitted).

The lease in LaFountain, on the other hand, provided that:

> The Lessor grants to the Lessee the option to renew said lease for two additional periods of five (5) years each, provided written notice of the intent to exercise the option is given at lease [sic] ninety (90) days before the expiration of the original term. In the event Lessee exercises its option to renew, the lease payment for the renewal period will be negotiated between the parties.

LaFountain, 732 So. 2d at 504. After the parties couldn't reach agreement on the rent amount, the lessee sued for breach of contract. Relying on Edgewater, the First District Court of Appeal agreed that the "will-be-negotiated" language was too indefinite to be legally binding. Id. at 505. "The renewal option . . . did not specify the rental amount or a method for reaching agreement on the rent, and the option was thus unenforceable once the parties failed to agree to an essential element of the lease." Id.

We find the renewal provision here – "renewal at the then prevailing market rate for comparable commercial office properties" – more like the indefinite procedure in LaFountain than the definite one in Lubal. Where the lease does not provide for the amount of renewal rent, the procedure for determining rent has to be definite enough, without further negotiation or litigation on the methodology used, to fix the rent with certainty. That is the kind of definite procedure we approved in Lubal. There, the procedure – which gave the lessee the right of first refusal on an actual offer – did not require the parties and the court to fill in any blanks on how to calculate the amount of rent. The amount was easily determined

and readily calculable once an offer was made on the property. The third-party offer was the new rent. There was no more information that the parties needed to fix the amount.[3]

Here, by contrast, there is still more for the parties to decide before the rent could be fixed with certainty. Who is responsible for obtaining the "comparables"? Must the lessor or the lessee provide the comparables? May the other party object and who will resolve any such objections? There are also issues as to the validity of the comparables. What factors are to be considered in determining that another property is truly comparable? Is it the square footage of the space, its location, its condition, its use, or must other factors also be considered? And what is the "prevailing market rate"? Is it the mean, medium, or mode of the three comparable commercial properties? Is it the highest or lowest price of the comparables? Is it the comparable sales rate or the rental rate that sets the "market"?

All of these issues demonstrate that the method provided by the parties here is not a sufficiently definite procedure for calculating the rent. There are too many

[3] Other examples of definite procedures include fixed percentage increases and increases based on the federal Consumer Price Index. See, e.g., 4A Fla. Jur. Forms Legal & Bus. § 16A:331 ("During each Renewal Period, the Base Rent shall be adjusted by increasing the Base Rent of the last Lease Year of the Lease Term by an amount equal to the percentage increase in the CPI between the first and last month of the Lease Term on the extended Lease Term…. During each Lease Year of the extended Lease Term, the annual Renewal Base Rent shall be increased by *[percentage]*% over the previous year's Renewal Base Rent.").

open questions about the method for determining rent that are subject to future negotiations by the parties or have to be decided by the courts. Where renewal rent can only be determined after future negotiations between the parties, or litigation, the procedure is not definite enough for there to have been a meeting of the minds on that essential term in the lease.[4]

While the Florida courts have not considered a provision similar to this one, we find persuasive the cases relied on by Edgewater, and especially Walker v. Keith, 382 S.W.2d 198 (Ky. 1964). There, like here, the lease renewal option provided:

> rental will be fixed in such amount as shall actually be agreed upon by the lessors and the lessee with the monthly rental fixed on the comparative basis of rental values as of the date of the renewal with rental values at this time reflected by the comparative business conditions of the two periods.

Id. at 199. The Kentucky court found this provision too indefinite.

> The majority of cases, passing upon the question of whether a renewal option providing that the future rent shall be dependent upon or

[4] That is not to say the trial courts are incapable of determining the fair value of property where valuation is an issue. We're sure that it could after hearing from competing experts, reviewing valuation models, and looking at real estate data about similar properties in the area. But that is the point. The Edgewater rule says rent is an essential term that should not be filled in by the courts where the parties have not been sufficiently definite in the lease. The renewal provision must be specific enough so that there are no disputes about what information is needed to determine the amount of rent. The determination should flow from the procedure in the lease without having to negotiate or fight about competing methodologies for determining fair market value that are subject to negotiation or court intervention.

