Florida Real Property and Business Litigation Report

Volume XI, Issue 34
August 27, 2018
Manuel Farach

McGinnis v. American Home Mortgage Servicing, Inc., Case No. 17-11494 (11th Cir. 2018).

An award of $3,506,000 in damages ($6,000 for economic injury, $500,000 for emotional distress, and $3,000,000 in punitive damages) for a wrongful foreclosure where the jury found intentional conduct, including placing disputed mortgage payments into a suspense account, is not excessive.

Derouin v. Universal American Mortgage Company, LLC, Case No. 2D17-1002 (Fla. 2d DCA 2018).

The appellate record must clearly show a "face to face" meeting under 24 C.F.R. § 203.604 when the failure to conduct the meeting is properly raised under the pleadings.

Chakra 5, Inc. v. The City of Miami Beach, Case No. 3D16-2569 (Fla. 3d DCA 2018).

Accrual of a landowner's 42 U.S.C. § 1983 claim against a government is determined by federal, not state, law, and the statute of limitations begins to run when plaintiffs know or should have known "(1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury."

Torres v. Bank Of New York, Case No. 4D17-1625 (Fla. 4th DCA 2018).

A borrower that successfully defends on the basis of failure of lender to prove entitlement to enforce the note is not entitled to an award attorney's fees but is entitled to an award of costs under Florida Statute section 57.041(1) and Florida Rule of Civil Procedure 1.420.

Sacks v. The Bank Of New York Mellon, Case No. 4D17-2122 (Fla. 4th DCA 2018).

The "trustworthiness" requirement of *Bank of N.Y. v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015), is not satisfied if the evidence (an affidavit in this case) does not reflect the steps taken by the affiant to verify the accuracy of the financial records.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11494

D.C. Docket No. 5:11-cv-00284-CAR

JANE MCGINNIS,

Plaintiff - Appellee,

versus

AMERICAN HOME MORTGAGE SERVICING, INC.,

Defendant - Appellant.

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

(August 22, 2018)

Before TJOFLAT, ROSENBAUM, and BRANCH, Circuit Judges.

BRANCH, Circuit Judge:

American Home Mortgage Servicing, now known as Homeward, appeals the denial of a new trial concerning an award of punitive damages arising from a

wrongful foreclosure. Jane McGinnis, the owner of several rental properties, brought suit against Homeward, the servicer of seven of her residential properties' mortgages, alleging wrongful foreclosure, conversion, interference with property, and intentional infliction of emotional distress. The jury found against Homeward on all claims and awarded McGinnis $3,506,000 in damages ($6,000 for economic injury, $500,000 for emotional distress, and $3,000,000 in punitive damages). Homeward appeals the district court's denial of a motion for a new trial, arguing (1) that the punitive damages award was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment and (2) that the punitive damages award unlawfully exceeded Georgia's $250,000 cap on punitive damages under O.C.G.A. § 51-12-5.1(f), (g).[1] Because we conclude that the award violates neither the U.S. Constitution nor Georgia law, we affirm the judgment of the district court.

I. FACTUAL BACKGROUND

McGinnis owns numerous residential rental properties in Georgia that served as her nest egg. McGinnis entrusted her son, Adam, with managing the properties.

[1] "In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm . . . there shall be no limitation regarding the amount which may be awarded as punitive damages." O.C.G.A. § 51-12-5.1(f). "For any tort action not provided for by subsection . . . (f) of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00." *Id.* § 51-12-5.1(g).

McGinnis refinanced seven of her properties with Taylor, Bean & Whitaker ("TB&W"), granting security deeds and promissory notes to TB&W. Her monthly payment to TB&W for one such rental property, located at 172 Hilton Street, was $605.58, including $490.13 for principal and interest and $115.45 for the escrow deposit. On October 17, 2009, Homeward obtained the rights to service McGinnis's seven loans. Homeward sent McGinnis a welcome letter that said McGinnis's payment on 172 Hilton Street for November 2009 was $843.58 without explaining the basis for the increase. McGinnis disputed the increase and paid $605.58 for November. In December 2009, Homeward sent McGinnis an escrow analysis showing a present payment of $843.58, including $490.13 for principal and interest and $353.45 for the escrow deposit. No explanation was given for the high percentage increase in the escrow deposit portion of the payment. The statement described McGinnis's new monthly payment beginning February 1, 2010 as $680.08. McGinnis sent a fax to Homeward asserting that the escrow amounts were incorrect and continued paying $605.58.

On January 15, 2010, Homeward sent McGinnis a letter explaining that the escrow analysis on her loan could have reflected an escrow error and directing her to disregard the December analysis and continue making payments at the previous amount. On February 20, 2010, Homeward sent a second escrow statement that described McGinnis's present payment as $843.59 through March 2010 and her

new payment, effective April 1, 2010, as $638.32. Homeward treated the past payments of $605.58 as partial, and held the funds in a suspense account until there were enough funds to pay off the oldest past-due monthly payment. The interest and late fees continued to mount and Homeward frequently contacted Adam and Jane by phone and mail demanding payment. On May 19, 2010, McGinnis sent Homeward a fax explaining that the correct payment for November 2009 through March 2010 should have been $605.58 and providing her own escrow analysis, which was identical to Homeward's analysis with respect to payments after April 2010. The only difference was the $843.58 that McGinnis refused to pay for November 2009 through March 2010 and associated late fees. Homeward failed to explain or retract the $843.48 amount and the issues persisted throughout 2010. McGinnis continued to pay $605.58 until January 2011 when she began paying the $638.32.

From February through May 2011, Homeward returned McGinnis's payments. On March 22, 2011, Homeward sent a formal notice of foreclosure on 172 Hilton Street and finally foreclosed on July 7, 2011.[2] At trial McGinnis testified that the experience traumatized her. Her clinical psychologist, Dr. Andrew Sappington, also testified that the events leading up to the foreclosure were a

[2] Each loan was subject to a family rider providing that default on any one of the loans triggered a default on the others. *McGinnis v. Am. Home Mort. Servicing, Inc.*, 817 F.3d 1241, 1247 (11th Cir. 2016). And Homeward's conduct at issue here involved all seven properties. *Id.* at 1249.

"major cause of . . . depression" for McGinnis as well as of physical symptoms that included projectile vomiting. McGinnis, who is retired and relies on her rental properties as her income, described the effect of the foreclosure: "I am too old to start over. They have taken my life away from me." McGinnis also presented at trial a letter that Adam had sent a fax to Homeward on December 17, 2009 describing the "und[ue] stress" Homeward's constant demands had caused him and his mother. At trial, McGinnis also presented recordings of phone conversations with Homeward in which Adam mentioned his and his mother's frustration with Homeward's repeated demands for payment and refusal to explain the increase. Homeward's only witness, a default case manager at Homeward, insisted that McGinnis was obligated to pay any amount Homeward demanded whether reasonable or in error.

II. PROCEDURAL HISTORY

McGinnis filed suit against Homeward in the United States District Court for the Middle District of Georgia asserting claims of (1) wrongful foreclosure, (2) violation of the Real Estate Settlement Procedures Act ("RESPA"), (3) intentional infliction of emotional distress ("IIED"), (4) conversion, (5) tortious interference with property rights, (6) defamation, and (7) violation of Georgia's Racketeer Influenced and Corrupt Organizations ("RICO") Act. McGinnis sought attorney's fees and punitive damages. After discovery, Homeward moved for summary

judgment. The district court granted summary judgment for Homeward on the RESPA, defamation, and Georgia RICO Act claims.

The case then proceeded to trial, which was bifurcated into two phases: one phase on liability and the other on punitive damages and attorney's fees. At the end of McGinnis's case on liability, Homeward moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), which the district court denied.

By special verdict, the jury found for McGinnis on all of her remaining claims—conversion, wrongful foreclosure, interference with property rights, and IIED. The jury awarded McGinnis $6,000 in economic damages and $500,000 in emotional distress damages. In the second phase of the trial, McGinnis withdrew her claim for attorney's fees, and the jury found that Homeward acted with the specific intent to cause McGinnis harm and awarded $3,000,000 in punitive damages.

After trial, Homeward filed a renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), and in the alternative, for a new trial on the issue of punitive damages. The district court granted in part the renewed judgment as a matter of law and reduced the punitive damages award to the statutory cap of $250,000 pursuant to O.C.G.A. § 51-12-5.1(g), finding that there was insufficient evidence Homeward acted with specific intent to cause

harm.[3] On appeal regarding Homeward's post-trial motions, we determined that Homeward did not properly preserve the issue of specific intent with regard to punitive damages in its Rule 50(a) motion, and was therefore precluded from raising the argument in its Rule 50(b) motion. *McGinnis*, 817 F.3d at 1261–64. Accordingly, we reversed the district court's ruling that Homeward had preserved the issue of specific intent and vacated the judgment that had reduced the jury's award to $250,000. *Id.* We remanded and instructed the district court to rule on the motion for a new trial on the issue of punitive damages. *Id.* at 1264.

On remand, the district court denied Homeward's motion for a new trial, concluding that the punitive damages award was not unconstitutionally excessive and that the jury's finding of specific intent—a prerequisite to an award in excess of Georgia's $250,000 statutory cap—was not against the clear weight of the evidence. Homeward filed the present appeal.

III. STANDARDS OF REVIEW

The district court's "decision that the punitive damages award does not run afoul of the federal Constitution . . . is subject to *de novo* review, though we 'defer to the District Court's findings of fact unless they are clearly erroneous.'" *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1309 (11th Cir. 2007) (quoting

[3] The district court did not conditionally rule on Homeward's motion for a new trial on the issue of punitive damages.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436, 440 n.14 (2001)).

"The district court's denial of a motion for a new trial is reviewed for an abuse of discretion." *Id.* (citing *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1247 (11th Cir. 2001)). "Deference to the district court is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed." *Id.* at 1309 (quoting *Middlebrooks*, 256 F.3d at 1247–48 (internal quotation marks omitted)).

IV. DISCUSSION

This appeal raises two issues related to the jury's punitive damages award: (1) whether the award violates Homeward's due process rights because it is grossly excessive; and (2) whether the district court abused its discretion when it concluded Homeward is not entitled to a new trial on the basis that there was insufficient evidence Homeward acted with specific intent to harm.

A. The Punitive Damages Award Is Not Unconstitutionally Excessive.

Homeward argues that the jury's punitive damages award is excessive in violation of due process. The Supreme Court has said that a punitive damages award violates due process when it is "grossly excessive" in relation to the State's interest in punishment and deterrence. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). The Supreme Court has instructed courts to consider three guideposts

when determining whether an award violates due process: (1) the degree of reprehensibility of the defendant's misconduct; (2) the ratio between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575–83. The district court concluded that under those factors the award in this case is not unconstitutionally excessive. We agree and address each factor in turn.

The reprehensibility of the defendant's conduct is the "dominant consideration" in assessing whether a jury's punitive damages award is excessive. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1283 (11th Cir. 2008). To determine reprehensibility, the Supreme Court has instructed courts to consider several sub-factors: (1) whether the harm caused was physical or economic; (2) whether the conduct evinced an indifference to or reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions rather than an isolated event; and (5) whether the conduct involved intentional malice, trickery, or deceit rather than mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576–77).

On the first *Gore* guidepost, we find a high degree of reprehensibility in Homeward's conduct based on the relevant sub-factors. First, Homeward's conduct

caused McGinnis physical and emotional harm in addition to economic harm. McGinnis's psychologist testified that the events leading up to the foreclosure were a major cause of her depression as well as her physical symptoms, including projectile vomiting. Second, Homeward's conduct evinces an indifference to McGinnis's health. Adam informed Homeward in writing that its actions were causing both of them "und[ue] stress." Further, "the sheer volume of adversarial communications . . . and looming threats of foreclosure" that Homeward repeatedly offered reflect that Homeward almost certainly knew its conduct was causing McGinnis emotional harm. *McGinnis v. Am. Home Mort. Servicing, Inc.*, 240 F. Supp. 3d 1337, 1352 (M.D. Ga. 2017).

Third, Homeward knew that McGinnis was financially vulnerable. The seven properties at issue in the foreclosure represented McGinnis's "livelihood, her nest egg, her security, her life's work, and a representation of her character in the community." *McGinnis*, 817 F.3d at 1259. And in the numerous communications with Jane and Adam, "Homeward almost certainly learned the stakes involved with the foreclosure, and yet it never looked back." *Id.*

Fourth, Homeward's conduct involved repeated actions rather than an isolated event. Adam "repeatedly notified Homeward of errors in the handling of [the] account and attempted to resolve the errors in good faith." *Id.* Each time, however, Homeward refused to correct its error or justify the increase. Moreover,

"Homeward's agents frequently" contacted McGinnis and Adam "by phone and mail" such that according to Adam, Homeward's demands became "a constant fixture of their lives." *Id.* at 1258. Indeed, the correspondence was so extensive that the collection letters stacked together reached five feet high. *Id.* Homeward also began placing each of McGinnis's monthly payments into a suspense account from which it "deducted, as its own income, late fees and other expenses," *McGinnis*, 240 F. Supp. 3d at 1351, numerous times over the course of five months, *McGinnis*, 817 F.3d at 1248, which, as noted below, facilitated the collection of more monies to which it was not entitled.

