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All South Subcontractors, Inc. v. Amerigas Propane, Inc., --- So. 3d ----, 2016 WL 4239846 (Fla. 1st DCA 2016).
An arbitration agreement contained in a bulk mailer sent out to prospective customers prior to the parties entering into a contract is not binding.

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Florida Statute section 702.06 permits the filing of an independent action for deficiency judgment, even if a deficiency was prayed for in the foreclosure complaint, so long as the foreclosure court did not render a decision on the deficiency claim. Conflict certified with the First District Court of Appeal's decision in Higgins v. Dyck-O'Neal, Inc., 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016).

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Recorded judgments which contain the address of the attorney for the creditor and not the creditor itself violate the requirements of Florida Statute section 55.10, and thus do not constitute liens on the real property of the judgment debtor.

Dyck-O'Neal, Inc. v. McKenna, --- So. 3d ----, 2016 WL 4262111 (Fla. 4th DCA 2016).
Florida Statute section 702.06 permits the filing of an independent action for deficiency notwithstanding deficiency was requested in the foreclosure complaint; conflict certified with the First District Court of Appeal's decision in Higgins v. Dyck-O'Neal, Inc., 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016).

Kajaine Estates, LLC v. US Bank National Ass'n, --- So. 3d ----, 2016 WL 4252938 (Fla. 5th DCA 2016).

The question of whether a foreclosing lender can establish legal standing for foreclosure purposes is different than whether the lender is the owner of a promissory note. Accordingly, an owner of a note may retrieve the original promissory note from the court file even if i was not able to establish legal standing to foreclose.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ALL-SOUTH SUBCONTRACTORS, INC.,

Appellant,

v.

AMERIGAS PROPANE, INC. and AMERIGAS PROPANE, L.P.,

Appellees.

_____/

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

CASE NO. 1D15-5862

Opinion filed August11, 2016.

An appeal from the Circuit Court for Escambia County.
Edward P. Nickinson, III, Judge.

Charles Philip Hall and J. Phillip Warren of Taylor, Warren & Weidner, P.A., Pensacola, for Appellant.

Robert Palmer of Wade, Palmer & Shoemaker, P.A., Pensacola, and George J. Murphy of Gibbons P.C., Philadelphia, *pro hac vice*, for Appellees.

JAY, J.

We have for review the trial court's final order dismissing with prejudice Appellant's amended complaint for lack of subject matter jurisdiction and granting

Appellees' motion to compel arbitration. The issue presented is whether an arbitration clause contained in a bulk mailer sent out in 2012 by Appellees to its customers applied retroactively to a business transaction between Appellant and Appellees that was finalized two years earlier. We hold it does not and reverse.

On December 3, 2014, Appellant All-South Subcontractors, Inc., filed an Amended Class Action Complaint naming as defendants Appellees Amerigas Propane, Inc., and Amerigas Propane, L.P., and alleging Appellees' practice of charging "Fuel Recovery Fees" to its customers, including Appellant and other Florida customers of Appellees, violates the Florida Deceptive and Unfair Trade Practices Act. Appellant also pleads a cause of action for unjust enrichment. According to the factual allegations of the amended complaint, Appellant is "a small commercial roofing business," and Appellees are "the largest seller[s] of propane in the United States." In 2010, while working on the roof of the National Flight Academy in Pensacola, Florida, Appellant purchased propane from Appellees.

Appellees filed a motion to dismiss the amended complaint for lack of subject matter jurisdiction, to compel arbitration, and to dismiss the complaint for failure to state a cause of action. In its motion, Appellees argue "the putative class action must be dismissed because the dispute between the parties is governed by an arbitration agreement between AmeriGas and its customers, including All-South, which requires such disputes be resolved through binding arbitration." Attached to the

motion is the affidavit of James Armstrong, president of Yoder and Armstrong Printing.[*] In his affidavit, Mr. Armstrong attests that on August 12, 2012, he was instructed by Appellees "to mail written notice of the General Terms and Conditions of AmeriGas Propane, L.P.[,] Relating to the Supply of Propane and Lease of Propane Related Equipment to Commercial Customers ('Terms and Conditions')." According to Mr. Armstrong, his company began preparation of the notices on November 29, 2012, and a "true and correct copy of the mailing that was prepared for and mailed to All South [sic]" is attached to his affidavit as "Exhibit A." The bulk mailer was delivered to the United States Postal Service on December 5, 2012. Each "tri-fold" document in the mailer contains the following introduction:

> We greatly appreciate the opportunity to be your propane supplier. It is our policy to annually provide all of our customers with our standard terms and conditions. We ask that you keep these standard terms attached with your other propane provider documents. We look

[*] "In considering a motion to dismiss challenging subject matter jurisdiction, a trial court may properly go beyond the four corners of the complaint and consider affidavits." Seminole Tribe of Fla. v. McCor, 903 So. 2d 353, 357 (Fla. 2d DCA 2005); see also Steiner Transocean Ltd. v. Efremova, 109 So. 3d 871, 873 & n.3 (Fla. 3d DCA 2013) (citing McCor and holding "a court is permitted to consider evidence outside the four corners of the complaint where the motion to dismiss challenges subject matter jurisdiction"). Cf. Mancher v. Seminole Tribe of Fla., Inc., 708 So. 2d 327, 328-29 (Fla. 4th DCA 1998) (recognizing that a court may consider affidavits when determining a motion to dismiss that challenges subject matter jurisdiction, but holding the issues in the motion to dismiss before it, which contended that the improper party was sued and that Seminole Tribe, Inc. enjoyed sovereign immunity were "not amenable to resolution by motion to dismiss because there [were] disputed factual questions"). The parties in the instant case have not argued the existence of disputed issues of fact.

> forward to providing you with continued reliable service in the years ahead.

Following the introduction is the heading: "GENERAL TERMS AND CONDITIONS," under which paragraph "20"—entitled "CLAIMS AND ARBITRATION"—reads in relevant part as follows:

> Aside from credit or collection matters, Customer and Company agree that upon the request of either party, any dispute or controversy between the parties that in any way arises out of or relates to the Agreement or Company's provision of goods and services to Customer, will be decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. *Neither Company nor Customer shall be entitled to . . . arbitrate any claim as a representative or member of a class . . . .* Within thirty (30) days of receipt of this arbitration provision, *Customer can elect to opt out* of this provision (that is, exclude it from this Agreement) by sending written notice to Company by certified mail to [address in Pennsylvania] stating that Customer wishes to opt out of this arbitration provision.