> proportionate to the valuation of the property at the time of renewal, hold that such provision is not sufficiently certain to constitute an enforceable agreement. The valuation of property and the ascertainment of 'comparative business conditions,' which we have under consideration, involve similar uncertainties.
>
> . . . .
>
> If 'comparative business conditions' afforded sufficient certainty, we might possibly surmount the obstacle of the unenforceable agreement to agree. This term, however is very broad indeed. Did the parties have in mind local conditions, national conditions, or conditions affecting the lessee's particular business?
>
> That a controversy, rather than a mutual agreement, exists on this very question is established in this case. One of the substantial issues on appeal is whether the Chancellor properly admitted in evidence the consumer price index of the United States Labor Department. At the trial the lessor was attempting to prove the change in local conditions and the lessee sought to prove changes in national conditions. Their minds to this day have never met on a criterion to determine the rent. It is pure fiction to say the court, in deciding upon some figure, is enforcing something the parties agreed to.
>
> . . . .
>
> The renewal provision before us was fatally defective in failing to specify either an agreed rental or an agreed method by which it could be fixed with certainty. Because of the lack of agreement, the lessee's option right was illusory.

Id. at 203-04 (citations omitted); see also 1651 North Collins Corp. v. Laboratory Corporation of America, 529 Fed. Appx. 628, 629 (6th Cir. 2013) (finding unenforceable and indefinite provision that renewal "rental for each option period shall be the then market rent for similar space in the Louisville area, but not less than the immediately preceding five-year period").

Here, as in Walker, there are too many open questions about "prevailing market rate[s]" and "comparable" properties for us to conclude that there was a

meeting of the minds on rent. (The parties can't even agree on the criteria for calculating market rent.) Like the right of first refusal in Lubal, the method for determining rent has to be sufficiently definite that the amount could be fixed with certainty without resorting to further negotiations or litigation to resolve open questions in the methodology. This one was not, and we have "no right to write a contract for parties where none exists." Belitz v. Riebe, 495 So. 2d 775, 777 (Fla. 5th DCA 1986); see also Fed. Home Loan Mortg. Corp. v. Beekman, 174 So. 3d 472, 476 (Fla. 4th DCA 2015).

CONCLUSION

We, therefore, agree with the trial court that section twenty-seven was not a valid and enforceable renewal provision. We affirm the trial court's judgment for the landlord.

Affirmed.

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

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

BANKERS LENDING COMPANY, LLC,

Appellant,

v. Case No. 5D17-542

ANGELA JACOBSON A/K/A
ANGELA J. JACOBSON A/K/A
ANGELA COOK, ROYALS PORTFOLIO, LLC,
DUN MAR CORPORATION A/K/A DUNMAR
CORPORATION, DUNBAR ESTATES
HOMEOWNERS ASSOCIATION, INC.,

Appellees.
_____/

Opinion filed August 10, 2018

Appeal from the Circuit Court
for Seminole County,
Michael J. Rudisill, Judge.

Victor Kline, Amanda L. Chapman and Edmund O. Loos, III, of Greenspoon Marder, PA, Orlando, for Appellant.

Jamie Billotte Moses, Suzanne E. Gilbert and Edward M. Fitzgerald, of Holland & Knight LLP, Orlando, for Appellee, Royals Portfolio, LLC.

No Appearance for other Appellees.

PER CURIAM.

Bankers Lending Company, LLC appeals the summary final judgment of foreclosure entered in favor of Pennymac Holdings, LLC, owner and holder of the first

mortgage, and the underlying order allowing Bankers, a junior mortgagee on a portion of the property, to redeem the mortgage as to the entire property, but prohibiting it from foreclosing on the remainder of the property owned by Royals Portfolio, LLC. Bankers argues the trial court erred when it limited the scope of its equitable subrogation claim. We agree and reverse.

The facts are undisputed. Pennymac was the holder of a promissory note and mortgage executed by Angela Jacobson and her deceased husband in the original amount of $505,085 for the purchase of approximately ten contiguous acres in Seminole County, Florida. The Jacobsons defaulted on the loan in 2010.