Fifth, Homeward's conduct went well beyond a calculation error. As we previously noted, Homeward's failure to explain, even at trial, how it arrived at the payment amount "speaks volumes" about its conduct. *McGinnis*, 817 F.3d at 1257. Homeward had numerous opportunities to correct any error but failed to do so each time. And when Adam and Jane reached out for help Homeward responded "with indifference, obstinacy, and, at times, belligerence." *McGinnis*, 240 F. Supp. 3d at 1350. Homeward also repeatedly contacted Jane and Adam to demand payment of an amount to which it knew it was not entitled. *McGinnis*, 817 F.3d at 1258. Indeed, "we [found] Homeward's awareness of its error rendered its opaqueness, unresponsiveness, and belligerence—in pursuing foreclosure in a fairly short

amount of time for a relatively small amount of money—extreme and outrageous as a matter of law." *Id.* at 1259. Such conduct is more than mere accident.

Homeward's use of the suspense account also involved intentional malice, trickery, or deceit. Homeward's placement of McGinnis's monthly payments in a suspense account, rather than crediting those payments to her account, allowed it to collect fees and expenses that Homeward knew McGinnis did not owe. *McGinnis*, 240 F. Supp. 3d at 1351. The jury determined that such conduct amounted to unlawful conversion—an intentional tort. *Id.* That is no surprise. Homeward knew that it had increased McGinnis's monthly payment beyond what was owed because McGinnis repeatedly pointed out the error. *Id.* Therefore, Homeward knew that the fees and expenses it deducted from the suspense account were not in fact due but deducted them anyway. *Id.* And Homeward knew that the suspense account would pressure McGinnis to pay the disputed amount in order to stop the deduction of late fees or to avoid foreclosure. *Id.* Thus, each of the *State Farm* sub-factors supports the conclusion that Homeward's conduct was highly reprehensible.

Turning to the second *Gore* guidepost, we consider whether the ratio of punitive damages to compensatory damages awarded by the jury in this case—5.9:1—is unconstitutionally excessive. We conclude that it is not. As an initial matter, the Supreme Court has approved of "single-digit multipliers" as "more likely to comport with due process, while still achieving the State's goals of

deterrence and retribution, than awards with [higher] ratios." *State Farm*, 538 U.S. at 425.

Homeward argues that even a single-digit ratio award offends due process in this case because of McGinnis's substantial recovery of other damages. Homeward relies on dicta in *State Farm* suggesting that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* However, in that same discussion the Supreme Court made clear that its suggested ratios were intended to be "instructive" and that "[t]he precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* Further, we have upheld ratios substantially greater than 1:1 in cases with large compensatory damages awards. In *Action Marine*, we upheld a punitive damages award of $17.5 million despite a sizeable $3.2 million compensatory damages award (a ratio of nearly 5.5:1) where the defendant's conduct was "exceedingly reprehensible." 481 F.3d at 1321. Similarly, in *Goldsmith*, we upheld a ratio of 9.2:1 on the basis of particularly reprehensible behavior after the jury awarded $54,321 in compensatory damages. 513 F.3d at 1283. And in *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), we upheld a punitive damages award of $2,000,000 where the plaintiff recovered $500,000 in compensatory damages, a ratio of 4:1.

Homeward argues that we must discount emotional distress damages when conducting the ratio analysis, but our case law has held otherwise. In *Bogle*, we upheld a substantial punitive damages award of $2,000,000 even though the $500,000 in compensatory damages award was based entirely on emotional distress. *Id.* at 1359, 1362. Similarly, in *Goldsmith*, we made no distinction between economic and emotional distress damages when upholding a punitive damages award of $500,000 based on a $54,321 award, half of which consisted of damages for emotional distress. 513 F.3d at 1275, 1283. Further, Homeward's assertion that the damages for emotional distress contained a punitive element in this case is unfounded because the trial court instructed the jury to base its compensatory damages award only on its determination of the appropriate amount to compensate McGinnis for her injury.

The final *Gore* guidepost we must consider is the amount of civil penalties authorized or imposed in comparable cases. Homeward asks us to compare the punitive damages award to the civil penalties available under RESPA for failure to provide an escrow analysis.[4] However, Homeward has failed to identify any

[4] This provision of RESPA provides: "In the case of each failure to submit a statement to a borrower as required under subsection (c) of this section, the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed on such lender or escrow servicer for all such failures during any 12-month period referred to in subsection (b) of this section may not exceed $100,000." 12 U.S.C. § 2609(d)(1). Intentional violations carry a $100 penalty and the $100,000 cap does not apply. *Id.* § 2609(d)(2).

similar cases in which RESPA penalties were actually applied. And, in any event, RESPA provides little if any guidance in this case because Homeward's conduct involved far more than failing to provide escrow statements. Homeward refused to justify or correct the payment increase and repeatedly demanded payments to which it knew it was not entitled through numerous phone calls and collection letters. At the same time, Homeward used a suspense account to "deduct[], as its own income," even more in late fees and expenses that it was aware were based on an unreasonable increase in McGinnis's monthly payments. *McGinnis*, 240 F. Supp. 3d at 1351.

In sum, after considering all of the *Gore* factors, we conclude that the jury's punitive damages award is not grossly excessive in relation to the State's legitimate interest in deterring Homeward's conduct, and therefore, does not violate the due process rights of Homeward.

B. The District Court Did Not Abuse Its Discretion by Concluding the Jury's Finding of Specific Intent Was Not against the Weight of Evidence.

We review the district court's decision to deny a new trial for abuse of discretion.[5] Rule 59 of the Federal Rules of Civil Procedure[6] allows a district court

[5] McGinnis argues that Homeward lost its right to challenge the jury's finding of specific intent under Rule 59 because it failed to make that argument under Rule 50. We disagree. This Court instructed the district court on remand to consider "Homeward's Rule 59 motion for a new trial on the issue of punitive damages." *McGinnis*, 817 F.3d at 1264. And although a movant cannot use Rule 59 to press matters that could have been pressed earlier, *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005), Rule 50 motions "are not prerequisites

to order a new trial if it determines that that the jury's verdict is against the weight of the evidence presented at trial. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984).

Homeward argues that the punitive damages award unlawfully exceeded the $250,000 statutory cap in O.C.G.A. § 51-12-5.1(g) because there was no evidence from which a jury could conclude that it acted with the specific intent to harm McGinnis. Georgia law caps punitive damages at $250,000 unless "it is found that the defendant acted, or failed to act, with the specific intent to cause harm," in which case there is no statutory limitation. O.C.G.A. § 51-12-5.1(f), (g). Specific intent to cause harm exists where an actor desires to cause the harm resulting from his or her actions or believes that the resulting harm is substantially certain to result from his or her actions. *Action Marine*, 481 F.3d at 1313.[7] In other words, specific intent can be established by showing that the actor engaged in a course of conduct even though he or she believed the conduct was almost certain to cause

---

to a motion for a new trial," *Urti v. Transp. Commercial Corp.*, 479 F.2d 766, 769 (5th Cir. 1973). Here, Homeward's argument that the jury's finding of specific intent is against the weight of the evidence could not have been made until after the jury reached a verdict.

[6] "The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59.

[7] The district court in the instant case gave the jury an instruction on the definition of specific intent nearly identical to the definition used by the *Action Marine* court. *See Action Marine*, 481 F.3d at 1313. Because Homeward did not object to that instruction it cannot now argue that more is required to establish specific intent. *See id.*

harm. *McGinnis*, 240 F. Supp. 3d at 1349.[8] The district court determined that it was not against the weight of the evidence for the jury to conclude that Homeward knew its conduct was substantially certain to cause McGinnis emotional harm from four pieces of evidence: Homeward's awareness of its error and refusal to retract its demands, Homeward's use of the suspense account, Homeward's knowledge of the emotional harm suffered by McGinnis, and Homeward's offer to avoid foreclosure. We agree.

First, the jury's finding of specific intent was supported by evidence showing Homeward knew its escrow analysis was in error yet proceeded to demand payment repeatedly without explanation and then foreclose on McGinnis's property. *See DeGolyer v. Green Tree Servicing, LLC*, 291 Ga. App. 444, 450, 662 S.E.2d 141, 148 (2008) (concluding that proceeding to foreclosure based on a known calculation error could constitute extreme or outrageous conduct supporting a claim for IIED). At trial, McGinnis presented evidence that she and Adam repeatedly made good-faith attempts to inform Homeward of its escrow calculation error. *McGinnis*, 817 F.3d at 1259. Undeterred, Homeward continued to demand payment of the unexplained amount, collect unwarranted late fees, and proceed to

[8] Homeward argues that an intentional tort is not the same as specific intent. That is correct. But as the district court explained, specific intent does not only mean having the desire to cause harm but also "engag[ing] in a course of conduct despite knowing that it would almost certainly" cause harm. *McGinnis*, 240 F. Supp. 3d at 1349. It is the latter meaning of specific intent that the district court determined, and we agree, a jury could find supported by the evidence here.

foreclosure without ever justifying the increase. And, even at trial, Homeward failed to produce any justification for the increase and insisted that McGinnis was required to pay any amount Homeward demanded. *McGinnis*, 817 F.3d at 1259.

Second, Homeward's use of the suspense account could support the jury's finding of specific intent. The evidence at trial showed that once McGinnis refused to pay the unexplained increase, Homeward began putting her payments in a suspense account from which it "deducted, as its own income, late fees and other expenses." *McGinnis*, 240 F. Supp. 3d at 1351. Further, "according to the evidence, Homeward was, while collecting these fees, also aware that it had increased McGinnis's monthly escrow payment by more than 300 percent," *id.*, and as a consequence, that the fees and penalties were not in fact owed. Therefore, "the jury could have considered Homeward's use of the suspense account as evidence of specific intent to harm" McGinnis by forcing her "to pay amounts in excess of what she owed, by requiring her to pay penalties and fees . . . or by decreasing the likelihood that she would be able to cure the default and avoid foreclosure." *Id.*

Third, a jury could infer from the evidence that Homeward knew its conduct was substantially certain to cause McGinnis emotional harm. The evidence showed that Adam explained to Homeward in writing that its conduct was causing him and Jane "und[ue] stress" and mentioned over the phone the frustration caused by Homeward's conduct. In addition, as the district court explained, a jury could infer

that Homeward knew its conduct was substantially certain to cause emotional distress from "the sheer volume of adversarial communications . . . and looming threats of foreclosure." *McGinnis*, 240 F. Supp. 3d at 1352. We explained similarly in the prior appeal in this case that "Homeward almost certainly learned the stakes involved with the foreclosure," including McGinnis's livelihood and reputation in the community. *McGinnis*, 817 F.3d at 1259. Accordingly, the jury's finding of specific intent was supported by evidence that Homeward knew its conduct was almost certain to cause McGinnis emotional harm.[9]

Finally, the district court did not abuse its discretion by concluding that Homeward's offer to let McGinnis bring her account current and avoid foreclosure was not contrary to the jury's finding of specific intent. Although McGinnis could have avoided foreclosure, she "would have had to give in to all of Homeward's existing demands," including by paying the unexplained monthly payment amount as well as all of the late fees and penalties. *McGinnis*, 240 F. Supp. 3d at 1352. In other words, she would have suffered the same harm even if she brought the account current. Therefore, Homeward's offer to allow McGinnis to bring the

[9] Homeward argues that because it directed most of its correspondence to Adam, it could not have known its conduct was causing Jane emotional harm. We are unpersuaded. Jane was present on at least some of the phone calls between Adam and Homeward (and certainly should be expected to be aware of correspondence regarding her property, even if addressed to Adam). Adam also informed Homeward that the correspondence was causing both of them "und[ue] stress." Moreover, it is hard to see how Homeward could believe that Adam, as Jane's agent, was not telling her everything that was happening.

account current does not contradict the jury's finding that Homeward knew its conduct was substantially certain to cause McGinnis harm regardless of whether she brought the account current. In sum, we conclude that the district court did not abuse its discretion by determining that the jury's finding of specific intent was not against the weight of evidence.

Homeward also argues that upholding the district court's decision not to reverse the jury's award in the instant case would make a substantial punitive damages award available in every foreclosure action wrongful or not. We disagree. Homeward's conduct went well beyond ordinary threats to foreclose. McGinnis repeatedly attempted to notify Homeward of the error in its billing, but Homeward never retracted or justified its demands. In fact, it continued to demand that McGinnis make the increased payments even at trial where Homeward's only witness maintained that McGinnis was obligated to pay any amount Homeward demanded whether reasonable or in error. Adam testified that Homeward's demands had "become a constant fixture of [Jane and Adam's] lives and resulted in a stack of collection letters that would reach five feet high. *McGinnis*, 817 F.3d at 1258. Homeward continued to send those demands and threaten foreclosure even though it knew that those demands were unreasonable and that its actions were causing McGinnis harm. At the same time, Homeward used a suspense account to

collect even more money to which it was not entitled by way of fees and expenses. The egregious actions in this case were not typical.