(Emphasis added.) At the very bottom of the second page of the mailer appears the date "August 20, 2012," and, just above the date, paragraph "27" states: "For most non-residential Customers, these terms and Conditions will become effective 30 days after the date of this notice."

In a second affidavit attached to the motion, Appellees' district manager attests to his having reviewed Appellant's "file," which contained "Sales & Service Orders" for the sale of propane, and for the removal of spent tanks dated January 29, 2013, and February 26, 2013. Finally, according to a third affidavit from a member

of Appellees' legal department, Appellant did not respond to the opt-out provision of the "Terms and Conditions."

At the hearing on the motion to dismiss, Appellees argued that the "Terms and Conditions" governed the relationship between them and their customers; that the "Terms and Conditions" had been on their website since before December 2010 and were updated monthly; and that the 2012 bulk mailer was their attempt to assure that all of their customers understood they were bound by those very same "Terms and Conditions," which were already present on the company website. More concisely, Appellees' counsel asserted, "Mailing is the offer. Continuing Service with the company is acceptance of the offer. No signature is required," and "Failing to opt out is assent."

Appellant initially responded by pointing out that the alleged website terms and conditions—going back to 2010—were not before the trial court, and that the date on the bottom of the mailer was August 2012. Appellant then stressed that its lawsuit is premised on a 2010 invoice and questioned Appellees' ability to retroactively bind Appellant to an arbitration clause that Appellant had not known existed in 2010. Appellant urged that the bulk mailer could not, by itself, form the contract without any evident means of assent on Appellant's part, and, absent a contract, there could be no agreement to arbitrate.

After listening to these arguments, the trial court ruled: "The Court finds that particularly in the context of sophisticated litigants—this is not a consumer issue from the Plaintiff's side—that the arbitration provision is enforceable and *was assented to* by the Plaintiff, and the case will be dismissed on that basis only." (Emphasis added.) Contrary to this finding, we hold, as a matter of law, that Appellant did not "assent" to arbitrate the 2010 claims with Appellees.

"[T]he standard of review applicable to the trial court's construction of [an] arbitration provision, and its application of the law to the facts found, is *de novo*." Gainesville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278, 283 (Fla. 1st DCA 2003) (citing Powertel, Inc. v. Bexley, 743 So. 2d 570, 573 (Fla. 1st DCA 1999)). "De novo review simply means that the appellate court is free to decide the question of law, without deference to the trial judge, as if the appellate court had been deciding the question in the first instance." Philip J. Padovano, Florida Appellate Practice §19:4 (2015 ed.).

In determining the issue of whether to compel arbitration, the principal consideration is whether there is an agreement to arbitrate. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), the United States Supreme Court explained, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." Id. at 626. Likewise, in Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999), the

Florida Supreme Court observed that "under both federal statutory provisions and Florida's arbitration code, there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Id. Later, in Shotts v. OP Winter Haven, Inc., 86 So. 3d 456 (Fla. 2011), the supreme court noted that "[c]hallenges to arbitration agreements in Florida generally focus on the first of the Seifert elements—'whether a valid written agreement to arbitrate exists . . . .'" Id. at 464 (quoting Seifert, 750 So. 2d at 636). The issue before us turns on the first of these three elements.

The supreme court in Seifert went on to elaborate that "because arbitration provisions are contractual in nature, construction of such provisions and the contracts in which they appear remains a matter of contract interpretation." 750 So. 2d at 636 (citing Seaboard Coast Line R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982); R.W. Roberts Constr. Co., Inc. v. St. Johns River Water Mgmt. Dist., 423 So. 2d 630, 632 (Fla. 5th DCA 1982)). See also Shotts, 86 So. 3d at 464 (holding, "[t]he issue of 'whether a valid written agreement to arbitrate exists is controlled by principles of state contract law'" (quoting Powertel, 743 So. 2d at 574)). It held that "the determination of whether an arbitration clause requires arbitration of a particular dispute necessarily 'rests on the intent of the parties,'" and further reasoned that "[a] natural corollary of this rule is that no party may be forced

to submit a dispute to arbitration that the party did not intend and agree to arbitrate." Seifert, 750 So. 2d at 636 (quoting Seaboard, 690 F.2d at 1348, 1352).

Appellant predicates its argument for reversal on the general rule that mutual assent is a condition precedent to the formation of a contract and that absent mutual assent, neither the contract nor any of its individual provisions come into existence. See generally Gibson v. Courtois, 539 So. 2d 459, 460 (Fla. 1989). Specifically, Appellant asserts that the bulk mailer was not a valid written agreement to arbitrate the earlier transaction because, fundamentally, Appellees did not reveal how Appellant could have anticipatorily assented to the written "Terms and Conditions" it had never seen prior to the receipt of the 2012 mailer. See, e.g., Steve Owren, Inc. v. Connolly, 877 So. 2d 918, 920 (Fla. 4th DCA 2004) (applying the "appropriate rule" that the one who should lose on the issue of an agreement to arbitrate is the one who failed to carry its burden of proving an acceptance of arbitration as a contractual remedy" (citing Shearson, Lehman, Hutton, Inc. v. Lifshutz, 595 So. 2d 996, 997 (Fla. 4th DCA 1992) (holding proponent of arbitration has burden of establishing an enforceable written agreement to arbitrate))).

Moreover, Appellant's class action complaint rests on a discrete transaction, a transaction that ended with an invoice issued by Appellees and paid by Appellant in the latter months of 2010—an invoice that did not mention arbitration. Appellees assert that the 2012 "Terms and Conditions" can reach back and capture the 2010

transaction and connect it to the later arbitration clause because of the purported continuing relationship between the parties and based on the fact that Appellant did not apprise Appellees of its intent to "opt out" of the 2012 arbitration provision. We reject that assertion and hold instead that absent any assent on Appellant's part to arbitrate the 2010 dispute, there can be no legal grounds to compel arbitration in this case. The following case law informs our decision.

