Florida Real Property and Business Litigation Report

Volume XI, Issue 36
September 10, 2018
Manuel Farach

The Estate of Caldwell Jones, Jr. v. Live Well Financial, Inc., Case No. 17-14677 (11th Cir. 2018).

12 U.S.C. § 1715z-20, which states the HUD Secretary "may not insure" a reverse mortgage unless it defers repayment obligations until the borrowing "homeowner" either dies or sells the mortgaged property (and defines "homeowner" to include the borrower's spouse), does not limit a lender's ability to demand repayment immediately following a borrower's death, even if the non-borrowing spouse continues to live in the mortgaged property.

The Bank of New York Mellon v. Glenville, Case No. SC17-954 (Fla. 2018).

The 60-day time period for filing a petition for surplus foreclosure sale proceeds commences to run upon the Clerk of the Court filing the Certificate of Disbursements; *Bank of New York Mellon v. Glenville*, 215 So. 3d 1284, 1285 (Fla. 2d DCA 2017), and *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878, 881 (Fla. 4th DCA 2016), are disapproved.

Borowski v. Ferrer, Case No. 1D15-3358 (Fla. 1st DCA 2018).

An appellate court may reverse a final judgment which is internally inconsistent, including reversing a final judgment which removes a fence that causes an obstruction to a neighbor's access easement but places the fence in a new location which causes a new obstruction to the neighbor's access easement.

Sterling Breeze Owners' Association, Inc. v. New Sterling Resorts, LLC, Case No. 1D17-1553 (Fla. 1st DCA 2018).

A declaration of condominium may exclude some parcels of airspace from the condominium, and upon doing so, the excluded parcels are not subject to the Condominium Act nor to responsibility under the Act.

Forbes v. Prime General Contractors, Inc., Case No. 2D17-353 (Fla. 2d DCA 2018).

A nonbreaching party has the option to treat the breach as a breach of the entire contract, i.e., a total breach, and upon doing so may either treat the contract as void and seek the damages that will restore him to the position he was in prior to entering into the contract, or may instead affirm the contract and seek damages for the "benefit of the bargain." In breached construction contracts, the benefit of the bargain is "either the reasonable cost of completion, or the difference between the value the construction would have had if completed and the value of the construction that has been thus far performed." Likewise, there is no duty to mitigate damages, and the Doctrine of Avoidable Consequences only prevents parties from recovering damages they "could have reasonably avoided."

Inter American Coal, S.A. v. SHE DDF2-FL2, LLC, Case No. 3D18-1205 (Fla. 3d DCA 2018).

Seeking affirmative relief waives a party's objection to service of process through publication.

Wells Fargo Bank, N.A. v. Elkind, Case No. 4D17-1213 (Fla. 4th DCA 2018).

A lender that voluntarily dismisses a suit is not entitled to a *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896, 899 (Fla. 4th DCA 2017), determination of no attorney's fees being due the borrower as a voluntary dismissal is not a judicial determination of no standing.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14677

D.C. Docket No. 1:17-cv-03105-TWT

THE ESTATE OF CALDWELL JONES, JR.,
EXECUTRIX VANESSA JONES,
VANESSA JONES,
Surviving Spouse in Her Individual Capacity and as guardian of Leah Grace Jones,
LEAH GRACE JONES,
Minor,

Plaintiffs - Appellants,

versus

LIVE WELL FINANCIAL, INC.,

Defendant - Appellee.

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

(September 5, 2018)

Before WILSON and NEWSOM, Circuit Judges, and VINSON,* District Judge.

NEWSOM, Circuit Judge:

This case arises out of the foreclosure of a home-equity conversion mortgage—commonly called a "reverse mortgage." We are asked to interpret a federal statute, 12 U.S.C. § 1715z-20, which authorizes the Secretary of the Department of Housing and Urban Development to establish a mortgage-insurance program designed to encourage lenders to offer reverse mortgages and thereby alleviate some of the financial pressures faced by elderly homeowners. *Id*. § 1715z-20(a). The particular provision at issue here states that the HUD Secretary "may not insure" a reverse mortgage unless it defers repayment obligations until the borrowing "homeowner" either dies or sells the mortgaged property—and importantly, expressly defines the term "homeowner" to include the borrower's spouse. *Id*. § 1715z-20(j).