V. CONCLUSION

The judgment of the district court is **AFFIRMED**.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RICHARD J. DEROUIN and KIM E. DEROUIN, Appellants, v. UNIVERSAL AMERICAN MORTGAGE COMPANY, LLC, a Florida limited liability company, Appellee.	)	Case No. 2D17-1002

Opinion filed August 22, 2018.

Appeal from the Circuit Court for Pasco County; Alicia Polk, Judge.

Dineen Pashoukos Wasylik and Jared M. Krukar of DPW Legal, Tampa, for Appellants.

Laura H. Howard and Stanford R. Solomon of The Solomon Law Group, P.A., Tampa, for Appellee.

LaROSE, Chief Judge.

Richard and Kim Derouin appeal a final foreclosure judgment entered in favor of Universal American Mortgage Company, LLC. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). The Derouins contend that Universal failed to engage in the face-to-face meeting required by 24 C.F.R. § 203.604 (2012) prior to filing the

foreclosure lawsuit. Critical to our resolution of this matter, they maintain that the trial court erred in finding that they waived Universal's compliance with the federal regulations. Because the record before us does not show waiver, we reverse and remand for entry of an order of involuntary dismissal.

Background

Universal loaned money to the Derouins to buy a home. The loan, insured by the Federal Housing Administration, was memorialized by a note and secured by a mortgage. The note provided that, if the Derouins defaulted, Universal "may, except as limited by regulations of the Secretary [of Housing and Urban Development] in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. . . . This Note does not authorize acceleration when not permitted by HUD regulations." (Emphasis added).

The HUD regulations upon which the Derouins rely provide, in relevant part, as follows: "The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." 24 C.F.R. § 203.604(b).[1] The regulations also cabin the mortgagee's ability to foreclose until the face-to-face interview is conducted. See 24 C.F.R. § 203.500 ("This subpart identifies servicing practices of lending institutions that HUD considers acceptable for mortgages insured by HUD. . . . It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.").

[1]These regulations, pertaining to FHA-backed loans to "high-risk borrowers," ensure that the lender "would engage in 'loss mitigation' measures . . . with the defaulting borrower, before foreclosing." U.S. ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank, N.A., 816 F.3d 428, 429 (6th Cir. 2016).

The regulations establish several exceptions to the face-to-face meeting requirement, two of which apply here. First, a mortgagee may be excused from conducting the interview when "[t]he mortgagor has clearly indicated that he will not cooperate in the interview." 24 C.F.R. § 203.604(c)(3). Second, a meeting is unnecessary when "[a] reasonable effort to arrange a meeting is unsuccessful." 24 C.F.R. § 203.604(c)(5). "A reasonable effort to arrange a face-to-face meeting with the mortgagor" includes "at a minimum . . . one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and "at least one trip to see the mortgagor at the mortgaged property." 24 C.F.R. § 203.604(d).

Universal sued the Derouins after they defaulted on their loan payments. Universal alleged that "[a]ll conditions precedent to commencement and maintenance of this action have been performed, satisfied[,] or otherwise discharged." The Derouins answered the complaint, denied the substantive allegations, and asserted several affirmative defenses. Universal replied to the affirmative defenses.

With the trial court's permission, the Derouins filed a second amended answer. See Thompson v. Jared Kane Co., Inc., 872 So. 2d 356, 360 (Fla. 2d DCA 2004) ("The Florida Rules of Civil Procedure reflect a clear policy that, absent exceptional circumstances, requests for leave to amend pleadings should be granted."). In that pleading, the Derouins specifically denied that Universal satisfied all conditions precedent to filing suit. Specifically, they alleged that Universal had failed to conduct, or otherwise attempt to conduct, a face-to-face meeting within ninety days of default. The Derouins also raised a corresponding affirmative defense: Universal "[f]ailed to make face-to-face contact or failed to make reasonable attempts to contact Defendants face-

to-face as required by 24 C.F.R. § 203.604." Universal did not reply to this new defense.

Following trial, the trial court granted the Derouins' motion for involuntary dismissal based on an evidentiary issue not before us. Universal moved for rehearing. The Derouins opposed that motion, arguing that there were several alternative bases supporting dismissal, including Universal's failure to comply with HUD's face-to-face meeting requirement.

The trial court granted Universal's rehearing motion, finding that the Derouins had "waived their right to seek compliance with 24 C.F.R. § 203.604." The trial court relied on Ms. Derouin's trial testimony "that shortly after the default, she received a telephone call from the Plaintiff or Plaintiff's servicer and that she no longer wished to deal directly with [them]." The trial court observed that the Derouins "were not prejudiced by the lack of a [face-to-face] meeting," and that Universal could not reasonably be expected to engage in such a meeting "[a]fter Ms. Derouin communicated to [Universal] that she was not to be contacted directly." The trial court awarded Universal a final judgment of foreclosure.

Standards of Review

The record compels us to employ several standards of review. To the extent that we review the trial court's interpretation of the note, we utilize de novo review. See Mgmt. Comput. Controls, Inc. v. Charles Perry Constr., Inc., 743 So. 2d 627, 630 (Fla. 1st DCA 1999) ("[A] decision interpreting a contract presents an issue of law that is reviewable by the de novo standard of review."). "However, the trial court's order in this case is based–at least in part–on findings of fact and legal conclusions regarding an alleged [waiver]. We defer to the [trial] court's findings of fact when they

are based on competent, substantial evidence." U.S. Bank Nat'l Ass'n v. Rios, 166 So. 3d 202, 207 (Fla. 2d DCA 2015). Yet, we are not obligated "to disregard record evidence that disproves the lower court's findings or that reveals its ruling to be an abuse of discretion." In re Doe, 932 So. 2d 278, 284 (Fla. 2d DCA 2005).

Because the trial court's grant of rehearing, which vacated the prior dismissal order and resulted in entry of a final judgment, was not based upon competent substantial evidence, we reverse. Moreover, because our de novo review of the note demonstrates that involuntary dismissal was appropriate, we order such relief on remand. See Simpson v. State, 33 So. 3d 776, 778 (Fla. 4th DCA 2010) ("The standard of review of a trial court's denial of a motion to dismiss is de novo."); Perez v. Perez, 973 So. 2d 1227, 1231 (Fla. 4th DCA 2008) ("An involuntary dismissal is properly entered only where the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case."); Robinson v. Wright, 425 So. 2d 589, 589 (Fla. 3d DCA 1982) ("Where no evidence [i]s presented in a non-jury trial to establish a prima facie case, it [i]s proper to grant defendant's motion . . . for involuntary dismissal . . . .").

Analysis

I. 24 C.F.R. § 203.604 as a condition precedent

The parties tacitly agree that the face-to-face meeting requirement is a condition precedent to filing a foreclosure lawsuit. For purposes of this appeal, we assume the same. See, e.g., ARC HUD I, LLC v. Ebbert, 212 So. 3d 513, 515-16 (Fla. 2d DCA 2017) (reversing an award of summary judgment because the mortgagee created an issue of material fact as to whether an exception applied to the "condition precedent" of a face-to-face interview); White v. Planet Home Lending, LLC, 234 So. 3d

802, 803 n.1 (Fla. 4th DCA 2018) ("Absent evidence that Appellee engaged in a face-to-face interview with Appellant before the former filed its foreclosure complaint or that any exception to the interview requirement applied, it would be appropriate to enter an involuntary dismissal of Appellee's foreclosure complaint." (citing McIntosh v. Wells Fargo Bank, N.A., 226 So. 3d 377, 379 (Fla. 5th DCA 2017))); Harris v. U.S. Bank Nat'l Ass'n, 223 So. 3d 1030, 1032 (Fla. 1st DCA 2017) (holding that compliance with face-to-face meeting requirement was a condition precedent to initiating foreclosure action); Palma v. JPMorgan Chase Bank, Nat'l Ass'n, 208 So. 3d 771, 773, 775 (Fla. 5th DCA 2016) (holding that mortgage language providing, in the event of a default, the debt could be accelerated "except as limited by regulations of the Secretary . . . of Housing and Urban Development" incorporated the federal regulations, including the face-to-face interview requirement, as a condition precedent to filing suit); cf. Laws v. Wells Fargo Bank, N.A., 159 So. 3d 918, 919 (Fla. 1st DCA 2015) (reversing mortgagee's award of summary judgment because mortgagor was "entitled to raise failure to comply with [HUD regulations] as a valid defense to foreclosure").

Seemingly, the case law is unsettled as to whether noncompliance with the regulations must be raised as an affirmative defense or as a specific denial in an answer. Compare Palma, 208 So. 3d at 774 ("We find that the trial court erred by requiring Appellant to raise Bank's noncompliance with section 203.604 as an affirmative defense."), with Harris, 223 So. 3d at 1033 ("A 'defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an affirmative defense, for which the defensive pleader has the burden of pleading and persuasion.' " (quoting Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1096 (Fla. 2010))). But see

Chrzuszcz v. Wells Fargo Bank, N.A., 43 Fla. L. Weekly D1486, D1487 (Fla. 1st DCA June 28, 2018) ("Here, as in Palma, where the Bank asserted in the complaint that all conditions precedent had been satisfied, but the Borrower denied that assertion with the specific claim that the Bank failed to meet the face-to-face counseling requirement of section 203.604, the burden of proving the condition precedent was shifted back to the Bank.").

We need not weigh in on the conflict. See Pagan v. Sarasota Cty. Pub. Hosp. Bd., 884 So. 2d 257, 264 (Fla. 2d DCA 2004) ("It is a long-standing rule of appellate jurisprudence that the appellate court should not undertake to resolve issues which, though of interest to the bench and bar, are not dispositive of the particular case before the court."). As the Derouins inform us, "in an abundance of caution" they raised noncompliance as both an affirmative defense and as a specific denial.[2] Consequently, as the pleadings progressed below, Universal had to demonstrate its compliance with the regulations or that its compliance was excused. See McIntosh, 226 So. 3d at 379 ("Here, Borrowers raised noncompliance with § 203.602 and the terms of the note and mortgage as both a specific denial and an affirmative defense. Thus, the burden remained on Wells Fargo to demonstrate compliance with the applicable HUD regulations."). As we shall explain, Universal demonstrated neither.

---

[2]The Derouins sufficiently pleaded their claims that Universal failed to comply with the face-to-face meeting requirement. See Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." (emphasis added)); see also Bank of Am., N.A. v. Asbury, 165 So. 3d 808, 810 (Fla. 2d DCA 2015) ("A defendant, as the responding party, shoulders the responsibility of identifying a specific, unfulfilled condition precedent should it wish to deny that general averment.").

II. Whether the Derouins waived compliance

Whether the Derouins waived Universal's compliance with the face-to-face meeting requirements begets an antecedent inquiry of whether the trial court could consider the issue.

A. Universal did not avoid the noncompliance affirmative defense

"In pleading to a preceding pleading a party shall set forth affirmatively . . . . waiver, and any other matter constituting an avoidance or affirmative defense." Fla. R. Civ. P. 1.110(d) (emphasis added). "As a matter of law, waiver . . . [is an] affirmative defense[] that must be pleaded." Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc., 915 So. 2d 220, 223 (Fla. 4th DCA 2005) (emphasis added). Once the Derouins raised noncompliance as an affirmative defense, Universal should have replied if it sought to avoid the defense. "If an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance." Fla. R. Civ. P. 1.100(a); see, e.g., Reno v. Adventist Health Sys./Sun-Belt, Inc., 516 So. 2d 63, 64-65 (Fla. 2d DCA 1987) ("[A] reply to an affirmative defense is necessary only in order to entitle the plaintiff to, in effect, prove an affirmative defense to an affirmative defense."); see also Kitchen v. Kitchen, 404 So. 2d 203, 205 (Fla. 2d DCA 1981) ("[I]t is only when 'new matter' is sought to be asserted to avoid the affirmative defense that a reply is required. Consequently, where, as here, the plaintiff does not seek to avoid the substantive allegation of the defendant's affirmative defense, he need not file . . . a reply."); Lazar v. Allen, 347 So. 2d 457, 458 (Fla. 2d DCA 1977) ("Where a party files no reply to an affirmative defense, this merely denies (as opposed to avoids) the affirmative defense." (citing Fla. R. Civ. P. 1.110(e))).