In CarePlus Health Plans, Inc. v. Interamerican Medical Center Group, LLC, 124 So. 3d 968 (Fla. 3d DCA 2013), the Third District Court of Appeal addressed the question of whether an arbitration clause in a 2010 agreement between Interamerican and another healthcare company—of which CarePlus was an affiliate—was sufficient to compel arbitration of a dispute between Interamerican and CarePlus based on a 2004 agreement that did not contain an arbitration clause. The Third District held that the 2010 agreement was not sufficient to require arbitration. It reasoned that "[t]he absence of any identifiable nexus or significant relationship between the 2010 Agreement and the claims arising out of the 2004 Agreement is fatal to the position taken by CarePlus, and the trial court properly denied the motion to compel arbitration." Id. at 973. In so holding, the Third District relied on the second prong of the Seifert test—whether an arbitrable issue exists. It emphasized that portion of the Seifert decision stating that to satisfy the second prong, "there must exist a significant relationship between the claim and the

agreement containing the arbitration clause." Id. at 972 (citing Seifert, 750 So. 2d at 637-38). Accord Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013).

Although resolution of the issue before us primarily rests on the first prong of the Seifert test—whether a valid written agreement to arbitrate was shown to exist—we find it compelling that the Third District held that under the terms of an earlier agreement—separate and apart from the later agreement—there was no intent by the parties to arbitrate disputes under the earlier agreement. See also Citigroup, Inc. v. Boles, 914 So. 2d 23 (Fla. 4th DCA 2005) (citing Seifert, and holding that the arbitration clause between the parties did not require arbitration because "the complaint did not involve or refer to the agreement, and the agreement is not related in any way to the allegedly tortious investment advice"). Here, the "Terms and Conditions" document was mailed to Appellant two years after the 2010 receipt of the invoice for the rental of Appellees' propane tank. Consequently, by analogy, there is no "nexus" between the 2010 invoiced transaction—the subject of the putative class action lawsuit—and the 2012 "Terms and Conditions." Correspondingly, we find there was no assent to arbitrate disputes arising from the 2010 invoice due to the lack of any arbitration language connected to that invoice.

In reaching our decision, we find opinions from the Eighth and Eleventh Circuit Courts of Appeals to be particularly persuasive. In Gedimex, S.A. v. Nidera,

Inc., 290 Fed. App'x 311 (11th Cir. 2008), Nidera appealed the district court's order denying its motion to dismiss or stay proceedings to allow arbitration. Between 2002 and 2007, Gedimex bought approximately fifty large shipments of bulk rice from Nidera. Each shipment was governed by an identical written standard form contract. Those contracts each contained a clause mandating the arbitration of disputes. Four months after the first rice purchase, Nidera and Gedimex entered into a separate oral contract in which Nidera agreed to supply Gedimex with empty bags at cost to facilitate shipment of the rice. That oral contract did not include an agreement to arbitrate disputes arising out of it.

In a subsequent breach of contract action brought by Gedimex, in which it claimed Nidera had overcharged it for the bags, Nidera moved to dismiss or stay the case on the ground that the subject matter of the dispute was covered by the earlier arbitration clause found in the rice-purchase contracts. While acknowledging "the strong federal policy in favor of arbitration," id. at 312, the Eleventh Circuit stated that it would "not compel parties to arbitrate a dispute where the parties have not agreed to do so." Id. Despite giving the phrase "arising out of" in an arbitration clause a broad reading, the Eleventh Circuit emphasized that "'[d]isputes that are not related—with at least some directness—to performance of duties specified by the contract do not count as disputes "arising out of" the contract, and are not covered by the standard arbitration clause . . . .'" Id. (quoting Telecom Italia, SpA v.

Wholesale Telecom Corp., 248 F.3d 1109, 1116 (11th Cir. 2001)). Accordingly, it held that "the arbitration clauses in the standard form rice contracts d[id] not encompass Gedimex's claims relating to the separate oral agreement to supply empty bags at cost," since "[e]ach of those arbitration clauses was explicit that it covered only disputes arising out of that particular contract." Id. Therefore, it determined that "[t]he dispute Nidera seeks to arbitrate is not 'a fairly direct result of the performance' of any of the duties set forth in the rice purchase contracts," and thus, was not subject to arbitration. Id. (citing Telecom Italia, 248 F.3d at 1116).

More to the point is the Eighth Circuit Court of Appeals' decision in Dakota Foundry, Inc. v. Tromley Industrial Holdings, Inc., 737 F.3d 492 (8th Cir. 2013). Dakota Foundry was an iron foundry located in Webster, South Dakota, and Tromley Industrial Holdings was an Oregon business that sold foundry equipment and was the parent company of Kloster Foundry Products. The dispute centered on certain equipment Dakota purchased from Kloster. The practice of Kloster was to collect information from potential customers and then prepare an initial quote on its stationery, the reverse side of which included the "Standard Terms and Conditions of Sale." Id. at 493-94. The "Standard Terms and Conditions of Sale" contained a binding arbitration clause. After preparing the initial quote, Kloster would make additional "working copies" of the quote, which did not contain the "Standard Terms

and Conditions of Sale" because only the front of the original quote was copied. Kloster would then send the working quote to the potential customer. Id. at 494.

In this way, in December 2009, Kloster delivered the first set of price quotes, i.e., the "working copies," to Dakota. Although the quotes contained a document with a "NOTES" section directing Dakota to pay particular attention to the "Standard Terms and Conditions of Sale," which, it was emphasized, were "'an integral part of this quotation,'" no "Standard Terms and Conditions of Sale" were attached to the quotes. On February 24, 2010, Dakota issued a purchase order to Tromley to cover the December 2009 quotes. Between February 2010 and April 2010, Tromley and Dakota exchanged several invoices, none of which contained the "Standard Terms and Conditions of Sale." On April 19, 2010, Tromley issued another quote, which stated it was a "'revised quotation'" and combined the December 2009 quotes "'and all subsequent changes made during our meetings into one, cohesive system quote.'" Id. This quote contained the same "NOTES" advising Dakota to "'[p]lease pay particular attention to the attached copy of our Standard Terms and Conditions of Sale which are an integral part of this quotation.'" Id. Both parties agreed they had never discussed the "Standard Terms and Conditions of Sale."