Sometime thereafter, Royals domesticated a Georgia state court judgment against the Jacobsons. When the final judgment remained unpaid, Royals levied on the mortgaged property. Consequently, the mortgaged property was partitioned. Jacobson maintained title to half an acre as her homestead, and Royals took title to the remaining nine-and-a-half acres, subject to the Pennymac mortgage, through the levy and Sheriff's sale. Bankers obtained its lien on Jacobson's half-acre parcel when she executed and delivered a note and mortgage to Bankers in exchange for $25,000. Jacobson remained liable on the Pennymac note for the entire mortgaged property, including the nine-and-a-half acres titled to Royals.

Ultimately, Pennymac[1] filed a foreclosure complaint as to the entire ten acres. Bankers sought to exercise its right of redemption under section 45.0315, Florida Statutes (2015).[2]

Royals objected to Bankers' motion to redeem and asked the trial court to determine the parties' redemption rights. Royals argued that Bankers should not be allowed to manipulate the right of redemption to expand its claim to Royals' parcel. According to Royals, Bankers' right of redemption and subsequent equitable subrogation should be limited solely to the half-acre parcel.

Bankers acknowledged that equitable subrogation through redemption is not permitted if it results in an injustice, but argued that there was no injustice in this case. Bankers explained that Royals is a defendant in Pennymac's foreclosure action; thus, its nine-and-a-half acres would be foreclosed by Pennymac or Bankers no matter which plaintiff pursued it. In other words, Royals' position in the action does not change and it is not prejudiced if Bankers is subrogated to the rights of Pennymac. Bankers noted that Royals also had the option to redeem.

Royals contended that Bankers would be getting a windfall if it is permitted to get its nine-and-a-half acres because Bankers would be made whole by the half-acre parcel. Royals underscores that Bankers did not dispute any of the facts related to the underwriting of Bankers' loan, including that the purpose of the loan was to create an

[1] Citibank, N.A., filed the initial foreclosure complaint, but Pennymac was substituted as plaintiff as assignee of Citibank.

[2] Pennymac later added Bankers as a defendant.

opportunity to reassemble and acquire the entire ten acres through redemption and foreclosure.

The trial court ultimately concluded, without making any factual findings, that "[i]t would be inequitable to allow Bankers to be equitably subrogated to the extent it would permit foreclosure of the Royals Parcel." Bankers was permitted to redeem the Pennymac mortgage under section 45.0315; however, the trial court ruled that Bankers "shall not be permitted to pursue a foreclosure claim against the Royals Parcel."

Thereafter, Bankers redeemed the Pennymac mortgage and moved for final judgment of foreclosure. The trial court's summary final judgment made a finding that Bankers held a lien superior to all defendants on the mortgaged property as limited by the trial court's redemption order.

Section 45.0315, Florida Statutes, provides:

> At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. Otherwise, there is no right of redemption.

"The right to redeem is an incident to every mortgage and belongs to the mortgagor and those claiming under him." Quinn Plumbing Co. v. New Miami Shores Corp., 129 So. 690, 692 (Fla. 1930). "As against a senior mortgagee, the only absolute right of a junior mortgagee is the right to redeem from the senior mortgage[e]." Id. (citing Parker v. Child,

25 N.J. Eq. 41, 43-44 (Ch. 1874)). "When the ['right of redemption'] is used with reference to a junior mortgagee, . . . it refers to his right to satisfy a prior mortgage by payment of the debt it secures and thereby become equitably subrogated to all rights of the prior mortgagee." Marina Funding Grp., Inc. v. Peninsula Prop. Holdings, Inc., 950 So. 2d 428, 430 (Fla. 4th DCA 2007) (quoting Engels v. Valdesuso, 497 So. 2d 698, 700 n.1 (Fla. 3d DCA 1986)).

Generally, a junior mortgagee of only a part of mortgaged premises, must pay the whole amount of the mortgage debt in order to redeem. Quinn Plumbing, 129 So. at 693. The junior mortgagee "cannot compel a redemption pro tanto, for the reason that the first mortgagee has not agreed to separate his debt and security into parts." Id. Instead, the first mortgagee is entitled to payment of the entire first mortgage. Id. Thus, the junior mortgagee "must pay the entire mortgage debt in order to redeem the premises in which he is interested, [and] when there are no intervening rights, he thereby becomes equitably subrogated to the original rights of the first mortgagee . . . ." Id. at 694.

Equitable subrogation is generally appropriate if the following five elements are met:

> (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party.

Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 646 (Fla. 1999) (citing Fowler v. Lee, 143 So. 613, 614 (Fla. 1932); E. Nat'l Bank v. Glendale Fed. Sav. & Loan Ass'n, 508 So. 2d 1323, 1324-25 (Fla. 3d DCA 1987)). Where a party has discharged the debt of the original creditor, that party "stands in the shoes" of the creditor whose claim has

been discharged and he is entitled to the "right and priorities of the original creditor." Id. (citing E. Nat'l Bank, 508 So. 2d at 1324); see also Tribeca Lending Corp. v. Real Estate Depot, Inc., 42 So. 3d 258, 262 (Fla. 4th DCA 2010) ("[T]he doctrine of equitable subrogation . . . is designed to apply where the claimant satisfied an obligation of another and then stands in the shoes of the satisfied creditor." (citing Radison Props., Inc. v. Flamingo Groves, Inc., 767 So. 2d 587, 591 (Fla. 4th DCA 2000))). For example, "a refinancing lender is equitably subrogated to the priority of the first mortgage even where it has actual knowledge of an intervening lien." Tribeca Lending Corp., 42 So. 3d at 262 (citing Suntrust Bank v. Riverside Nat'l Bank of Fla., 792 So. 2d 1222, 1227 n.3 (Fla. 4th DCA 2001)).

Royals does not contest that Bankers met the first four requirements for equitable subrogation. It argues that equitable subrogation is not allowed in the instant case because subrogation would work an injustice to it because Bankers came to the table with unclean hands. Royals claims that Bankers acquired its interest in the Jacobson's half-acre parcel intending to reunite all ten acres once Pennymac foreclosed. While this may be true, "a party asserting unclean hands 'must prove that he was injured in order for the unclean hands doctrine to apply.'" See Tribeca Lending Corp., 42 So. 3d at 262 (quoting McCollem v. Chidnese, 832 So. 2d 194, 196 (Fla. 4th DCA 2002)). This Royals failed to do. Even if it had, redemption and equitable subrogation to all rights of the Pennymac's mortgage would not have put Royals in a worse position. Royals took title to the nine-and-a-half-acre parcel subject to Pennymac's mortgage. And like Bankers, Royals had the right to redeem, but chose not to exercise that option.

There is simply no record evidence to establish that inequity would result to Royals if Bankers, rather than Pennymac, had been permitted to foreclose on Pennymac's mortgage. Instead, the redemption order and final judgment effectively negated Bankers' right of redemption because Bankers' only option was to pay off the final judgment amount of $354,802.65, plus post-judgment interest, in order to prevent foreclosure on the half-acre parcel. Royals' position never changed because the property was going to be foreclosed upon by either Pennymac or Bankers regardless.

We conclude Bankers is legally entitled to equitable subrogation as to the entire ten acres. No injustice befalls to Royals. Royals took title to the property subject to Pennymac's mortgage and would be unjustly enriched if Bankers was forced to pay the entire amount set forth in the final judgment in order to assert its right to redeem, while Royals paid nothing and was awarded title to the nine-and-a-half acres free and clear.

Therefore, we reverse the final judgment of foreclosure and underlying order on Bankers' motion to redeem to the extent that they prohibit Bankers from foreclosing on the entire ten acres.

REVERSED.

SAWAYA, BERGER and WALLIS, JJ., concur.

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

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

BANK OF AMERICA, N.A.,

Appellant,

v. Case No. 5D17-2541

JAMES EASTRIDGE AND JENNIFER EASTRIDGE,

Appellees.

_____/

Opinion filed August 10, 2018

Appeal from the Circuit Court
for Seminole County,
Jessica J. Recksiedler, Judge.

Elizabeth Ann Henriques, and Tricia J. Duthiers, of Liebler, Gonzalez & Portuondo, Miami, for Appellant.

James Eastridge, and Jennifer Eastridge, Oviedo, pro se.

EDWARDS, J.