After all, "[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are." Bank of Am., N.A. v. Asbury, 165 So. 3d 808, 809 (Fla. 2d DCA 2015). "An issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination." Gordon v. Gordon, 543 So. 2d 428, 429 (Fla. 2d DCA 1989). Because Universal failed to address the waiver issue by reply to an affirmative defense, the trial court could not award Universal relief on such a basis. See, e.g., Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 923 (Fla. 2d DCA 2000) ("Since the defense was waived, it should not have been considered by the trial court, much less used as the basis for granting summary judgment."); Frisbie v. Carolina Cas. Ins. Co., 162 So. 3d 1079, 1081 (Fla. 5th DCA 2015) ("Here, because Appellee raised the issue of unclean hands as an avoidance of Appellants' two affirmative defenses, Appellee should have pleaded the issue in a reply to Appellants' answer . . . ."); Boca Golf View, Ltd. v. Hughes Hall, Inc., 843 So. 2d 992, 993 (Fla. 4th DCA 2003) ("The trial court erred when it relied on a defense not raised by the pleadings to grant the motion for involuntary dismissal.").

B. The Derouins' specific denial

Universal fares no better against the Derouins' specific allegation that it "[f]ailed to make face-to-face contact or failed to make reasonable attempts to contact [the Derouins] face-to-face as required by 24 C.F.R. § 203.604." Their specific denial shifted the burden to Universal to prove compliance or an exception to compliance. See Nelson v. Hillsborough County, 189 So. 3d 1037, 1039 (Fla. 2d DCA 2016) ("Provided such compliance is specifically denied by the defendant, the burden shifts 'to the plaintiff

to prove the allegations concerning the subject matter of the specific denial.' " (quoting Sheriff of Orange Cty. v. Boultbee, 595 So. 2d 985, 987 (Fla. 5th DCA 1992))). Universal failed on both fronts. See 24 C.F.R. § 203.604(c)(3), (5). Although the trial court's order granting Universal's rehearing motion failed to specify which of the five enumerated exceptions it relied on to find waiver, subsections (3) and (5)[3] most aptly apply. See 24 C.F.R. § 203.604(c)(1)–(5).

i. 24 C.F.R. § 203.604(c)(3)

At trial, Ms. Shannon Georgantas, a senior staff account manager for Universal, admitted that Universal paid no visit to the Derouins' residence for the purpose of conducting the face-to-face meeting. Elaine Marie Henning, an employee of Universal's loan servicer, conceded that neither Universal nor its servicer requested a face-to-face meeting with the Derouins in the three-month period following their initial default.

Ms. Henning testified that the servicer's records reflected that the servicer called the Derouins' residence roughly forty-five days after default. Apparently, Ms. Derouin instructed the servicer to "only contact [the Derouins'] attorney, he is now handling everything . . . . She will not speak or give any info to us." Ms. Henning offered that the servicer did not "go out and knock on the Derouin[s'] door" because "[w]e were told to direct everything to her attorney." Curiously, the servicer continued to mail letters directly to the Derouins. Ms. Henning admitted that there had been no request of the Derouins, or their attorney, for the required face-to-face meeting.

[3]24 C.F.R. § 203.604(c)(3) provides that a face-to-face meeting is not required if "[t]he mortgagor has clearly indicated that he will not cooperate in the interview." Further, 24 C.F.R. §203.604(c)(5) excuses the face-to-face meeting when "[a] reasonable effort to arrange a meeting is unsuccessful."

Ms. Derouin testified that the servicer never offered a face-to-face meeting. She also testified that she never told Universal or its servicer that she was unwilling to conduct a face-to-face meeting "because they didn't offer." Ms. Derouin readily admitted, that when she spoke on the phone with the servicer, she "told them that I contacted an attorney and they should direct all questions to the attorney." She denied that she "ever indicated to them that [she was] no longer open to a face-to-face meeting notwithstanding [she] hired an attorney."

We cannot say that the Derouins clearly indicated that they would not engage in the face-to-face meeting. Indeed, if Universal never offered such an opportunity, it cannot be the case that the Derouins demonstrated a reluctance or refusal to meet sufficient to excuse Universal's obligations. We are even less inclined to conclude that Ms. Derouin's statement that Universal or its servicer should speak to her lawyer constitutes a clear indication that she was unwilling to cooperate in the face-to-face interview. There was no evidence Universal or its servicer was prohibited from asking the Derouins for a face-to-face meeting through their attorney, nor was there any evidence that the Derouins would not participate in one if asked.

In an apparent effort to buttress its waiver finding, the trial court pointed out that the Derouins "had no interest in mediation." Section 203.604 does not mandate postfiling mediation. Ms. Derouin's rejection of mediation after suit was filed is not indicative of her willingness to meet face-to-face prior to filing. In any event, postfiling actions cannot cure Universal's failure to comply with section 203.604. A party's right to sue "must be measured by the facts as they exist when the suit was instituted." Voges v. Ward, 123 So. 785, 793 (Fla. 1929) (holding that party did not have a right to

repossess a car when it filed suit before it possessed the notes necessary to have the right to repossession under the contract).

ii. 24 C.F.R. § 203.604(c)(5)

Section 203.604(c)(5) excuses the face-to-face meeting requirement where "[a] reasonable effort to arrange a meeting is unsuccessful." However, this presupposes that an effort was made. Universal's witnesses, Ms. Georgantas and Ms. Henning, as well as Ms. Derouin, testified that neither Universal nor its servicer made any such effort. Thus, the trial court's finding of waiver is unsupported under this claimed exception.

III. Trial by consent

Universal urges that the parties tried the waiver issue by consent. See Fla. R. Civ. P. 1.190(b) ("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.").

> An exception to the rule requiring relief to be pled is if the issue is tried by consent of the parties. "When issues not raised by the pleadings are tried by express or implied consent, they shall be treated in all respects as if they had been raised in the pleadings." An issue is tried by consent "when there is no objection to the introduction of evidence on that issue."

Fed. Home Loan Mortg. Corp. v. Beekman, 174 So. 3d 472, 475 (Fla. 4th DCA 2015) (first quoting Fla. R. Civ. P. 1.190(b); then quoting Scariti v. Sabillon, 16 So. 3d 144, 145-46 (Fla. 4th DCA 2009)). We reject Universal's position.

Although an unpleaded issue may be tried by consent when a party fails to object to the introduction of evidence on that issue:

> [I]n order to rely on questions and answers not objected to during trial as evidencing the opposing party's implied consent to try unpled issues, it must be shown that such questions and answers are irrelevant to any pled issues; the failure to object cannot be taken as implied consent to try unpled issues when there is no occasion for such party to object that such evidence is irrelevant to the issues being tried.

Bilow v. Benoit, 519 So. 2d 1114, 1116 (Fla. 1st DCA 1988). Stated differently, "[a] failure to object cannot be construed as implicit consent to try an unpled theory when the evidence introduced is relevant to other issues properly being tried." Raimi v. Furlong, 702 So. 2d 1273, 1285 (Fla. 3d DCA 1997); see also Nichols v. Michael D. Eicholtz, Enter., 750 So. 2d 719, 720 (Fla. 5th DCA 2000) ("We reject appellee's argument that the parties tried the unpled action on an express contract by implied consent because an unpled theory may not be tried by implied consent when the evidence presented at trial is relevant to other issues which are properly being tried.").

Universal argues that the Derouins consented to try the waiver issue by presenting evidence of Ms. Derouin's request that Universal or its servicer contact her attorney. However, this evidence was relevant to the Derouins' pleaded affirmative defense that Universal failed to make a reasonable effort to arrange a face-to-face meeting. See 24 C.F.R. § 203.604(c)(3), (5). The evidence was unrelated to Universal's unpleaded avoidance.

In further support of its trial by consent argument, Universal notes the trial court's request for posttrial written memoranda on the waiver issue. Universal apparently maintains that the Derouins' failure to contemporaneously object to the trial court's request evidenced that the parties tried the waiver issue by consent.

This argument is unavailing for two reasons. First, because the trial court sought written argument on the issue, we cannot conceive of why the Derouins would have been required to lodge a contemporaneous oral objection. Second, in accordance with the trial court's request, the Derouins explained in their written memorandum that waiver was unavailable as an avoidance because Universal did not plead it. To the extent a contemporaneous objection is even necessary to prevent an unpleaded issue from being tried by consent, we believe that the Derouins' written closing argument was tantamount to such an objection. See, e.g., Da Cunha v. Mann, 183 So. 3d 1113, 1115-16 (Fla. 3d DCA 2015) (stating that an issue was not tried by consent when the opposing party raised an objection upon receipt of the written order); cf. Givens v. Holmes, 241 So. 3d 232, 235 (Fla. 2d DCA 2018) (explaining that failure to raise contemporaneous objection did not preclude appellate review of issue "[b]ecause the trial court abruptly ended the hearing without articulating any findings or announcing the particular terms of the final judgment").

Further, in their opening statement at trial, the Derouins proclaimed that "there is no valid excuse for [Universal]'s noncompliance. They haven't raised it in the pleadings." This was sufficient to alert both the trial court and Universal that the Derouins had no intent to allow for the waiver issue to be tried by consent. Cf. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 561, 563 (Fla. 1988) ("We cannot see the difference between objecting to the introduction of the evidence pertaining to an unpled claim at trial or by a motion in limine immediately prior to the trial. The effect is the same–calling the court's attention to the fact that an unpled claim is not being tried by consent . . . .").

Conclusion

Because the parties agree that compliance with 24 C.F.R. § 203.604 is a condition precedent to foreclosure, and the trial court erred in finding that the Derouins waived Universal's compliance with the HUD regulations, we reverse and remand for entry of an order of involuntary dismissal.

Reversed and remanded with instructions.

LUCAS and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed August 22, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2569
Lower Tribunal No. 13-17885

Chakra 5, Inc., et al.,
Appellants,

vs.

The City of Miami Beach,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Gisela Cardonne Ely, Judge.

Kozyak Tropin & Throckmorton, LLP, and Thomas A. Tucker Ronzetti, Harley S. Tropin, and Tal J. Lifshitz, for appellants.

Raul J. Aguila, City Attorney, and Robert F. Rosenwald, Jr., First Assistant City Attorney; Carlton Fields Jorden Burt, P.A., and Alix Cohen, for appellee.

Before LAGOA, EMAS, and SCALES, JJ.

LAGOA, J.

Appellants, Chakra 5, Inc. ("Chakra 5"), 1501 Ocean Drive, LLC ("1501"), and Haim Turgman ("Turgman") (collectively, "Appellants"), appeal the trial

court's final order dismissing with prejudice their claims against the City of Miami Beach (the "City"). Additionally, the City has moved to dismiss the appeal with respect to Chakra 5 and 1501 because of their administrative dissolution by the Florida Secretary of State. For the reasons set forth below, we deny the City's motion to dismiss the appeal. In addition, we affirm in part and reverse in part the trial court's final order. Specifically, we affirm the trial court's dismissal with prejudice with respect to claims based on injuries alleged to have occurred before May 20, 2009, as they are time barred. Additionally, we affirm the dismissal with prejudice of any claims asserting a violation of substantive due process, regardless of when the underlying events occurred. Finally, we reverse the dismissal with prejudice with respect to claims asserting a violation of procedural due process based on injuries alleged to have occurred after May 20, 2009.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

In early 2006, Turgman organized 1501 and Chakra 5 to purchase and operate an entertainment complex located in Miami Beach (the "Club"). The purchase was financed in part by a loan from a bank, which took a security interest in the Club. Appellants allege that, shortly after they took ownership of the Club,

[1] Our summary of the factual background comes from the amended complaint. On review of a motion to dismiss, we view the factual allegations in the complaint in the light most favorable to the plaintiffs. See Cortez v. Palace Resorts, Inc., 123 So. 3d 1085, 1088 (Fla. 2013); Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 734-35 (Fla. 2002).

the City, through its code enforcement department, initiated a "campaign of harassment" against the Appellants, with the aim to extort bribes from them.

As alleged, City code enforcement inspectors unfairly enforced the City's existing building, zoning, fire and tax regulations against the Club. Prior to May 20, 2009, City inspectors allegedly:

> (1) delayed, from July 4, 2006, through December 11, 2006, the issuance of a conditional use permit required for the Club to open;
>
> (2) conducted "successive, pre-textual inspections" after the Club opened in December 2006;
>
> (3) shut the Club down for operating past midnight on January 26, 2007, even though the Club's permit authorized it to be open until 5:00 a.m., and required Turgman to pay $3445 to operate until 5:00 a.m.;
>
> (4) visited the Club several times per week during the first half of 2007 and issued two citations during this time period—one for violating the City's noise ordinance when the Club was not open and one for not turning on a rooftop sign;
>
> (5) after a lull in inspection activity after Turgman changed the Club's name and management staff, the City code enforcement staff resumed their prior level of inspections in September 2008 after discovering Turgman's continuing involvement with the Club;
>
> (6) on November 20, 2008, City code enforcement issued a cease and desist order prohibiting the Club's operations for not having code-compliant fire exits, even though the City had approved the construction plans of a neighboring establishment to remove the Club's fire exits; and
>
> (7) after Turgman notified the City in writing of his intent to sue for the closure of the Club, the City monitored every event held at

> the Club, and in many instances, City inspectors orally ordered Turgman to not let people inside or to shut down the Club.[2]

The following actions allegedly occurred after May 20, 2009:

> (1) in February 2010, a City official informed organizers planning an event at the Club that the Club would be shut down the night of their event, due to a failure to pay past due resort taxes; Appellants subsequently entered into a payment plan with the City to avoid the closure;
>
> (2) Turgman was fined $1800 for event flyer litter violations resulting from a March 2010, Winter Music Conference event over a month after that event occurred; and
>
> (3) on June 3, 2011, the City's Lead Code Compliance Officer, code inspector Jose Alberto, solicited an initial bribe from Turgman, followed by numerous other bribes Turgman paid to various City employees.[3]

Finally, at a date not specifically alleged in the amended complaint, City officials decided they wanted to permanently put the Club out of business and directed code enforcement to do whatever was necessary to achieve that goal.[4] Appellants allege that this decision was due to Turgman's unwillingness to contribute to certain City officials' election campaigns or to provide them favors.