In June 2010, Dakota received an email containing an addendum outlining specification changes, attached to which was a document of binding "Standard Terms and Conditions" from two other of Tromley's divisions—sister companies to

Kloster, but with which Dakota had never corresponded. Those terms and conditions were identical to Tromley's "Standard Terms and Conditions of Sale," and, accordingly, contained an arbitration clause; but the officer at Dakota did not read them because he did not believe they were meant to apply to the original agreement. Id. Dakota agreed to the changes. Later, it filed a lawsuit against Tromley after becoming dissatisfied with Kloster's equipment. Tromley answered, raising a defense that there was a binding arbitration clause based on the "Standard Terms and Conditions of Sale." Accordingly, it initiated an arbitration proceeding in Oregon and filed a motion to compel arbitration. Because there were disputed issues of fact, an evidentiary hearing was held and, ultimately, the district court denied the motion.

The Eighth Circuit affirmed the district court's decision, announcing that the "primary inquiry [was] whether Tromley's Standard Terms and Conditions of Sale which were referenced but not included in the December 2009 and April 2010 price quotes were incorporated into the agreement between Tromley and Dakota." Id. Citing Mitsubishi Motors, it acknowledged, "'the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.'" Id. (quoting Mitsubishi Motors, 473 U.S. at 626). It went on to hold that "'if the parties [did] not agree[] to arbitrate, the courts have no authority to mandate that they do so.'" Id.

Applying South Dakota contract law, which is in all relevant respects the same as that of Florida, the Eighth Circuit emphasized that there must be mutual assent on all essential terms of the contract, and observed that Tromley bore the burden of proving that "its Standard Terms and Conditions of Sale were part of the parties' agreement." Id. Significantly, it found:

> The December 2009 and April 2010 quotes did not include a copy of the Standard Terms and Conditions of Sale even though the NOTES section referred to "the attached copy of our Standard Terms and Conditions of Sale." The quotes did have a document entitled "STANDARD PAYMENT TERMS" attached, though it did not include an arbitration provision.

Id. at 496. It further found: "Here, Dakota did not have a reasonable opportunity to reject the arbitration provision because it was unaware of the clause." Id. It then went on to assert that "it cannot be said Dakota was on notice of a document it did not already have in its possession. Because the arbitration provision was not readily available and because Dakota did not have a reasonable opportunity to reject it, Tromley cannot establish the necessary consent to bind Dakota to that provision." Id. The Eighth Circuit concluded: "[I]t was reasonable for Dakota to ignore the attached Standard Terms and Conditions of Sale which appeared tailored to two divisions with which it had no business. Therefore, applying the same analysis . . . we cannot say the parties mutually assented to modify their agreement to include the arbitration provision." Id. at 497.

In sum, the Eleventh Circuit's analysis in Gedimex is noteworthy because it confirms Appellant's argument that Appellees' 2012 "Terms and Conditions" should not be applied retroactively to bind Appellant when the terms were not known by it at the time of its receipt of the 2010 invoice, an invoice that forms the basis of the class action lawsuit. However, we find the Eighth Circuit's logic in Dakota Foundry to be even more compelling. As was true in that case, here, the 2010 invoice did not have the "Terms and Conditions" appended to it. Consequently, Appellant did not assent to them by leasing the propane tank. Moreover, Appellant's mere receipt of the "Terms and Conditions" in 2012 did not evidence a mutual intent that they be applied retroactively to the 2010 invoice. See also Holick v. Cellular Sales of N.Y., LLC, 802 F.3d 391 (2d Cir. 2015) (holding claims did not fall within scope of arbitration clause because the parties did not intend the clause to be retroactive); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171 (9th Cir. 2014) (denying motion to compel arbitration and holding the proximity or conspicuousness of the hyperlink to the terms and conditions containing the arbitration clause, alone, was not enough to give rise to constructive notice of those terms); Dasher v. RBC Bank (USA), 745 F.3d 1111 (11th Cir. 2014) (holding the district court did not err in denying the bank's motion to arbitrate, despite the fact that an earlier version of the parties' agreement contained an arbitration clause, because that agreement was entirely superseded by a newer agreement, which was silent on arbitration, and

further observing that when, under state law, parties agree to supersede an old contract by forming a new one, basic contract principles require the court to look only to the new agreement for evidence of the parties' intent, which, in the case before it, provided no evidence that the parties agreed to be bound to arbitrate their disputes); Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003) (rejecting argument that because subsequent customer agreements, each of which contained an arbitration agreement identical to the one signed by the customer when he opened his account, constituted an independent obligation for the customer to arbitrate the instant dispute, where the later customer agreements did not cover the present dispute); Int'l Ambassador Programs, Inc. v. Archexpo, 68 F.3d 337 (9th Cir. 1995) (holding arbitration clause in prior agreement did not apply to subsequent agreement); cf. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 723 (9th Cir. 1999) (rejecting Simula's argument that its Lanham Act claims were not arbitrable because they were separate tort claims relating to conduct that occurred prior to the date on which the parties entered into the arbitration clause and, therefore, they were governed by the parties' previous agreements, holding instead that "any obligation of Autoliv under the 1993 nondisclosure agreement and the January 1994 letter of intent was incorporated into the 1995 Agreement under the merger clause, and is subject to the arbitration clause").

Appellees rely on two federal district court decisions that we conclude are readily distinguishable from the circumstances of the instant case. The first of those is Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS (M.D. Fla. Jan. 14, 2008) [2008 WL 150479]. In Sanders, the Plaintiffs filed a federal class action lawsuit alleging Comcast's "On Demand" cable feature was defective. Comcast filed a motion to compel arbitration. The Plaintiffs asserted they should not be compelled to arbitrate because they never signed an arbitration agreement and never consented to submit their disputes to arbitration. Comcast argued it mailed a "Notice from Comcast Regarding Arbitration" to each Plaintiff; that the Notice bound the Plaintiffs to arbitration; and that none of the Plaintiffs had opted out of the terms of the Notice. Id. at *1. Although the federal district court determined it was "essential that this Court first determine whether the parties agreed to arbitrate the dispute at hand," id. at *3, it acknowledged it must also determine from the record "whether Plaintiffs can be bound to arbitrate by virtue of their failure to opt out of the terms of the Arbitration Notice *and by virtue of their continued use of Comcast's services*." Id. (emphasis added). The district court pointed out that no signature was needed to meet the Federal Arbitration Act's written agreement requirement. Furthermore, in response to the Plaintiffs' contention that they had not received the Notice, it relied on the fact that "'the common law has long recognized a rebuttable presumption that an item properly mailed was received by the

addressee.'" Id. at *6 (quoting Barnett v. Okeechobee Hosp., 283 F.3d 1232, 1239 (11th Cir. 2002)). Lastly, the district court considered that the Plaintiffs' continued use of Comcast's services "militated in favor of finding that the Plaintiffs consented to the terms and conditions" as stated in the arbitration clause. Id. (citing Rivera v. AT & T Corp., 420 F. Supp. 2d 1312, 1320 (S.D. Fla. 2006)).