This case involves obtaining ownership of real property by squatters' rights, i.e. adverse possession. Bank of America, N.A. ("BOA"), appeals the final default judgment that extinguished BOA's mortgage and title to the subject property and awarded unencumbered title to Appellees, James and Jennifer Eastridge, based on their convincing, but incorrect, assertion that seven years of actual and continuous adverse

possession is no longer required by section 95.18, Florida Statutes (2016). We find that the trial court erred by: (1) ruling that because a clerk's default had been entered, BOA could not oppose entry of judgment by asserting failure to state a cause of action, (2) finding that section 95.18 no longer required seven continuous years of adverse possession, (3) concluding that Appellees met the requirements of section 95.18, and (4) denying BOA's motion for rehearing. Accordingly, we reverse the final judgment and remand the cause to the trial court with instructions to dismiss Appellees' complaint without prejudice

BOA obtained a mortgage on the subject property when it issued a home equity line of credit to the Clairs, previous owners who subsequently abandoned the property. BOA obtained title to the property by obtaining a quit-claim deed from the homeowners association that foreclosed its lien on the subject property for the Clairs' unpaid association fees. Appellees asserted their claim of adverse possession by filing a complaint to quiet title in February 2017. As an exhibit to their complaint, Appellees attached their Return of Real Property in Attempt to Establish Adverse Possession Without Color of Title ("Return"), in which they claimed they began their possession of the subject property less than four-and-one-half years prior to filing suit.

When BOA was one day late responding to the complaint, Appellees sought and obtained a clerk's default. BOA's counsel appeared and filed a motion for extension of time, one day after the default had been entered. Five days post-default, BOA filed its verified motion to set aside the default, which the trial court denied. Appellees then moved the trial court to enter a final judgment. In a written memorandum filed prior to entry of final judgment, BOA opposed entry of judgment, claiming that Appellees' complaint failed

to state a cause of action because the attachments affirmatively showed Appellees possessed the land for a little more than four years, rather than for seven years as specifically required by section 95.18. Following a hearing, the trial court ruled that because BOA was in default, it could not assert that defense. The trial court first entered final judgment quieting title in favor of Appellees and then denied BOA's timely-filed motion for rehearing in which BOA reasserted the same pleading deficiencies.

First, the trial court erred when it refused to consider BOA's argument that Appellees' complaint failed to state a cause of action. "The default operates as an admission by [the defendant] of the well-pled allegations of the complaint, but not as an admission of facts not properly pled or conclusions of law." *Appel v. Lexington Ins. Co.*, 29 So. 3d 377, 379 (Fla. 5th DCA 2010). The party seeking affirmative relief may not be granted a judgment that is not supported by the pleadings or by substantive law applicable to the pleadings. *Becerra v. Equity Imps., Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989). A party in default may rely on these limitations. *Id.* "The defense of failure to state a cause of action may be raised by motion, even after a default, and may be raised at the trial on the merits." *Appel*, 29 So. 3d at 379. Therefore, the trial court was required to entertain BOA's argument addressing Appellees' allegedly inadequate complaint, and erred by refusing to consider it. However, that error requires reversal only if Appellees' complaint fails to state a cause of action.

Second, the trial court erred by finding that section 95.18(1) no longer required seven continuous years of adverse possession. Adverse possession generally requires the possessor/claimant to have actual, open, and notorious possession for the statutory period. *Milton v. Corrie*, No. 16-62590-Civ-Scola, 2017 WL 2214756, at *3 (S.D. Fla. May

18, 2017). However, Florida allows a squatter or adverse possessor to "tack" or combine his/her period of adverse possession with the period of a prior adverse possessor in order to meet the statutory time requirement. *See, e.g.*, *Supal v. Miller*, 455 So. 2d 593, 594 (Fla. 5th DCA 1984) (finding that "tacking can be used to establish a prescriptive easement" to meet the full prescriptive period).

Although tacking was not involved here, the statutory provisions regarding tacking were used to create confusion in this case. Section 95.18(1) speaks to the possessory accomplishments of both the claimant and the claimant's predecessors. Here, BOA, Appellees, and the trial court all agreed that the 2012 version of this statute required Appellees to prove that they, or their predecessors, had actually and continuously occupied the subject property for seven years. Under the 2012 version, Appellees' time of possession would have fallen short of the requirement by approximately thirty months. However, Appellees argued and the trial court found, despite BOA's disagreement, that a legislative change in 2013 eliminated the seven-year possessory requirement. To determine if such a change was made, we will examine both versions.