---

[2] In the amended complaint, Appellants do not allege specific dates where the Club was improperly forced to shut down after the City's monitoring began.

[3] The amended complaint alleges that many of these officials who received bribes were convicted in federal court as a result of an FBI investigation.

[4] When City officials allegedly committed this act is unclear, but Appellants allege they learned about it in 2011 when they were solicited for bribes.

Allegedly as a result of the City's actions, Appellants suffered significant financial losses, and in 2010, defaulted on the loan secured by the Club. The lender subsequently took possession of the Club and sold it at a May 26, 2012, auction.

On May 20, 2013, Appellants filed the instant action against the City and the seven City employees involved in the alleged extortion scheme. On October 23, 2015, Appellants filed their amended complaint, which included two counts against the City under 42 U.S.C. § 1983 (2012) asserting deprivation of their rights to substantive and procedural due process.

In response to the amended complaint, the City filed a motion to dismiss, asserting that: (1) Appellants failed to state a cause of action; (2) the statute of limitations barred Appellants' injuries prior to May 20, 2009; and (3) Chakra 5 and 1501 could not proceed with their claims because they had been administratively dissolved. After holding a hearing on the matter, the trial court entered a final order dismissing the counts against the City with prejudice and dismissing the City from the case.[5] This appeal ensued.

[5] Although a third count against certain individual defendants remains pending below, we treat the order as a partial final judgment immediately appealable pursuant to Florida Rule of Appellate Procedure 9.110(k).

II. STANDARD OF REVIEW

We review de novo an order granting a motion to dismiss with prejudice. Falkinburg v. Village of El Portal, 183 So. 3d 1189, 1191 (Fla. 3d DCA 2016). We are bound by the same restrictions the trial court faced when it ruled on the motion to dismiss, and we therefore treat as true all of the well-pled allegations of the complaint, including its incorporated attachments, and "look no further than the complaint and its attachments." Id.

III. ANALYSIS

We first consider the City's argument that because Chakra 5 and 1501 were administratively dissolved by the Florida Secretary of State, this appeal with respect to those entities should be dismissed or, alternatively, the trial court's order should be affirmed under the "tipsy coachman" doctrine. Second, we address whether Appellants' claims are barred by the statute of limitations and whether they fail to state a claim.[6]

A. Administrative Dissolution of the Entity Appellants

Chakra 5 and 1501 are a Florida corporation and a Florida limited liability company, respectively. Although not relied upon by the trial court in dismissing

[6] In its order, the trial court dismissed the counts against the City with prejudice because "[a]ny amendment as to the City would be futile since, *among other grounds*, the alleged acts occurred more than four years before plaintiff filed its original complaint." (emphasis added) We therefore address whether Appellants failed to state a claim, as the City argued it below and the trial court expressly referred to "other grounds" supporting dismissal with prejudice in its final order.

the City from the instant case, the City has argued, both here and below, that Chakra 5 and 1501 cannot maintain suit either in the trial court or on appeal because they have been administratively dissolved by the Florida Secretary of State. Accordingly, the City argues that their appeal should be dismissed or, alternatively, that the trial court's dismissal as to these two entities should be affirmed under the "tipsy coachman" doctrine, i.e., that the trial court was right for the wrong reason. E.g., Porter v. Porter, 913 So. 2d 691, 694 (Fla. 3d DCA 2005).

Appellants' appendix to their reply includes two certificates of status, which we take judicial notice of,[7] from the Florida Secretary of State showing that both Chakra 5 and 1501 have been reinstated and are now active. As this Court has previously stated:

> The sanctions authorized for failing to file an annual report—involuntary dissolution and the inability to carry on any business, including bringing or defending a lawsuit, other than that necessary to wind up its affairs under sections 607.1420 and 607.1421—are intended to benefit the State, not third parties outside the corporation/State relationship. Hence, the [defendants], "who are strangers to the dealings between plaintiff and

[7] See Schriver v. Tucker, 42 So. 2d 707, 709 (Fla. 1949) ("This court will take judicial notice . . . of the records of extradition proceedings on file in the office of the Secretary of State. And the failure of the lower court to take judicial notice of these records does not necessarily prevent this court from so doing." (citation omitted)); see also § 90.202(5), (12), Fla. Stat. (2018) (permitting a court to take judicial notice of "[o]fficial actions of the . . . executive . . . department[] . . . of any state . . . of the United States" and "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned").

> the State, should not be allowed to take advantage of the plaintiff's default . . . to escape their own obligations to the plaintiff."

Allied Roofing Indus., Inc. v. Venegas, 862 So. 2d 6, 9 (Fla. 3d DCA 2003) (quoting Cosmopolitan Distribs., Inc. v. Lehnert, 470 So. 2d 738, 739-40 (Fla. 3d DCA 1985)); see also Bldg. B1, LLC v. Component Repair Servs., Inc., 224 So. 3d 785, 788 (Fla. 3d DCA 2017). Venegas is clear that when the issue of an entity's status with the Florida Secretary of State is raised, the appropriate course by a trial court is to abate the action for a brief period of time to permit compliance with the statute; only after a failure to comply within a reasonable time may sanctions such as dismissal be considered. Venegas, 862 So. 2d at 9.

Accordingly, as Chakra 5 and 1501 are now reinstated, the litigious disability has been cured. E. Invs., LLC v. Cyberfile, Inc., 947 So. 2d 630, 631-32 (Fla. 3d DCA 2007) ("The language of the statute suggests that any failure to comply simply prevents a plaintiff from prosecuting the action, a disability that can be remedied at any point."); Indus. Nat'l Mortg. Co. v. Blake, 406 So. 2d 103, 104 (Fla. 3d DCA 1981) ("Industrial National could have overcome its litigious disability by the simple expedient of filing the overdue reports and paying the back taxes."); accord § 607.1422(3), Fla. Stat. (2013) ("When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as

if the administrative dissolution had never occurred."); § 605.0715(4), Fla. Stat. (2013) ("When reinstatement under this section becomes effective: (a) [t]he reinstatement relates back to and takes effect as of the effective date of the administrative dissolution[; and] (b) [t]he limited liability company may resume its activities and affairs as if the administrative dissolution had not occurred."). Accordingly, we conclude that dismissal of the appeal is inappropriate on this ground.[8]

The issue remains, however, whether the trial court, at the time it issued its final order, would have been correct in dismissing the entities' claims due to their administrative dissolution, as Chakra 5 and 1501 were reinstated only after this appeal was taken. Based on our review of the record, the City first raised this issue in its motion to dismiss the amended complaint, and the record does not show that the trial court granted the entities a period of time in which to correct the deficiency. Under Venegas, dismissal by the trial court would not have been appropriate, and we therefore reject application of the "tipsy coachman" doctrine as a basis to affirm the trial court's dismissal order.

B. The Dismissal of Appellants' Amended Complaint

[8] Because Chakra 5 and 1501 have been reinstated, we need not address the ancillary argument raised by the City that the instant suit is not the sort of suit that is permitted as part of winding up.

In their amended complaint, Appellants brought two claims against the City under 42 U.S.C. § 1983, alleging violations of their constitutional rights to substantive and procedural due process. The trial court dismissed the case against the City with prejudice, finding that "[a]ny amendment as to the City would be futile since, among other grounds, the alleged acts occurred more than four years before plaintiff filed its original complaint." Upon review of the record, the trial court's phrase "other grounds" appears to refer to the City's argument that Appellants failed to state a claim under § 1983. Accordingly, we address each ground separately. First, we address the application of the statute of limitations. Second, we address whether the Appellants stated a claim under § 1983.

1. *Statute of Limitations*

Section 1983 provides for concurrent state and federal court jurisdiction. While § 1983 provides a federal cause of action, "in several respects . . . federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts." Wallace v. Kato, 549 U.S. 384, 387 (2007). In Florida, the limitations period for a § 1983 claim is four years. Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003).

The application of the statute of limitations to a claim is a question of fact. Saltponds Condo. Ass'n v. McCoy, 972 So. 2d 230, 231 (Fla. 3d DCA 2007). As our sister court has concluded:

> the statute of limitations and laches are affirmative defenses which should be raised by answer rather than by a motion to dismiss the complaint; and only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law, should a motion to dismiss on this ground be granted. Since the statute of limitation[s], being an affirmative defense, may be avoided by facts alleged in a reply, in order to grant the motion to dismiss the allegations of the complaint must also conclusively negate any ability on the part of the plaintiff to allege facts in avoidance of the applicable statute of limitations by way of the reply.

Rigby v. Liles, 505 So. 2d 598, 601 (Fla. 1st DCA 1987) (citations omitted); accord Saltponds, 972 So. 2d at 231. Thus, we must review the specific allegations of the amended complaint to determine whether the trial court could adjudicate the limitations issue via a motion to dismiss.

As set forth above, Appellants allege that several injuries occurred before May 20, 2009 (i.e., four years before filing of the complaint), some after May 20, 2009, and others at an unknown date. Appellants' claims based on injuries alleged to have occurred after May 20, 2009, fall within Florida's four-year limitations period and the trial court should not have dismissed them as time barred. Additionally, the trial court should not have dismissed the claims based on injuries

for which no date is alleged in the amended complaint as time barred, as it was not conclusive on the face of the amended complaint that those injuries occurred outside of the limitations period.

With respect to injuries that allegedly occurred before May 20, 2009, we must determine whether claims based on those injuries accrued outside the limitations period and are therefore time barred. "[T]the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." Wallace, 549 U.S. at 388 (emphasis in original). Under federal law, "[a] cause of action under [§ 1983] will not accrue, and thereby set the limitations clock running, until the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury." Chappell, 340 F.3d at 1283. Appellants do not contend that, upon occurrence of each injury, they did not immediately know of the injury and who had inflicted it. Thus, on the face of the amended complaint, the claims against the City based on injuries occurring prior to May 20, 2009, fall outside the limitations period and are therefore time barred, absent the application of some doctrine that would save the claims with respect to those injuries.

In this regard, we find Amin Ijbara Equity Corp. v. Village of Oak Lawn, 860 F.3d 489 (7th Cir. 2017), instructive in its application of the federal accrual rule. In Amin, a mall owner brought a § 1983 action against the city and two of its

officials, alleging that the city harassed it by, inter alia, issuing baseless citations and requiring costly renovations. Id. at 492. As a result, the financial health of the mall and its corporate owner deteriorated until the lender foreclosed on the property and took possession of the property. Id. The defendants moved to dismiss the case as time barred based on the complaint's allegations. Id. The district court dismissed the case, and the Seventh Circuit affirmed. Id. at 492, 494. In determining when the cause of action accrued under the federal rule, the Seventh Circuit found that each act of harassment "inflicted a cognizable injury almost immediately: he was forced to make costly and unnecessary repairs and sustained losses in revenue from tenants." Id. at 493. As such, the claim accrued when those injuries occurred, and certainly no later than when the owner lost possession of the mall during the foreclosure when a receiver was appointed. Id. The Seventh Circuit specifically rejected the contention that the owner's claim accrued when the final judgment of foreclosure was entered, almost a year after the receiver was appointed. Id. at 493-94. Because the owner filed suit more than two years (the applicable limitations period in Illinois) after the receiver was appointed and possession was lost, the Seventh Circuit concluded that the trial court was correct in dismissing the case on statute of limitations grounds. Id.

In response, Appellants assert that the doctrine of continuing tort applies with respect to those injuries outside the limitations period. In applying this

doctrine to § 1983 actions, we look to Florida law. Mullinax v. McElhenney, 817 F.2d 711, 716 (11th Cir. 1987). Florida law provides that "'[a] continuing tort is "established by continual tortious *acts,* not by continual harmful effects from an original, completed act."'" Effs v. Sony Pictures Home Entm't, 197 So. 3d 1243, 1245 (Fla. 3d DCA 2016) (quoting Suarez v. City of Tampa, 987 So. 2d 681, 686 (Fla. 2d DCA 2008)). "'When a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort.'" Suarez, 987 So. 2d at 686 (quoting *In re* Med. Review Panel for Claim of Moses, 788 So. 2d 1173, 1183 (La. 2001)). A continuing tort is thus perhaps best understood as a tort in which the wrong cannot be described as a discrete event. See Effs, 197 So. 3d at 1244-45; cf. Amin Ijbara Equity, 860 F.3d at 493 (finding that each act of harassment "inflicted a cognizable injury almost immediately"). Applied to this case, Appellants have not alleged a continuing tort, but instead a series of discrete acts of varying kinds. As noted above, each act constituted a separate, cognizable injury to Appellants that Appellants could have sued on at the time each incident occurred. The fact that multiple discrete acts occurred over a period of time does not convert those acts into a continuing tort under Florida law. Instead, successive causes of action accrued from each alleged violation of Appellants' due process rights. The continuing tort doctrine therefore

does not apply to Appellants' claims, and their claims based on injuries occurring before May 20, 2009, are untimely.