In contrast to the circumstances and issues addressed in Sanders, here, the issue does not turn on Appellant's alleged continuous business relationship with Appellees or whether it assented to the subsequent arbitration clause by not opting out. The distinction lies in the fact that the class action lawsuit arises from a singular transaction that took place two years before Appellees mailed out their "Terms and Conditions" document. As the Eleventh Circuit Court of Appeals pointed out in Chastain v. The Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992), "the calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of any agreement, *including the existence of an agreement to arbitrate*." Id. at 854 (emphasis in original). Indeed, the very existence of an agreement to arbitrate is what is at issue here. Sanders does not change our conclusion.

For similar reasons, the decision in Dorward v. Macy's Inc., No. 2:10–cv–669–FtM–29DNF (M.D. Fla. July 20, 2011) [2011 WL 2893118], is equally

inapposite. Similar to the situation in Sanders, Dorward involved an arbitration clause that viewed the employees' continued employment with the company as an identifiable means of assent under the terms of the arbitration clause. The federal district court compelled arbitration because the plaintiff had declined to opt out of the arbitration clause. It reasoned that "[b]y declining to opt out in accordance with the terms of the offer, plaintiff accepted defendant's offer to resolve any disputes through arbitration." Id. at **26-27. Again, Dorward does not address the distinctive circumstances presented in the instant case, where Appellant is suing Appellees on the basis of a single contractual transaction that contained *no* arbitration clause to which Appellant could have assented at the time. In the common parlance of blackletter contract law, there was no "meeting of the minds" between the parties in 2010 on any terms involving the mandatory arbitration of disputes.

For all of these reasons, we reject Appellees' call for affirmance of the trial court's order dismissing Appellant's complaint with prejudice and granting Appellees' motion to compel arbitration. Instead, we hold there was no showing that Appellant and Appellees entered into a valid written agreement in 2010 to arbitrate the dispute addressed in Appellant's amended complaint. Accordingly, we reverse the order on appeal and remand the case to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

B.L. THOMAS and WINOKUR, JJ., CONCUR.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

LISA GDOVIN, Appellant, v. DYCK-O'NEAL, INC., Appellee.	)	Case No. 2D16-394

Opinion filed August 10, 2016.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Alane Laboda, Judge.

Austin Tyler Brown of Parker & DuFresne, P.A., Jacksonville, for Appellant.

Susan B. Morrison of Law Offices of Susan B. Morrison, P.A., Tampa, for Appellee.

SILBERMAN, Judge.

Lisa Gdovin seeks review of an order denying her motion for relief from judgment in an independent deficiency action filed by Dyck-O'Neal, Inc., as assignee of the underlying foreclosure judgment and note. Gdovin unsuccessfully argued that the circuit court lacked subject matter jurisdiction because jurisdiction to enter a deficiency judgment rested solely with the foreclosure court. We affirm.

The question here is whether a circuit court has subject matter jurisdiction to adjudicate an independent deficiency action when the plaintiff had requested deficiency relief in its complaint in a separate foreclosure action involving the same note and the foreclosure court had entered a final judgment reserving jurisdiction to grant deficiency relief. We answer the question in the affirmative. We agree with the Third District's conclusion that the plain language of section 702.06, Florida Statutes (2013), authorizes the filing of an independent deficiency action in such cases because "the foreclosure court did not grant or decline to grant the deficiency judgment claim." Garcia v. Dyck-O'Neal, Inc., 178 So. 3d 433, 436 (Fla. 3d DCA 2015); see also Dyck-O'Neal, Inc. v. Beckett, No. 5D15-3005, 2016 WL 3570108 (Fla. 5th DCA July 1, 2016); Dyck-O'Neal, Inc. v. Hendrick, No. 5D15-3790, 2016 WL 3570112 (Fla. 5th DCA July 1, 2016); Cheng v. Dyck-O'Neal, Inc., 41 Fla. L. Weekly D1076 (Fla. 4th DCA May 4, 2016); Dyck-O'Neal, Inc. v. Weinberg, 190 So. 3d 137 (Fla. 3d DCA 2016).

In so deciding, we certify conflict with the First District's decision in Higgins v. Dyck-O'Neal, Inc., 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016). The court in Higgins rejected the Third District's plain language interpretation of section 702.06 and instead concluded that the outcome was controlled by First Federal Savings & Loan Ass'n of Broward County v. Consolidated Development Corp., 195 So. 2d 856 (Fla. 1967), and Belle Mead Development Corp. v. Reed, 153 So. 843 (Fla. 1934). See Higgins, 41 Fla. L. Weekly at 1379. But as Judge Makar stated in his dissenting opinion in Higgins, the plain language of the 2013 amendment to section 702.06 "trumps whatever perceived inconsistency" exists with First Federal Savings and Belle Mead.

Id. at D1380 (Makar, J., dissenting). We therefore affirm the order denying Gdovin's motion for relief from judgment.

Affirmed; conflict certified.

BLACK and SLEET, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed August 10, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1139
Lower Tribunal No. 12-8650

Richard Effs,
Appellant,

vs.

Sony Pictures Home Entertainment, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Gill S. Freeman, Judge.

Daniels Kashtan, and Lorne E. Berkeley, for appellant.

Shutts & Bowen LLP, and Suzanne Youmans Labrit (Tampa) and Jerel C. Dawson, for appellee.

Before ROTHENBERG, LAGOA, and LOGUE, JJ.

ROTHENBERG, J.

The question presented in this appeal is whether the "continuing tort"

doctrine is applicable to Richard Effs' ("Effs") claim for tortious interference with a business relationship against Sony Pictures Home Entertainment, Inc. ("Sony Pictures"), which, if applicable, would delay the commencement of the four-year statute of limitations. Because we conclude that the continuing tort doctrine is not applicable, we find that Effs' claim was barred by the expiration of the statute of limitations, and therefore, affirm the entry of final judgment in favor of Sony Pictures.