The relevant portion of the 2012 version reads:

> When the occupant has, *or those under whom the occupant claims have*, been in actual continued occupation of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree, the property actually occupied is held adversely if the person claiming adverse possession made a return, as required under subsection (3), of the property by proper legal description to the property appraiser of the county where it is located within 1 year after entering into possession and has subsequently paid, subject to s. 197.3335, all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality.

§ 95.18(1), Fla. Stat. (2012) (emphasis added). After the amendment in 2013, which the 2016 version reflects, the statute now reads:

> (1) When the possessor has been in actual continued possession of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree, *or when those under whom the possessor claims meet these criteria*, the property actually possessed is held adversely if the person claiming adverse possession:
> (a) Paid, subject to s. 197.3335, all outstanding taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality within 1 year after entering into possession;
> (b) Made a return, as required under subsection (3), of the property by proper legal description to the property appraiser of the county where it is located within 30 days after complying with paragraph (a); and
> (c) Has subsequently paid, subject to s. 197.3335, all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality for all remaining years necessary to establish a claim of adverse possession.

§ 95.18(1), Fla. Stat. (2016) (emphasis added).

Appellees argued and the trial court determined that the 2016 version of section 95.18(1) required either actual, continuous possession for seven years or, in the alternative, compliance with the requirements listed in subsections 95.18(1)(a)–(c) without seven years of possession. The court's interpretation of the statute is incorrect for three reasons: (1) the language allowing combined consideration of the activities of the possessor and its predecessors clearly and unambiguously applies only to the requirement of actual, continuous possession; (2) the court's interpretation would render portions of the statute meaningless; and (3) the court's interpretation would lead to an absurd result.

Both the 2012 and the 2016 versions set forth minimum seven-year actual and continuous occupancy or possessory requirements that can be met by the claimant alone or that can be met through tacking by considering the actions of the claimant and the claimant's predecessors. We will refer to the statutory language regarding the claimant's predecessor's actions as the tacking phrase. In the 2012 version, the tacking phrase was found at the beginning of the section: "When the occupant has, *or those under whom the occupant claims have*, been in actual continued occupation of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree." § 95.18(1), Fla. Stat. (2012) (emphasis added). In this context, the language clearly and unambiguously indicates that either the occupant or its predecessor must have actually and continually occupied the property for seven years and must also be without color of title.

The 2016 version contains substantially the same tacking phrase, even though the phrase was shifted and now appears after the requirement of possession for seven years without color of title: "When the possessor has been in actual continued possession of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree, *or when those under whom the possessor claims meet these criteria* . . . ." § 95.18(1), Fla. Stat. (2016) (emphasis added). It is because of this shift in location that the court apparently reached its interpretation that seven years of continuous and actual possession of the property was but one alternative way of obtaining ownership through adverse possession. However, in so construing, the court ignored simple sentence structure—the phrase "*or when those under whom the*

possessor claims meet these criteria" clearly only refers back to the criteria or requirements of actual, continuous possession without color of title.

Furthermore, both versions have additional requirements or tasks that address the open, notorious, and adversary nature of possession of "the property actually occupied" or "possessed" which only the claimant can accomplish, such as filing a return and paying outstanding taxes and liens. Thus, the tacking phrase applies only to the possessory requirement and not to the additional adverse qualities of the possession required to perfect a claim for section 95.18(1). Since the language is clear and unambiguous, there is no need to look beyond the plain language of the statute. *See Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). The plain language of the statute clearly requires the claimants/possessors, here Appellees, individually or in combination with their predecessors to meet the criteria of actual, continuous possession for seven years without color of title. The requirement of actual possession, which can be accomplished by the claimant or its predecessor adverse possessors, is in addition to, rather than as an alternative to, the requirement of establishing the adverse nature of the possession which must be personally accomplished by the claimant/current possessor.

Additionally, the trial court's interpretation of the statute renders portions of the statute meaningless, which courts should avoid doing. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992). Here, the trial court presumably reached its conclusion by ignoring the following statutory language found in section 95.18(1): "the property actually possessed is held adversely if the person claiming adverse possession . . . ." That phrase not only reiterates the "actual possession" requirement in a short-hand manner, it states that the statute only considers specific

actions (making a return, paying taxes and liens) of "the person claiming adverse possession" to determine whether the possession was adverse. Neither version of the statute permits or considers whether a claimant's predecessor made a return, paid outstanding taxes, or paid outstanding liens. *See Scherer v. Volusia Cty. Dep't of Corr.*, 171 So. 3d 135, 139 (Fla. 1st DCA 2015) (finding that no part of a statute, "not even a single word," should be ignored or rendered meaningless). Thus, for this reason as well, the trial court erred.