The question before us is whether § 1715z-20(j) can be read to do more—specifically, to prevent foreclosure pursuant to a reverse-mortgage contract that, by its terms, permits the lender to demand repayment immediately following a borrower's death, even if his or her non-borrowing spouse continues to live in the mortgaged property. We hold that it cannot be construed so broadly. Because the statute addresses and limits only the Secretary's authority—specifying the types of

*Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

mortgages that HUD "may not insure"—it does not alter or affect the rights that a lender independently possesses under a reverse-mortgage contract.

I

A reverse mortgage is a financial instrument designed to allow older homeowners to convert their home equity into liquid assets. *Cf. Bennett v. Donovan*, 703 F.3d 582, 584 (D.C. Cir. 2013). In the typical reverse-mortgage transaction, the borrower receives a loan—in either a lump sum, a series of periodic payments, or a line of credit—that is secured by a mortgage on his home. *Id.* at 584–85. Unlike a traditional mortgage loan, a reverse-mortgage loan generally needn't be repaid until a specific "triggering" event occurs—usually, the borrower's death or the sale of his home. *Id*. Upon the occurrence of that event, either (1) the estate will pay off the loan or (2) the lender will foreclose on the home to recover the money it lent.

Reverse mortgages are ordinarily "non-recourse" loans, meaning that even if a borrower or his estate fails to repay the loan when due and the sale of the home doesn't cover the outstanding balance, the lender can't go after any of the borrower's (or his estate's) other assets. *Id.* at 585. "This feature is, of course, favorable to borrowers but introduces significant risk for lenders—if regular disbursements are chosen, they can continue until the death of the borrower (like a life annuity), and the loan balance will increase over time, making it less and less

likely that the borrower will be able to cover the full amount." *Id.* And "[i]f a borrower lives substantially longer than expected, lenders could face a major loss." *Id.*

Recognizing both the risks to lenders and the "special needs of elderly homeowners" facing rising costs of living on reduced income, Congress authorized the HUD Secretary to administer a mortgage-insurance program designed to induce lenders to offer reverse-mortgage loans. *See generally* 12 U.S.C. § 1715z-20 ("Insurance of home equity conversion mortgages for elderly homeowners"). This program "provide[s] assurance to lenders that, if certain conditions [are] met, HUD [will] provide compensation for any outstanding balance not repaid by the borrower or covered by the sale of the home." *Bennett*, 703 F.3d at 585.

Section 1715z-20 specifies several conditions that a reverse mortgage must meet to be insurable under the program. One such condition—central to this appeal—prohibits HUD from insuring a reverse-mortgage contract that permits foreclosure while either the borrowing homeowner or his or her spouse continues to reside in the mortgaged property:

> The Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. For purposes of this subsection, the term "homeowner" includes the spouse of a homeowner.

Id. § 1715z-20(j).

II

In 2014, Caldwell Jones obtained a reverse mortgage, which the original lender almost immediately assigned to Live Well Financial, Inc.[1] The mortgage was secured by the home that Caldwell shared with his wife Vanessa and their minor daughter, and was covered by HUD's mortgage-insurance program. The reverse-mortgage contract (in mortgag-ese, the "security deed") expressly defined the "Borrower" to be "Caldwell Jones, Jr., a married man." Vanessa was not designated a "Borrower"—and indeed, at the time was not yet 62 years old, which is the minimum age to qualify for a reverse mortgage. Later that same year, Caldwell died.