FACTS AND PROCEDURAL HISTORY

On March 6, 2012, Effs filed suit against Sony Corporation of America Pictures ("Sony") and others, alleging that he had a 25% ownership interest in a motion picture—*Shottas*—pursuant to an oral agreement he had with defendant Norman "Cess" Silvera ("Silvera") and Keith Dean, a deceased non-party. Thus, Effs alleged that when Sony subsequently entered into a licensing agreement with others and acquired licensing and distribution rights to *Shottas*, Sony tortiously interfered with the business relationship Effs had with Silvera and Dean.

Sony Pictures[1] answered Effs' complaint and asserted affirmative defenses, including that Effs' claim for tortious interference with a business relationship was barred by the expiration of the applicable four-year statute of limitations. § 95.11(3)(o), Fla. Stat. (2005). Thereafter, Sony Pictures moved for summary

[1] Sony Pictures was substituted for Sony as the real party in interest.

judgment on that basis.

When considered in the light most favorable to Effs as the non-moving party, the record reflects that Silvera and Effs formed Access Pictures, LLC to produce *Shottas*. In 2005, after the movie was produced, Silvera met with Sony Pictures without Effs' presence, and in May 2005, Sony Pictures entered into a licensing agreement whereby Sony Pictures was granted exclusive distribution rights to *Shottas*. Pursuant to the licensing agreement, the first payment from Sony Pictures was due on October 30, 2005; other distribution payments were allegedly made after that date; and in May 2007, Effs' counsel sent Sony Pictures an email advising it of Effs' involvement in *Shottas.*

Following a hearing, the trial court entered an order granting Sony Pictures' motion for summary judgment. Specifically, the trial court found that Effs' claim for tortious interference with a business relationship accrued on October 30, 2005, when Sony Pictures was required to make its first distribution payment, and under the "delayed discovery doctrine," the latest date that Effs learned of the alleged interference was in May 2007—which is when Effs' counsel emailed Sony Pictures—and therefore the claim was time-barred because the lawsuit was filed on March 6, 2012. In reaching this conclusion, the trial court rejected Effs' argument that Sony Pictures engaged in a "continuing tort" based on Sony Pictures' subsequent distribution payments in the years following the execution of the

licensing agreement. Specifically, the trial court found that "the distributions did not constitute tortious interference. Rather, they were part of Effs' alleged damages resulting from the claimed interference." Thus, the trial court entered a final judgment in favor of Sony Pictures.

ANALYSIS

As previously stated, the question presented in this appeal is whether the "continuing tort" doctrine is applicable to Effs' claim for tortious interference with a business relationship[2] filed against Sony Pictures. Under the continuing tort doctrine, the cause of action **accrues** when the tortious conduct ceases. Laney v. Am. Equity Inv. Life Ins. Co., 243 F. Supp. 2d 1347, 1357 (M.D. Fla. 2013) (applying Florida law). "**A continuing tort is 'established by continual tortious *acts*, not by continual harmful effects from an original, completed act**.'" Suarez v. City of Tampa, 987 So. 2d 681, 686 (Fla. 2d DCA 2008) (quoting Horvath v. Delida, 540 N.W.2d 760, 763 (Mich. 1995)) (italics in original; emphasis added); see also Black Diamond Props, Inc. v. Haines, 69 So. 3d 1090 (Fla. 5th DCA 2011).

Although it appears that there are no Florida cases addressing the

[2] The elements of a claim for tortious interference with a business relationship are "(1) the existence of a business relationship . . . ; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damages to the plaintiff as a result of the breach of the relationship." Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985).

"continuing tort" doctrine as it pertains to a cause of action for tortious interference with a business relationship, we find several persuasive decisions rendered from other jurisdictions. For example, in D'Arcy & Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P., 129 S.W.3d 25, 30 (Mo. Ct. App. 2004), the appellate court found as follows:

> Assuming that [the defendant] unjustifiably interfered with [the plaintiffs'] business relationship, [the defendant's] tortious conduct was complete when it induced or caused the breach. The wrong, therefore, was not continuing. The damage or injury that had been inflicted may have continued to develop during successive tax periods, but it did not result from repeating wrongful conduct.

See also Elec. Bankcard Sys., Inc. v. Retriever Indus., Inc., 2003 WL 204717, *7 (Tex. App. Jan. 30, 2003) (declining to apply the continuing tort doctrine to the plaintiffs' claim for tortious interference with a business relationship where there is no "ongoing wrong"; noting that the "continuing loss of residual fees that may have resulted from that alleged wrongful conduct does not toll the statute of limitations").

We therefore agree with the trial court's determination that the continuing tort doctrine is not applicable to Effs' claim for tortious interference with a business relationship. Contrary to Effs' assertion, the tort was not continual in nature merely because Sony Pictures made subsequent distribution payments. These additional distribution payments were merely "harmful effects from an original, completed act." Suarez, 987 So. 2d at 686 (quoting Horvath, 540 N.W.2d

at 763). Although these additional distribution payments could have potentially increased Effs' claimed damages, they did not delay the cause of action from accruing. Because the "continuing tort" doctrine is not applicable in the instant case, we conclude that the trial court properly determined that the cause of action was barred by the four-year statute of limitations.

We also conclude that Effs' remaining arguments are without merit and do not warrant discussion. Accordingly, we affirm the final judgment entered in favor of Sony Pictures.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ABRAHAM GOMEZ and **NEIDA BARBARITA GOMEZ,**
Appellants,

v.

TIMBEROOF ROOFING CO., INC., and **JOSE GARZON,**
Appellees.

No. 4D14-4685

[August 10, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. 13-022534 CACE (05).

Andrew M. Kassier of Andrew M. Kassier, P.A., Coral Gables, and Albert J. Piantini of Albert J. Piantini, P.A., Coral Gables, for appellants.

Randall L. Gilbert and Bryce J. Gilbert of Gilbert & Caddy, P.A., Hollywood, for appellee Timberoof Roofing Co., Inc.

CIKLIN, C.J.

Abraham Gomez and Neida Barbarita Gomez ("the unit owners") appeal the summary judgment entered in favor of Timberoof Roofing Co., Inc. ("Timberoof") on Timberoof's prayer for declaratory relief. The unit owners argue that the trial court erred in finding that judgments recorded by Timberoof constituted liens where the judgments contained the address of Timberoof's attorney rather than the address of the judgment holder, as required by statute. Because the statute is clear and unambiguous, we agree, and thus reverse and remand for further proceedings.