Moreover, the court's statutory interpretation would lead to absurd results. If one employed the trial court's interpretation, a person claiming adverse possession of a property with six years' outstanding taxes could successfully obtain ownership through adverse possession under section 95.18 simply by paying the outstanding taxes, filing the return, and then paying the current year's taxes without ever entering into possession of the property. Given the statute's title and clear requirement of seven years' possession by the claimant and/or its predecessors, this hypothetical result would be absurd. As courts should avoid interpretations rendering the result absurd, the court's interpretation was in error. *See M.M. v. State*, 187 So. 3d 300, 304 (Fla. 5th DCA 2016).

Third, the trial court erred by concluding that Appellees met the requirements of section 95.18, as it should have considered whether Appellees' complaint contained well-pled allegations that Appellees were in actual, continuous possession of the subject property for seven years as required by section 95.18(1), Florida Statutes (2016). Appellees' complaint generally asserts compliance with the statute. However, the only specific statement regarding when Appellees commenced possession is found in their Return which they attached to the complaint. Their Return states that they entered into

possession of the subject property on September 24, 2012, which means that only four years, four months, and thirty days elapsed from first possession to the filing of their complaint—a period far short of the statutory seven-year requirement.[1] Because the date provided in the Return which Appellees' attached to their complaint contradicts the general averment of compliance with the statute, the date set forth in the Return controls. "Where a document on which the pleader relies in the complaint directly conflicts with the allegations of the complaint, the variance is fatal and the complaint is subject to dismissal for failure to state a cause of action." *Appel*, 29 So. 3d at 379. Given that Appellees' complaint failed to state a cause of action under section 95.18, under both the 2012 and 2016 versions, the lower court erred both by ignoring BOA's efforts to raise that defense and by entering the default final judgment.[2]

Fourth, the trial court erred by denying BOA's motion for rehearing. A trial court's denial of a motion for rehearing is usually subject to an abuse of discretion standard of review; however when the motion only addresses issues of law the standard of review is de novo. *Randall v. Walt Disney World Co.*, 140 So. 3d 1118, 1119–20 (Fla. 5th DCA 2014) (quoting *Mistretta v. Mistretta*, 31 So. 3d 206, 208 (Fla. 1st DCA 2010)). As the issues of law raised in BOA's motion for rehearing should have been decided in BOA's favor, the trial court erred in denying BOA's motion for rehearing.

[1] Appellees assert in their answer brief that their possession of the subject property commenced one month later, on October 24, 2012, which is even less time than reported in their Return.

[2] BOA argues that the Return and complaint disclose that Appellees failed in other ways to comply with section 95.18; however, because of the remand, we need not address those issues at this time.

Accordingly, the final default judgment is reversed in its entirety and the case is remanded to the trial court with instructions to dismiss Appellees' complaint with leave to file an amended complaint within twenty days if they can do so in good faith.[3] Should Appellees file an amended complaint, BOA will be entitled to timely respond.

REVERSED and REMANDED with instructions.

SAWAYA and ORFINGER, JJ., concur.

[3] Given Appellees' previous statements of when their possession commenced, they may find themselves unable to plead compliance with section 95.18(1) without subjecting themselves to sanctions.

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

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

JAY SIMON, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF ROBERT SIMON,

Appellant,

v. Case No. 5D17-3355

RICHARD WATERS,

Appellee.

_____/

Opinion filed August 10, 2018

Appeal from the Circuit Court
for Orange County,
John E. Jordan, Judge.

Eric W. Ludwig, Orlando, of the Law Office
of Eric W. Ludwig, for Appellant.

Christopher R. Turner, of Christopher R.
Turner, PLLC, Orlando, for Appellee.

ROBERSON, E.C., Associate Judge.