Thus, with respect to the statute of limitations, the trial court correctly concluded that Appellants' claims based on injuries occurring before May 20, 2009, were untimely, but erred in determining that the portion of Appellants' claims based on injuries occurring after May 20, 2009, as well as injuries without a clearly alleged date, were untimely.

2. *Due Process Claims*

We now turn to whether Appellants stated a claim under § 1983. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Albright v. Oliver, 510 U.S. 266, 271 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). A plaintiff asserts a claim under § 1983 against a municipality by alleging: (1) a deprivation of a constitutional right; (2) the municipality had a policy that amounts to "deliberate indifference" to that right; and (3) the policy caused the constitutional violation. See City of Canton v. Harris, 489 U.S. 378, 388-91 (1989); Exec. 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991).

As noted by the United States Supreme Court, the first step in assessing any such claim "is to identify the specific constitutional right allegedly infringed." Albright, 510 U.S. at 271. Here, Appellants assert that the City violated their

rights to substantive and procedural due process. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court's interpretation of this clause "explicates that the amendment provides two different kinds of protection: procedural due process and substantive due process." McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994) (en banc) (citing Zinerman v. Burch, 494 U.S. 113, 125 (1990)).

a. *Substantive Due Process*

As noted by the United States Court of Appeals for the Eleventh Circuit, the "substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is, rights that are 'implicit in the concept of ordered liberty.'" McKinney, 20 F.3d at 1556 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The United States Supreme Court has cautioned that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). As stated by the Court in Michael H. v. Gerald D., 491 U.S. 110 (1989):

> It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process

> Clause extends beyond freedom from physical restraint. Without that core textual meaning as a constraint, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.

Id. at 121(citations omitted) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

Substantive due process analysis has two features. First, as noted above, the Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and traditions,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted) (quoting Moore, 431 U.S. at 503, and Palko, 302 U.S. at 325-26). Second, substantive due process analysis requires a "'careful description' of the asserted fundamental liberty interest." Id. at 721. "A finding that a right merits substantive due process protection means that the right is protected 'against a certain government action regardless of the fairness of the procedures used to implement them.'" McKinney, 20 F.3d at 1556 (quoting Collins, 503 U.S. at 125).

As noted by the Eleventh Circuit in McKinney, the United States Supreme Court has deemed most of the rights enumerated in the Bill of Rights to be

fundamental, as well as certain unenumerated rights not found in the constitutional text. 20 F.3d at 1556. Regarding those unenumerated rights, the United States Supreme Court has noted that the "protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright, 510 U.S. at 272; see also Washington, 521 U.S. at 720.

Here, Appellants do not allege a violation of a right enumerated in the Bill of Rights and applied to the States via the Fourteenth Amendment. Instead, Appellants assert that they have a constitutionally protected interest to pursue an occupation, an unenumerated right differing in kind from those mentioned in Albright and Washington. As noted earlier, substantive due process analysis requires a "careful description" of the asserted interest at issue. Thus, as discussed below, we believe that Appellants have mischaracterized the interest at stake here, which is more properly viewed as a case challenging the improper enforcement of a municipality's zoning or land use regulations. Nonetheless, Appellants' substantive due process claims fail under either characterization.

In Conn v. Gabbert, 526 U.S. 286 (1999), the United States Supreme Court acknowledged that "[i]n a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment,

but a right which is nevertheless subject to reasonable governmental regulation." Id. at 291-92 (citing Dent v. West Virginia, 129 U.S. 114 (1889), and Truax v. Ratch, 239 U.S. 33, 41 (1915)); see also Greene v. McElroy, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment.")

We find these cases offer little support to Appellants' claims here. In Conn, the Court concluded that the use of a subpoena to temporarily interfere with a lawyer's ability to represent his client "whether calculated to annoy or even to prevent [the attorney's] consultation with a grand jury witness" did not violate the Fourteenth Amendment. 526 U.S. at 293. In Greene, unlike here, the plaintiff alleged a complete inability to obtain work in his desired occupation.

Moreover, this Court, in the context of a procedural due process case, has already considered the scope of the constitutionally protected interest in an individual's ability to follow a chosen trade or profession. In International Longshoreman's Ass'n, Locals 1416, et al. v. Miami-Dade County, 926 So. 2d 433 (Fla. 3d DCA 2006), plaintiffs challenged the county's temporary revocation of their port security clearances without process. Id. at 434. In concluding that no constitutionally protected interest was implicated by the county's summary action, we stated that "Appellants were not deprived of their right to engage in a chosen

trade or profession as they were not precluded from obtaining employment at another port facility." Id. at 436. A fortiori, the right claimed here will not support Appellants' claim of a violation of substantive due process. Cf. Ammons v. Okeechobee County, 710 So. 2d 641, 645 (Fla. 4th DCA 1998) (rejecting a claim of violation of substantive due process based on allegedly wrongful revocation of occupational license, as "[t]he denial of such a license does not prevent a business owner from pursing a lawful occupation," but "merely prevents the business from operating at a particular location") Appellants' allegations do not support a claim that they were prohibited from engaging in their chosen trade or profession or that they were unable to operate the Club at another location. Thus, to the extent Appellants' substantive due process claims are based on the right to pursue a chosen trade or profession, the trial court's order dismissing those claims with prejudice must be affirmed.

That being said, we do not agree with Appellants that their claims implicated a broad, and relatively undefined, right to pursue one's trade or profession. Instead, Appellants allege the serial misuse and abuse of the City's existing zoning, fire and tax regulations by City code enforcement officers. Properly described, Appellants' claims are based on the allegedly unfair and corrupt application of the City's zoning and other business regulations, and are therefore governed by the Eleventh Circuit's landmark en banc decision in McKinney and its progeny, an

analysis adopted by this Court and our sister Florida appellate courts. See Jacobi v. City of Miami Beach, 678 So. 2d 1365, 1366-67 (Fla. 3d DCA 1996) (adopting McKinney and its progeny for purposes of substantive due process analysis); see also, e.g., Ammons, 710 So. 2d at 645.

In McKinney, the plaintiff alleged that his pretextual termination by the board of county commissioners violated his right to substantive due process. 20 F.3d at 1355. The Eleventh Circuit, sitting en banc, receded from its prior precedent and held that the plaintiff had only procedural, not substantive, due process claims available to him when alleging harm based on an executive deprivation of a state-created right. Id. at 1558-59. In setting forth the new standard to govern substantive due process claims, the Eleventh Circuit stated that:

> areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Claus because "substantive due process rights are created only by the Constitution." As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural—not substantive—due process are observed.

Id. at 1556 (citation omitted) (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985)). In its analysis, the Eleventh Circuit emphasized the distinction between "legislative" and "executive" actions when considering an alleged violation of substantive due process. Id. at 1557 n.9. Executive acts "apply to a limited number of persons . . . [and] typically arise from the ministerial

or administrative activities of . . . the executive branch" while legislative acts "generally apply to a larger segment of . . . society," such as laws and broad executive regulations. Id. "The analysis, and the substantive/procedural distinction . . . , that is appropriate for executive acts is *inappropriate* for legislative acts." Id. (emphasis in original). The court thus concluded that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees" and overruled its prior decisions to the extent they were contrary to the rule announced in McKinney. Id. at 1060.

In DeKalb Stone, Inc. v. County of DeKalb, Georgia, the Eleventh Circuit reiterated its holding in McKinney that "a plaintiff did not present a substantive due process claim when he alleged an executive deprivation of a state-created right." 106 F.3d 956, 960 (11th Cir. 1997). In DeKalb Stone, the plaintiff brought a substantive due process claim based on an alleged deprivation of the right to use its land as a nonconforming use under existing zoning laws. Id. at 958. The Eleventh Circuit stated that "land use rights, as property rights generally, are state-created rights" and that "enforcement of existing zoning regulations is an executive, not legislative, act." Id. at 959. Noting that McKinney's analysis had been applied to state education rights and state-created land use rights other than zoning regulations, e.g., issuance of a certificate of occupancy, the court in DeKalb Stone concluded that the plaintiff had alleged "an executive violation of a state-

created property right, not a deprivation of any constitutional right." Id. at 960. As a result, the plaintiff could not proceed on a claimed violation of substantive due process.

Indeed, claims similar to Appellants have been rejected in Eisenberg v. City of Miami Beach, 54 F. Supp. 3d 1312 (S.D. Fla. 2014). In Eisenberg, the plaintiff alleged that City code enforcement officials, including some of the same allegedly corrupt officials at issue in this case, embarked on a scheme to shut down the plaintiff's hotel using a series of code violation citations. Id. at 1316-19. As in this case, bribes were solicited by the City officials, but apparently the plaintiff in Eisenberg did not pay any of them. Relying on McKinney and its progeny, the court in Eisenberg concluded that plaintiff's substantive due process claim for constitutional deprivation of their liberty and/or property interests did not survive. See id. at 1325-27. That conclusion is consistent with the federal and Florida state courts that have considered and rejected substantive due process claims based on the enforcement or application of a host of land use, zoning, and other similar regulations. See, e.g., DeKalb Stone, 106 F.3d at 960 (rejecting a challenge to denial of nonconforming use exemption to local zoning laws); Boatman v. Town of Oakland, Florida, 76 F.3d 341, 346 (11th Cir. 1996) (rejecting a claim that town executives arbitrarily and capriciously refused to issue certificate of occupancy); Nantucket Enterprises, Inc. v. City of Palm Beach Gardens, No. 10-81549-CIV,

2013 WL 3927834, at *2, *7-9 (S.D. Fla. July 29, 2013) (finding no cognizable substantive due process claim for a corporate entity's eviction from a commercial leasehold based on allegations that the city improperly "red tagged" plaintiff for failing to obtain a certificate of occupancy, and that the city forced plaintiff out of the leasehold without a court order at the request of the purported owners and landlords of the property); Reserve, Ltd. v. Town of Longboat Key, 933 F. Supp. 1040, 1044 (M.D. Fla. 1996) (finding plaintiffs did not possess a cognizable substantive due process claim for their state-created property interest in a revoked building permit where "both the issuance and revocation of the building permit constitute 'executive' and not 'legislative' acts."); City of Pompano Beach v. Yardarm Restaurant, Inc., 834 So. 2d 861, 866-70 (Fla. 4th DCA 2003) (rejecting a substantive due process claim based on allegations that the city, as part of attempt to "kill" a restaurant's development project, improperly delayed issuing building permits, improperly revoked building permits, improperly delayed permitting reviews, and attempted to repeal an existing special exemption); Ammons, 710 So. 2d at 645 (rejecting a substantive due process claim based on revocation of commercial occupational license that had been improperly issued under existing zoning regulations); Jacobi, 678 So. 2d at 1366-68 (rejecting a substantive due process claim based on the city's refusal to allow reconfiguration of lots under municipal zoning regulations). These decisions are persuasive, and we find no

basis to vary from their conclusions.[9] Accordingly, we conclude that, regardless of whether time barred or not, Appellants failed to state a claim for a violation of substantive due process, and we affirm that aspect of the trial court's final order dismissing those claims with prejudice.

b. *Procedural Due Process*

To state a claim for violation of procedural due process, Appellants must allege "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." Arrington v. Helms, 438 F.3d 1336, 1347 (11th Cir. 2006). As noted by the Eleventh Circuit in

---

[9] Appellants' reliance on Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982) is unavailing. First, Espanola Way predates McKinney, and its application to a substantive due process claim in light of McKinney and its progeny is highly questionable. Second, it is unclear whether Espanola Way involved a claim asserting a violation of substantive due process, procedural due process, or perhaps, both. Indeed, in Post v. City of Fort Lauderdale, 7 F.3d 1552, 1560 (11th Cir. 1993), another pre-McKinney case, the Eleventh Circuit appeared to treat Espanola Way as relevant to a procedural due process claim. We note that in McKinney, the Eleventh Circuit acknowledged that a number of its prior decisions had not adequately distinguished between substantive and procedural due process rights, 20 F.3d at 1560, and in light of that we find Espanola Way to be of little persuasive value. Finally, to the extent that Espanola Way involved a claim relating to substantive due process and continues to have some persuasive value in light of McKinney, it appears that the actions in Espanola Way may have involved "legislative" and not "executive" actions, as the city commission was alleged to be taking action against an entire category of businesses. 690 F.2d at 828-29. In any event, as noted by the Eleventh Circuit in both Espanola Way and Post, the factual record in Espanola Way is too sparse to draw many conclusions from it. Simply put, Espanola Way cannot overcome the consistent conclusions of the courts applying McKinney, which supports the trial court's dismissal of the substantive due process claims with prejudice.