After obtaining money judgments against a condominium association, Timberoof brought an action against the unit owners, seeking a declaration that it was entitled to be paid the unit owners' share of the judgments, as the judgments were obtained before the unit owners transferred ownership of one of their units. The unit owners moved to dismiss, arguing that the judgments did not constitute liens as they did not contain the address of the judgment holder, as required by section

55.10(1), Florida Statutes (2013). The trial court denied the motion. In their answer to the complaint, the unit owners raised, as an affirmative defense, Timberoof's failure to comply with section 55.10(1).

In its reply to the answer, Timberoof asserted that the judgments became judgment liens because "they contain the address which [Timberoof], a dissolved company, designated was its address, all within the body of the judgment." (Emphasis in original).

Timberoof then moved for summary judgment, asserting that its judgments constituted liens on the property. In support of its motion, Timberoof filed exhibits, including the three judgments on which it relied, and the affidavit of Bill Ferguson, the owner of Timberoof, who averred as follows:

> 2. Plaintiff last filed its annual business report with the [S]ecretary of State on March 29, 2010[,] and on September 23, 2011[,] the company became inactive due to its failure to file its annual business report.
>
> 3. On and before Plaintiff receiving its First Judgment (dated April 29, 2010) against [the condominium association,] Plaintiff was in the process of closing its business, and I as the owner, was personally moving out of Florida back to Texas.
>
> 4. Plaintiff designated its address as 1720 Harrison Street, Penthouse B Hollywood, FL 33020 within all of the Final Judgments because that is where Plaintiff wanted to receive its mail and where Plaintiff wanted to designate its address.

(Footnote omitted).

Attached to the affidavit was Exhibit 1, a February 2014 printout of a Sunbiz[1] information sheet for the Plaintiff, reflecting its "Principal Address" as "12935 Veterans Memorial, Houston, TX 77014" and its mailing address as "PO Box 682495, Houston, TX 77268." The printout also reflects that "Ferguson, William E." is the registered agent of Timberoof, and has the address "218 Tropical Drive #J737, Hollywood, FL 33021."

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[1] Sunbiz refers to the website for the Florida Department of State, Division of Corporations.

The three recorded judgments filed as summary judgment evidence provide the following addresses, respectively:

> TIMBEROOF ROOFING CO., INC. whose address is c/o Gilbert & Caddy PA 1720 Harrison Street, Penthouse B Hollywood, FL 33020 . . . .
>
> TIMBEROOF ROOFING CO., INC. as of whose address is c/o Gilbert & Caddy PA 1720 Harrison Street, Penthouse B Hollywood, FL 33020 . . . .
>
> TIMBEROOF ROOFING CO., INC. whose address is designated as c/o Gilbert & Caddy PA 1720 Harrison Street, Penthouse B Hollywood, FL 33020 . . . .

After a hearing, the trial court granted summary judgment on the claim for declaratory relief, finding as follows: "A lien was created. The judgment lien is valid and complied with the requirements of the lien statute." Because the summary judgment is based on a legal rather than factual issue, we employ a de novo standard of review. *Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000).

Section 55.10, Florida Statutes provides in pertinent part:

> (1) A judgment, order, or decree becomes a lien on real property in any county when a certified copy of it is recorded in the official records or judgment lien record of the county, whichever is maintained at the time of recordation, *provided that the judgment, order, or decree contains the address of the person who has a lien as a result of such judgment, order, or decree* or a separate affidavit is recorded simultaneously with the judgment, order, or decree stating the address of the person who has a lien as a result of such judgment, order, or decree. *A judgment, order, or decree does not become a lien on real property unless the address of the person who has a lien as a result of such judgment, order, or decree is contained in the judgment, order, or decree* or an affidavit with such address is simultaneously recorded with the judgment, order, or decree.

(Emphasis added).

Our courts have found the language of the statute to be plain and unambiguous in its requirement that the judgment contain the address of the person who "has a lien." In *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998), this court observed that the Legislature had taken pains to make it clear that the judgment holder's address is required:

> As if to insist on one interpretation, the statute in this case says the same thing in two different ways. In separate sentences, section 55.10(1) specifies that the address of a judgment creditor must be contained in the judgment or in a simultaneously recorded affidavit in order for the judgment to become a lien on real estate. First, the statute states how a judgment becomes a lien: "[a] judgment . . . becomes a lien on real estate . . . [when properly recorded] . . . provided that the judgment . . . contains the address of the person who has a lien as a result of such judgment." To emphasize this point, in the next sentence, the statute states that a judgment does *not* become a lien "unless the address of the person who has a lien as a result of such judgment . . . is contained in the judgment." We cannot expand this clear statutory directive to say that the address of the judgment holder's attorneys may be substituted for that of the judgment holder.

Id. at 1238 (alterations and emphasis in original). *See Tomalo v. Kingsley Displays, Inc.*, 862 So. 2d 899, 901 (Fla. 2d DCA 2003) (finding that lien did not comply with section 55.10(1) where it contained address of creditor's attorney); *Robinson v. Sterling Door & Window Co.*, 698 So. 2d 570, 571 (Fla. 1st DCA 1997) (finding a judgment did not constitute a lien where the judgment contained the names of the creditor's attorneys, but not the creditor's address).

Timberoof argues that the "designation" of the attorney's address as its own was sufficient to comply with the statute. The Second District rejected a similar argument in *Tomalo*:

> In the case at bar, Kingsley has attempted to distinguish *Hott* and *Robinson* by focusing on the "c/o" on Kingsley's recorded judgment. While we recognize that the name [of the lienholder] and an address do appear on the recorded judgment, we are mindful that section 55.10(1) does not merely call for "an address." The statute very specifically requires "the address of the person who has a lien."

Tomalo, 862 So. 2d at 901.

Even if the case law could be read as leaving unsettled whether a dissolving or dissolved business may use its attorney's address as its own where the business has no other possible address it could utilize—a matter we do not address in this opinion—the summary judgment evidence is unclear as to whether Timberoof was unable to comply with the statute and thereby state "the address of the [entity] who has a lien." The owner's affidavit simply provides that at the time the first judgment was obtained, Timberoof was in the process of dissolving, and that it used its attorney's address in all the judgments "because that is where Plaintiff wanted to receive its mail and where Plaintiff wanted to designate its address."