Generally, a court cannot award attorney fees unless "expressly provided for by statute, rule, or contract."[1] *Hubbel v. Aetna Cas. & Sur. Co.*, 758 So. 2d 94, 97 (Fla. 2000). It follows, then, that a court cannot use an equitable remedy to indirectly assess

[1] There are certain extraordinary circumstances, not present here, such as bad faith conduct or civil contempt, that deviate from this general rule as a sanction. *See, e.g., Dep't of Child. & Fam. Servs. v. J.B.*, 898 So. 2d 980, 981 (Fla. 5th DCA 2005) (citing *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998)).

attorney fees where it cannot do so directly. Accordingly, we reverse the trial court's imposition of an equitable lien consisting almost entirely of Appellee's attorney fees in *unsuccessfully* defending the claims below.

This lawsuit involves a dispute as to the ownership of property located in Orlando, Florida (the "Property"). Robert and Henrietta Simon, husband and wife, owned the Property. In 2006, they executed a Special Warranty Deed retaining a life estate for themselves then passing title to their two children, Jay Simon and Janice Simon Waters, as "equal tenants in common."

Henrietta predeceased Robert, who passed away in 2011. Jay Simon was named the Personal Representative of Robert Simon's Estate because Janice Simon Waters passed away in 2009. Her husband, the Appellee, found the Special Warranty Deed in 2010 but did not assert a claim under it after Robert Simon passed away. Appellee ultimately obtained an Order of Summary Administration awarding him Janice Simon Water's interest in the Property through her will and the Special Warranty Deed.

Jay Simon, in his capacity as Personal Representative of the Estate of Robert Simon (the "Estate"), sued to nullify the Special Warranty Deed. The Estate argued, and the trial court agreed, that Henrietta Simon "was incapable of comprehending the nature and effect of the [Special Warranty Deed] as the result of mental infirmity." Because Janice Simon Waters died before her father, Jay Simon was the only living heir when Robert Simon passed away and thus was the sole beneficiary of the Estate.

While vacating the Special Warranty Deed,[2] the trial court found that "the parties [were] entitled to reversion to status quo prior to its execution."[3] Appellee then filed a Motion for Summary Judgment, along with an affidavit, for damages that would return him to the status quo. The motion sought, through an award of attorney fees or an equitable lien, a total of $76,892.73. That amount consisted of $75,094.23 in attorney fees spent in this lawsuit and $1,798.50 in fees for the summary administration proceedings.

The trial court granted the motion and awarded Appellee an equitable lien for $76,892.73 encumbering the Property. The trial court rejected Appellee's claim for an award of attorney fees by correctly noting that "fees cannot be awarded as a matter of equity." In addressing the request for an equitable lien, however, the court found it appropriate based on the "'general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case.' *See Jones v. Carpenter*, 106 So. 127, 129 (Fla. 1925)." The Estate timely appealed.

The facts pertaining to the equitable lien are undisputed. As such, we review the question of law that arises from those undisputed facts *de novo*. *CTX Mortg. Co., LLC v. Advantage Builders of Am., Inc.*, 47 So. 3d 844, 846 (Fla. 2d DCA 2010) (citing *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008)).

The Estate's argument is straightforward and well taken. A court can only award attorney fees when authorized by statute, rule, or contract. *Hubbel*, 758 So. 2d at 97. The trial court cited many of the cases so holding. *See, e.g.*, *Bane v. Bane*, 775 So. 2d

[2] Appellee has not appealed the order vacating the Special Warranty Deed.

[3] The trial court was referring to a requirement of rescission. *See Royal v. Parado*, 462 So. 2d 849, 855 (Fla. 1st DCA 1985).

938, 940 (Fla. 2000); *City of Miami Beach v. Deutzman*, 180 So. 3d 245, 246 (Fla. 3d DCA 2015); *Bauer v. DILIB, Inc.*, 16 So. 3d 318, 320 (Fla. 4th DCA 2009); *Attorney's Title Ins. Fund, Inc. v. Landa-Posada*, 984 So. 2d 641, 643 (Fla. 3d DCA 2008). It is a natural corollary that a court may not utilize general, amorphous notions of equity to circumvent such a well-established rule. Neither Appellee nor this Court's own research has revealed a case approving an equitable lien awarding attorney fees to a non-prevailing party. We decline Appellee's invitation to create another avenue for courts to award attorney fees.

REVERSED and REMANDED.

EVANDER and EISNAUGLE, JJ., concur.