McKinney, deprivation of state-created rights that do not give rise to a claim for violation of substantive due process may nonetheless give rise to a claim for violation of procedural due process. 20 F.3d at 1556, 1560.

The City asserts that the lack of factual detail in the amended complaint regarding the sufficiency of process afforded to the Appellants, as well as discovery responses provided by Appellants, establishes that Appellants cannot maintain a claim for violation of their procedural due process rights. While that ultimately may be true, this matter came before the trial court via a motion to dismiss, and the City's argument relies too much on inferences drawn from silences in the Appellants' amended complaint and discovery responses outside the four corners of that pleading, which are more appropriately considered via summary judgment. We therefore conclude that the trial court erred in dismissing with prejudice Appellants' claims for violations of procedural due process arising from those injuries that are not time barred. We express no opinion regarding the merits of those claims, nor do we express any opinion regarding Appellants' ability, on remand, to amend their pleading with respect to those particular claims.[10]

---

[10] We note that this was only Appellants' first amended complaint. As is oft repeated one way or the other:

> As set forth in Florida Rule of Civil Procedure 1.190(a), "[l]eave of court [to amend a pleading] shall be given freely when justice so requires." While our courts have recognized that there is no "magic number" as to the number of amendments that should be allowed, under the

IV. CONCLUSION

We deny the City's motion to dismiss the appeal. Regarding the merits, the trial court correctly concluded that Appellants' claims based on events that occurred before May 20, 2009 are time barred. In addition, regardless of when the injuries occurred, Appellants' claim for violation of their substantive due process rights fails to state a claim and was properly dismissed with prejudice as well. The trial court erred, however, in dismissing with prejudice Appellants' claim for violation of their procedural due process rights based on events that occurred after May 20, 2009 (or events for which no date is alleged in the amended complaint). Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part.

SCALES, J., concurs.

> facts of this case, the trial court should have afforded Annex the opportunity to amend its first amended complaint, particularly in light of the fact that the complaint had been amended only once. "Leave to amend should not be denied unless the privilege has been abused or the complaint is clearly not amendable."

Annex Indus. Park, LLC v. City of Hialeah, 218 So. 3d 452, 453 (Fla. 3d DCA 2017) (alterations in original) (quoting Osborne v. Delta Maint. & Welding, Inc., 365 So. 2d 425, 427 (Fla. 2d DCA 1978)).

EMAS, J., concurring in part and dissenting in part.

I join in that portion of the majority opinion reversing the trial court's dismissal of Appellants' claims for violation of their procedural due process rights, and affirming the dismissal of Appellants' claims for violation of their substantive due process rights.

However, I respectfully dissent from that portion of the majority opinion affirming the trial court's order to the extent it dismissed claims based on events occurring before May 20, 2009. I believe that Appellants have alleged a continuing tort sufficient to overcome a statute of limitations affirmative defense asserted at this stage of the proceedings.

Procedurally, the trial court entered its order at the motion-to-dismiss stage. We therefore review this order *de novo* and, as the majority acknowledges, we must accept the factual allegations in the complaint as true, and construe all well-pleaded allegations in a light most favorable to Appellants. See maj. op. at *2, n. 1. Applying that standard, I conclude that the trial court and the majority incorrectly concluded that, to the extent Appellants' claims are based on events that occurred before May 20, 2009, they are time barred.

The majority makes a valiant effort to parse out those events occurring before May 20, 2009 and those occurring after May 20, 2009. However, and

contrary to the majority's conclusion, the operative complaint does not merely allege a discrete or individual act or event engaged in by Appellees. Indeed, the complaint alleges an ongoing scheme, consisting of a course of conduct by Appellees which began with the harassment of Appellants through false and wrongful taxes, fines, penalties and closures; followed by extortionate demands of cash from Appellants to allow them to operate their business without harassment or false and wrongful taxes, fines, penalties and closures; and accompanied by threats to close down Appellants' business if they did not comply with the extortionate demands.

"A cause of action accrues when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (2013). Broadly speaking, in a suit for damages in tort, a cause of action generally accrues and the limitations period begins to run on the date when the plaintiff suffers injury. Sellers v. Miami-Dade Cty. School Bd., 788 So. 2d 1086, 1087 (Fla. 3d DCA 2001) (quoting Dep't of Transp. v. Soldovere, 519 So. 2d 616, 617 (Fla. 1988)). Under the continuing torts doctrine, however, where the tortious conduct is ongoing in nature, the cause of action does not accrue, and the statute of limitations does not begin to run, until the tortious conduct ceases. Effs v. Sony Pictures Home Entm't, Inc., 197 So. 3d 1243, 1244-45 (Fla. 3d DCA 2016); Pearson v. Ford Motor Co., 694 So. 2d 61 (Fla. 1st DCA 1997); Halkey-Roberts Corp. v. Mackal, 641 So. 2d 445, 447 (Fla.

2d DCA 1994); Spadaro v. City of Miramar, 855 F. Supp. 2d 1317, 1330 (S.D. Fla. 2012); Laney v. American Equity Inv. Life Ins. Co., 243 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003). The continuing tort doctrine, as an exception to the statute of limitations, has long been recognized in Florida. See Seaboard Air Line R.R. v. Holt, 92 So. 2d 169 (Fla. 1956); Suarez v. City of Tampa, 987 So. 2d 681 (Fla. 2d DCA 2008); Mackal, 641 So. 2d at 447.

Note that the premise for the continuing tort doctrine is not the continuing (or recurring) nature of the damages suffered, but rather the continuing or recurring nature of the tortious conduct: "A continuing tort 'is established by continual tortious *acts*, not by continual harmful effects from an original, completed act.'" Suarez, 987 So. 2d at 686 (quoting Horvath v. Delida, 540 N.W. 2d 760, 763 (Mich. App. 1995)).

This court's decision in Effs, 197 So. 3d at 124, is instructive. There, we held that the continuing torts doctrine did not apply to an action for tortious interference with a business relationship, relying in part upon decisions from other jurisdictions:

> 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.

Id. (quoting D'Arcy & Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P., 129 S.W. 3d 25, 30 (Mo. Ct. App. 2004)) (emphasis added). See also Bankcard Sys., Inc. v. Retriever Indus., Inc., 2003 WL 204717, *7 (Tex. App. Jan. 30, 2003) (cited with approval in Effs, 197 So. 3d at 124, as "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'").

I would agree with the majority that the continuing torts doctrine would not apply in this case if the complaint merely alleged an "original, completed act," resulting in "continual harmful effects." See Suarez, 987 So. 2d at 686. However, that is not the case. Rather, the instant complaint alleges an ongoing course of conduct, and a series of interrelated and recurring acts perpetrated by Appellees, leading ultimately to the loss of Turgman's business.

Specifically, the operative complaint alleges:

- "[A] long-standing and persistent pattern and practice of extortion, bribery, and harassment [of plaintiffs] by the City of Miami Beach";
- Actions by the City, through its government officials, which for years "has levied unlawful taxes, fines, penalties, and business closures on victims who refuse to go along with the City's demands";

- The "harassment that the City of Miami Beach inflicted on Plaintiffs was the subject of a nearly year-long undercover FBI investigation that produced wiretaps, video, and audio recording evidence—all of which was marshalled and presented by the United States Attorney's Office for the Southern District of Florida culminating in the prosecution and sentencing of all of the individual defendants, and the resignation of Miami Beach City Manager Jorge Gonzalez";
- In January 2006 Turgman created 1501 Ocean Drive, LLC to purchase the Club property, and incorporated Chakra 5, Inc. as the operational entity for the Club. Turgman capitalized 1501 Ocean Drive, LLC with $2 million from his personal finances;
- In March 2006, 1501 Ocean Drive, LLC completed its purchase of the Club for $5.6 million (Turgman's $2 million plus a loan of $3.6 million by Citrus Bank (and secured by the Club property));
- The Club opened in Miami Beach in December 2006 as a restaurant, nightclub and entertainment complex. Following the Club's opening, "the City immediately began harassing the Club with successive, pre-textual inspections by the City's code Compliance Department";
- "At midnight on January 26, 2007, the City shut down the Club for being open past midnight even though the conditional use permit authorized the

Club to be open until 5 a.m. The City required Turgman to pay an additional $3,445.00 to operate until 5:00 a.m.";

- "Beginning the Friday night of Super Bowl weekend, the harassing inspections started and continued incessantly";
- By the summer of 2007, Turgman concluded that the harassment from the City was going to eventually cause the Club to fail;
- Believing that the City's harassment was the result of Turgman's involvement in the venture, he eventually assembled a management team to take over the Club's operation and changed the name of the Club to Dolce Ultra Lounge;
- However, in September 2008, City officials discovered that Turgman was still the owner of the facility and was operating the nightclub, and "[t]he inspections immediately returned to their previous harassing levels";
- In November 2008, the City improperly issued a cease and desist order, prohibiting the Club from operating. The Club was forced to close during the holiday season, and Turgman hired a contractor to perform additional work to obtain authorization for the Club to reopen;
- In November and December 2008 Turgman sent a letter to the City Attorney and to City officials, complaining of the improper cease and desist order and closure of the Club;

- "From that point (December 2008) forward, the City monitored every event held at the Club. As soon as the Club's doors would open, code inspectors would be there. In many instances, Turgman was orally told not to let people in, and in some cases the inspectors would just shut the Club down";
- As a result of the City's conduct, Turgman and the Club lost substantial income and forced to reopen the Club as an events-only rental facility;
- "In February 2010, Turgman contracted with a gay rights fundraising organization to hold its annual fundraiser party at the Club. Before the event, City officials contacted the event organizers and warned them that the City would shut the Club down on the night of the party";
- Turgman met with the City's Chief Finance Officer to ask why the City would shut the Club down, and was told the Club "owed the City $36,000 in back resort taxes and the only way that the Club would be allowed to continue operating would be to pay the City immediately";
- Turgman requested an itemized list of the monies owed to the City, but the Chief Finance Officer refused his request. Ultimately, and "desperate for the income the event would generate in light of years of the City's misconduct, [Turgman] entered into a payment plan . . . to pay the City";

- "In March 2010, the Winter Music Conference organization contracted with Turgman to have an awards ceremony at the Club . . . . Thousands attended. Over a month after the event took place, Turgman received a citation for $1800 for flyer violations." Turgman called the City regarding the fine and was advised to pay $125 and write a letter to the Special Master;
- On June 3, 2011, following a Memorial Day Weekend event at the Club, Turgman called to follow up on the status of the $1800 fine from the 2010 event. He spoke with the City's Lead Code Compliance Officer, Jose Alberto. "Alberto told him that he needed to speak with him in person immediately because Chakra 5, Inc. was going to be assessed a $50,000 fine for flyers related to the Memorial Day weekend party";
- Alberto came to Turgman's office and "told him that he could take care of the fines for $3000, which he would use to take care of 10-11 of 'his guys'";
- "The following Monday, June 6, 2011, Alberto called Turgman and told him that the situation was worse than he [Alberto] had thought and that they needed to meet right away";
- Alberto came to the Club "and told Turgman that the fines were likely to be around $60,000"; "Alberto demanded $3,000 again, but made it clear

the payment needed to be in cash and paid directly to him by Friday, June 10." Turgman asked for Alberto to give him until Monday, June 13, and Alberto agreed;

- "The following day, June 7, 2011, Alberto appeared again at the Club. Alberto told Turgman that the City of Miami Beach officials despised Turgman and wanted the Club shut down." Turgman assured Alberto that he would pay the $3,000 by June 13;
- On June 9, 2011, Turgman reported the incident to the FBI;
- Thereafter, Turgman began assisting the FBI in an investigation into corruption in the City's Code Compliance Division. His assistance included wearing a recording device for future meetings with Alberto;
- On June 11, 2011, Turgman met with Alberto at the Club, where their meeting was monitored and recorded by the FBI. At the meeting, Turgman gave Alberto $2,500 and begged Alberto not to allow the Club to be shut down. "Alberto then assured Turgman that there would be no further problems with fines from the flyers";
- Shortly thereafter, Alberto and Turgman reached an agreement by which Turgman "would pay Alberto $1,500 every Monday, or $1,000 if he was open only on Friday night." The weekly meetings were monitored and recorded by the FBI;