Timberoof also argues that the statute is unconstitutionally overbroad and vague, but it relies on the statute's application to others not similarly situated to itself. Accordingly, we do not entertain the argument. *See Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla. 4th DCA 2001) ("The traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" (citation omitted)).

Reversed and remanded for further proceedings.

GROSS and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DYCK-O'NEAL, INC.,
Appellant,

v.

PAUL MCKENNA,
Appellee.

No. 4D15-3571

[August 12, 2016]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; William L. Roby, Judge; L.T. Case No. 2014-CA-851.

Susan B. Morrison of Law Offices of Susan B. Morrison, P.A., Tampa, for appellant.

Austin Tyler Brown of Parker & DuFresne, P.A., Jacksonville, for appellee.

DAMOORGIAN, J.

Appellant, Dyck-O'Neal, Inc., appeals an order dismissing its suit to recover a deficiency judgment. Based on our holding in *Cheng v. Dyck-O'Neal, Inc.*, 41 Fla. L. Weekly D1076 (Fla. 4th DCA May 4, 2016), we reverse the final order of dismissal and remand with instructions to reinstate the complaint.

The genesis of this appeal was a foreclosure judgment in favor of EverHome Mortgage Company and against Appellee, Paul McKenna. The final judgment of foreclosure stated that the trial court retained jurisdiction to enter a deficiency judgment. The proceeds of the foreclosure sale were insufficient to satisfy the outstanding judgment. EverHome assigned the judgment and note to Dyck-O'Neal. Thereafter, Dyck-O'Neal filed a new complaint against McKenna seeking to collect the "deficiency" (i.e., the difference between the amount of the judgment in the foreclosure action and the fair market value of the foreclosed property as of the date of the foreclosure sale). McKenna filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the court lacked jurisdiction over the separate deficiency action because the judgment of foreclosure

reserved jurisdiction to enter a deficiency judgment in the court that entered the foreclosure judgment. The court granted the motion to dismiss for lack of subject matter jurisdiction. We note that at the time the trial court dismissed the case, the trial judge did not have the benefit of our decision in *Cheng*.

The issue presented here has been resolved by this court in *Cheng*. There, the borrower appealed the denial of his Rule 1.540 motion for relief from judgment on the ground that the trial court lacked jurisdiction to consider the deficiency action because the final judgment of foreclosure included an express reservation of jurisdiction to enter a deficiency judgment. This court held that section 702.06, Florida Statutes, "is unambiguous," and "the foreclosure judgment's reservation of jurisdiction does not preclude a separate suit to recover the deficiency where the foreclosure court has not granted or denied a claim for a deficiency judgment." *Id.* (citing *Garcia v. Dyck–O'Neal, Inc.,* 178 So. 3d 433 (Fla. 3d DCA 2015), and *Dyck–O'Neal, Inc. v. Weinberg,* 190 So. 3d 137 (Fla. 3d DCA 2016)).

Thus, under this court's holding in *Cheng*, the trial court did not lack jurisdiction over the separate deficiency action. Recently, the First District Court of Appeal reached the opposite result, holding that a party is *not* entitled to pursue a separate action at law where the foreclosure complaint includes a prayer for a deficiency judgment and the trial court reserves jurisdiction to enter a deficiency judgment. *Higgins v. Dyck–O'Neal, Inc.,* 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016). Accordingly, we certify conflict with *Higgins v. Dyck–O'Neal, Inc.,* 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016).

Reversed and remanded with instructions; conflict certified.

GROSS and TAYLOR, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

KAJAINE ESTATES, LLC,

Appellant,

v.

US BANK NATIONAL ASS'N AND DAVID WILLIAMS,

Appellees.
_____/

Case No. 5D15-1892

Opinion filed August 12, 2016

Appeal from the Circuit Court
for St. Johns County,
Arthur W. Nichols, lll, Senior Judge.

James J. Dougherty, of Law Office of Paul A. Krasker, P.A., West Palm Beach, for Appellant.

James Russell Collins and Vincent L. Sullivan, of Rusty Law, LLC, St. Augustine, for Appellee.

PER CURIAM.

The issue presented is whether a party that purchased a note from a plaintiff that unsuccessfully attempted to foreclose on the note is entitled to recover the original note from the court file. U.S. Bank National Association ("U.S. Bank") brought the initial foreclosure action in this case. Prior to trial, U.S. Bank substituted Kondaur Capital Corporation ("Kondaur") as party plaintiff, alleging that U.S. Bank had assigned Kondaur its right to enforce the note.

The trial court determined that Kondaur's witness was not qualified to testify regarding the note's history nor to establish the foundation to admit documents, apparently prepared by U.S. Bank, under the business records exception to hearsay. The trial court therefore ruled that Kondaur failed to establish U.S. Bank's standing at the inception of the foreclosure action and entered judgment in favor of Williams, the homeowner. Kondaur did not appeal.

Subsequently, Kajaine Estates, LLC, ("Kajaine") requested release of the original documents from the foreclosure proceeding, attaching an assignment, dated after the final judgment, purporting to assign the mortgage and note from Kondaur to Kajaine. Williams took the position that, because the trial court had already determined Kondaur had not established standing to enforce the note, Kondaur could not thereafter sell the note to Kajaine. The trial court apparently agreed and refused to release the original note to Kajaine. We reverse.

The issue of whether Kondaur could establish standing to foreclose is distinct from whether it owned the note. See, e.g., Devries v. CitiMortgage Inc., 188 So. 3d 909, 910 (Fla. 5th DCA 2016). Kondaur had a valid assignment but could not establish that U.S. Bank's ownership predated the filing of the foreclosure action. See id. (noting that standing must be shown as of the date complaint was filed). That does not mean U.S. Bank did not own the note and could not validly assign its interest to Kondaur. The original judgment did not prohibit Kondaur from pursuing foreclosure if Williams continued to fail to make payments on the mortgage. Nor did it prohibit Kondaur's assignee from seeking enforcement of the note going forward. Kajaine demonstrated a claim to ownership of the

note as of the date of the hearing. Whether Kajaine could properly seek enforcement of the note was not relevant to the trial court's consideration.

REVERSED AND REMANDED.

COHEN and LAMBERT, JJ., and LEMONIDIS, R., Associate Judge, concur.