- In the weeks that followed, Turgman made numerous extortionate payments to Alberto in exchange for allowing Turgman to continue "operating without any unwarranted inspections or fines from the City Code Compliance Department";
- In August of 2011, the FBI brought in an undercover agent, posing as the manager of the Club, to make the payments to Alberto, relieving Turgman of that responsibility and the accompanying stress and anxiety from participating in the investigation;
- "The City acted with the goal of causing the business of the Club to fail."
- Plaintiffs were told "by the City's Lead Code Compliance Inspector Jose Alberto that City officials wanted the Club to be permanently put out of business and that he had been directed to use the Code Compliance Division to do whatever was necessary to achieve that goal";
- As a result of the actions of the City and City officials, the $3.6 million loan to the Club went into default in 2010, and ultimately Citrus Bank took possession of the Club, and was sold at auction in May 2012;
- "The Club failed as the proximate result of being targeted by the City of Miami Beach";

- "The City's conduct proximately caused Plaintiffs to suffer damages, including but not limited to, the payment of fraudulent fines to the City of Miami Beach, payment of fraudulent tax bills to the City of Miami Beach, lost profits, and loss of the Club";
- In 2012, "each of the Individual Defendants confessed to participating in the scheme to extort Plaintiffs";
- Also in 2012, defendants "Jose Alberto, Willie E. Grant, Orlando E. Gonzalez, Ramon D. Vasallo, Vicente L. Santiesteban, Henry L. Bryant, and Chai D. Footman were arrested on charges of conspiracy to commit extortion and attempt to commit extortion for their involvement in the extortion of Plaintiffs";
- "All of the Individual Defendants have been prosecuted and sentenced";
- It was the custom or practice of the Defendant City of Miami Beach to allow its officials and employees to coerce and harass Miami Beach businesses into paying illegal bribes and extortion monies to the City, City officials, and City employees, and to provide goods and services to City officials and City employees free of charge or at a substantially reduced rate";
- "Under this custom or practice, the City's final policy makers—the City Commission and former City Manager Jorge Gonzalez—delegated their

final policymaking authority to subordinate code inspectors and other City officials";

- "Under this custom or practice, subordinate City code inspectors and other City officials used their final policy making authority to harass business owners by conducting Code inspections at harassing times or intervals, issuing unwarranted or excessive finds, issuing fraudulent tax bills, improperly exercising discretionary decision making for the purpose of delaying or denying permits, reducing allowed occupancy levels, and improperly ordering clubs to close."

Accepting the above allegations as true, the four corners of the complaint set forth a continuing tort, and the law dictates (at least at this stage of the proceedings below) that the statute of limitations does not bar the action or any portion thereof. The trial is generally the appropriate venue for making the fact-intensive determination of whether Appellees engaged in a continuing tort, and thus whether the affirmative defense of the statute of limitations bars any portion of Appellants' claims. See, e.g., Goodwin v. Sphatt, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013) (recognizing that the continuing torts doctrine, as an exception to a statute of limitations defense, "presents a factual question that would also preclude dismissal of the complaint"); Mackal, 694 So. 2d at 68-69 (holding: "Whether the continuing torts doctrine applies to the facts of a case is for a trier of fact to decide"); Halkey-

Roberts, 641 So. 2d at 447 (reversing summary judgment and holding that the "question of whether [defendant's] actions constituted continuing torts precludes the granting of summary judgment as to counts I and II. To what extent, if any, the concept applies to this case is an issue for the trier of fact to decide.")

We do not and cannot know whether the evidence may ultimately bear out the allegations of a continuing tort. But our review at this stage depends not on ultimate proof, but upon the allegations of the complaint. Accepting those allegations as true—as we must—Appellants have sufficiently alleged a continuing tort such that the trial court erred in dismissing claims based on events occurring before May 20, 2009 (i.e., more than four years before the filing of the complaint). I would reverse that portion of the trial court's order.

I therefore respectfully concur in part and dissent in part.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOSE TORRES,
Appellant,

v.

BANK OF NEW YORK As Trustee For **THE CERTIFICATE HOLDERS CWABS, INC. ASSET BACKED CERTIFICATES SERIES 2006-26,**
Appellee.

No. 4D17-1625

[August 22, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Judge; L.T. Case No. 07-026252 CACE (14).

Kendrick Almaguer and Peter Ticktin of The Ticktin Law Group, P.L.L.C., Deerfield Beach, for appellant.

J. Kirby McDonough of Quarles & Brady, LLP, Tampa, for appellee.

PER CURIAM.

Jose Torres ("the homeowner") appeals an order denying his motion for attorneys' fees and costs rendered in favor of the Bank of New York as Trustee ("the bank") following an involuntary dismissal of the bank's foreclosure action. We affirm in part and reverse in part.

First, we affirm the denial of attorneys' fees. Because the homeowner prevailed on an argument that the bank failed to prove entitlement to enforce the note and mortgage, the homeowner cannot now seek to take advantage of the fee provisions of the note and mortgage. *See Sabido v. Bank of N.Y. Mellon*, 238 So. 3d 867, 868-69 (Fla. 4th DCA 2018); *Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896, 898 (Fla. 4th DCA 2017), *review granted*, No. SC17-1387, 2018 WL 2069328 (Fla. Feb. 13, 2018).

However, we reverse the denial of costs. Florida Rule of Civil Procedure 1.420 provides in relevant part, "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of

costs." Fla. R. Civ. P. 1.420(d); *see also* § 57.041(1), Fla. Stat. (2017) ("The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment . . . ."). Because the case was involuntarily dismissed, the homeowner is entitled to taxable costs.

In this situation, any costs awardable to the homeowner flow from rule 1.420 and not from the subject mortgage and/or note.

We therefore remand for the trial court to consider what costs should be awarded as authorized by the Uniform Guidelines for Taxation of Costs in Civil Actions.[1]

Affirmed in part; reversed in part.

GERBER, C.J., GROSS and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[1] Fla. R. Civ. P. Taxation of Costs.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARK B. SACKS and **BARBARA SACKS,**
Appellants,

v.

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, as Trustee for the Certificate holders of the CWMBS, Inc., Mortgage Pass-Through Trust 2005-HYB7 Mortgage Pass-Through Certificates, Series 2005-HYB7,
Appellee.

No. 4D17-2122

[August 22, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Roger B. Colton, Judge; L.T. Case No. 50-2016-CA-003944-XXXX-MB.

Bruce K. Herman of The Herman Law Group, P.A., Fort Lauderdale, for appellants.

Alexis Fields of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Fort Lauderdale, for appellee.

FORST, J.

Appellants Mark and Barbara Sacks appeal a final summary judgment of foreclosure in favor of Appellee, The Bank of New York Mellon ("the Bank"). Appellants raise several issues on appeal. We affirm without comment with respect to all issues with one exception. The trial court erred in admitting the payment history submitted by the Bank to establish the amount owed under the note. Accordingly, we reverse the judgment and remand for an evidentiary hearing. We otherwise affirm the judgment of foreclosure.

Background

Appellants defaulted on their mortgage, and the Bank filed a foreclosure complaint and subsequently moved for summary judgment. In support of its motion, the Bank filed a tabulation of Appellants' payment history under the terms of the note and mortgage and an accompanying affidavit

seeking to establish the business records predicate for admission. The affiant was a document coordinator of the Bank's servicer, Bayview Loan Servicing ("BLS"). The payment history attached to the affidavit was generated by BLS and it incorporated tabulations by Bank of America ("BoA"), a prior servicer of the loan. The entirety of the affidavit's discussion of BLS's business records was as follows:

> The information in this affidavit is taken from BLS's business records. I have personal knowledge of BLS's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of BLS's regularly conducted business activities; and (c) it is the regular practice of BLS to make such records.

Appellants did not challenge the admissibility of the payment history or any other affidavit filed by the Bank in support of its summary judgment motion. The trial court granted the Bank's motion for summary judgment and entered a final judgment of foreclosure against Appellants.

Analysis

"The standard of review for evidentiary rulings is abuse of discretion." *Holt v. Calchas, LLC*, 155 So. 3d 499, 503 (Fla. 4th DCA DCA 2015). However, "whether evidence is hearsay and whether evidence fits within an exception to the hearsay rule are questions of law reviewed de novo." *Washburn v. Washburn*, 211 So. 3d 87, 90 (Fla. 4th DCA 2017). "[G]enerally the courts hold the moving party for summary judgment or decree to a strict standard and the papers supporting [the movant's] position are closely scrutinized . . . ." *OneWest Bank, FSB v. Jasinski*, 173 So. 3d 1009, 1014 (Fla. 2d DCA 2015) (quoting *Gonzalez v. Chase Home Fin. LLC*, 37 So. 3d 955, 958 (Fla. 3d DCA 2010)).

"All affidavits in support of a motion for summary judgment 'shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164, 1167 (Fla. 1st DCA 2014) (quoting Fla. R. Civ. P. 1.510(e)). Therefore, no objection to the sufficiency of the affidavit was necessary below.

Here, the Bank sought to meet the business records exception to hearsay for its records, including the payment history, via affidavit. The

affidavit needed to demonstrate:

> (1) that the record was made at or near the time of the event; (2) that it was made by or from information transmitted by a person with knowledge; (3) that it was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Bank of N.Y. v. Calloway, 157 So. 3d 1064, 1069 (Fla. 4th DCA 2015) (citing *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008)).

Because the servicer's (BLS) records incorporated a payment history generated by a predecessor servicer (BoA), the additional requirements of demonstrating reliance and trustworthiness attached. This Court's opinion in *Calloway* explains:

> Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been "made" by the successor business, such that both records constitute the successor business's singular "business record." *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007), as amended (Feb. 13, 2008). However, since records crafted by a separate business lack the hallmarks of reliability inherent in a business's self-generated records, proponents must demonstrate not only that "the other requirements of [the business records exception rule] are met" but also that the successor business relies upon those records **and** "the circumstances indicate the records are trustworthy." *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993).
>
> . . . .
>
> This principle is codified within section 90.803(6) itself, which provides trial courts the ability to exclude documents otherwise fitting the business records exception where "the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. (2008).

157 So. 3d at 1071 (alteration in original) (emphasis added) (footnote omitted). Trustworthiness can be established by either (1) "providing evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy," or (2) "the

successor business itself may establish trustworthiness by independently confirming the accuracy of the third-party's business records upon receipt." *Id.* at 1072.

In *Calloway*, we found the bank's witness confirmed the trustworthiness of the relied-upon third-party business records by testifying that the bank reviewed the payment history for accuracy before inputting the payment information into its own system. *Id.* We additionally noted that, "even had [the witness] not so testified, the circumstances of the loan transfer itself would have been sufficient to establish trustworthiness given the business relationships and common practices inherent among lending institutions acquiring and selling loans." *Id.*

Somewhat similarly, in *Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209 (Fla. 5th DCA 2015), the court found a witness's entry of records created by a prior servicer proper "so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy." *Nationstar Mortg.* at 216; *see also Le v. U.S. Bank*, 165 So. 3d 776, 778 (Fla. 5th DCA 2015) (holding that a witness properly laid the foundation for a prior servicer's records because the witness "testified that she was familiar with industry standards in recording and maintaining the records and that the records received from the prior servicer were tested for accuracy and compliance with industry standards via a boarding process before the information was input").

On the other hand, the Fifth District reversed a judgment of foreclosure in *Hidden Ridge Condominium Homeowners Ass'n, Inc. v. Onewest Bank, N.A.*, 183 So. 3d 1266 (Fla. 5th DCA 2016), in part due to the failure of an affidavit filed on behalf of the bank to address whether the foreclosing bank verified a predecessor's payment history for accuracy and compliance with industry standards. *Id.* at 1270. The affidavit, in fact, made no mention of the predecessor. *Id.* at 1268; *see also Channell v. Deutsche Bank Nat'l Tr. Co.*, 173 So. 3d 1017, 1020 (Fla. 2d DCA 2015) (remanding for establishment of the amount due because there was no testimony on whether a predecessor's loan documents had been verified for accuracy nor whether the witness was familiar with the predecessor's record-keeping system).

Here, the relevant portion of the Bank representative's affidavit merely recited the four elements of the business records exception, as applied to BLS's own records. Just as in *Hidden Ridge Condominium*, the affidavit said nothing about incorporating the predecessor servicer's payment

records or, indeed, anything about the predecessor at all. Without any explanation as to how BoA's payment records were verified for accuracy or how the Bank acquired them, the trustworthiness requirement was not met. Thus, we must conclude "[t]he record fails to demonstrate that an adequate foundational predicate was established, and the loan . . . records relied on to establish the outstanding debt constituted inadmissible hearsay." *Channell*, 173 So. 3d at 1020 (citing §§ 90.802, 90.803(6), Fla. Stat. (2014)). Without the payment history, there was insufficient evidence to support the amount owed under the loan, and summary judgment was granted in error on this point.

Conclusion

While we otherwise affirm the foreclosure judgment, the Bank failed to establish a foundation for entry of its business records concerning the amount due and owing. Thus, "there is insufficient evidence to support the amount due and owing under the loan," and "we must reverse and remand for further proceedings to properly establish the amount due and owing." *Channell*, 173 So. 3d at 1020.

Affirmed in Part, Reversed and Remanded in Part.

WARNER and MAY, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.