Shortly thereafter, Live Well asserted a right to repayment under a provision of the mortgage contract authorizing it to "require immediate payment-in-full of all sums secured by this Security Instrument" if "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower." When the loan was

[1] For those who may not remember, Caldwell ("Pops") Jones was, as the kids would say, a "legit baller" in his day. The 32nd pick in the 1973 NBA Draft, Caldwell played three seasons in the ABA and then 14 more in the NBA, most prominently for the Philadelphia 76ers. While Julius Erving ("Dr. J.") provided those 76er teams their flash, Caldwell did the yeoman's work—playing tenacious D and controlling the boards. For his efforts, in both 1981 and 1982 Caldwell was named to the NBA All-Defensive First Team. *See generally* Caldwell Jones, Wikipedia (Aug. 20, 2018), https://en.wikipedia.org/wiki/Caldwell_Jones. For a few video highlights of Caldwell's career—including a nasty block of all-time NBA leading scorer Kareem Abdul-Jabbar's jumper, check out the following link: In Memoriam: Caldwell Jones, YouTube (Aug. 20, 2018), https://www.youtube.com/watch?v=PqFI8uvLew4.

not repaid, Live Well initiated non-judicial foreclosure proceedings by running a "Legal Notice of Default and Notice of Sale Under Power" in a local newspaper.

In response, Vanessa, individually and on behalf of both the Estate of Caldwell Jones and her minor daughter (collectively, "the Estate"), filed a petition in state court seeking injunctive relief to prevent the foreclosure sale. The Estate argued that 12 U.S.C. § 1715z-20(j) prohibited Live Well from foreclosing while Vanessa lived in the home because even though she was not a "Borrower" under the terms of the mortgage contract, she was nonetheless a "homeowner" protected by the statute. A state-court judge granted a temporary restraining order and enjoined the foreclosure. Live Well then removed the case to federal court and filed a motion to dismiss. The district court granted that motion, concluding that § 1715z-20(j) addresses only HUD's authority to insure loans and does not affect Live Well's contractual right to foreclose. This appeal followed.

III

On appeal, the Estate contends that the district court's order dismissing its action to enjoin the foreclosure must be reversed because it "is contrary to public policy and Congress's express intent to protect the non-borrowing surviving spouse of a [r]everse [m]ortgage [b]orrower from displacement from their

residential home." Br. of Appellant at 5, 6.[2] For the reasons that follow, we are constrained to reject the Estate's contention.

To begin, it seems clear to us that Live Well has a right to foreclose under Georgia law and the terms of the mortgage contract. "Georgia law clearly authorizes the use of 'non-judicial power of sale foreclosure' as a means of enforcing a debtor's obligation to repay a loan secured by real property." *You v. JP Morgan Chase Bank*, 743 S.E.2d 428, 430 (Ga. 2013). This process "permits private parties to sell at auction, without any court oversight, property pledged as security by a debtor who has come into default." *Id.* Aside from some limited statutory consumer protections not at issue here, "non-judicial foreclosure is governed primarily by contract law." *Id*. A security deed that includes a power-of-sale provision "is a contract and its provisions are controlling as to the rights of the parties thereto and their privies." *Gordon v. S. Cent. Farm Credit, ACA*, 446 S.E.2d 514, 515 (Ga. 1994).

Here, the mortgage contract authorized the sale of the property to recover the balance due if "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower." Importantly, although Vanessa remained in the house following Caldwell's death, the Estate has repeatedly and consistently acknowledged—from the very outset of this litigation—that she is *not* a

[2] Our review is *de novo*. *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016).

"Borrower" under the mortgage contract. And with good reason: as already noted, the contract explicitly defines the term "Borrower" to mean "Caldwell Jones, Jr., a married man."[3] Accordingly, under the plain terms of the mortgage contract—which defers foreclosure following a "Borrower[']s]" death only as long as a "surviving Borrower" still lives in the mortgaged property—Live Well clearly had authority to foreclose upon the death of sole "Borrower" Caldwell.

Not so fast, says the Estate. It contends that contract terms aside, § 1715z-20(j) protected Vanessa from displacement as a non-borrowing surviving "spouse" who remained in the home. In the Estate's view, Congress's clear "intent" in enacting § 1715z-20(j) was to require lenders to defer homeowners' loan obligations beyond the homeowner's death until his spouse either dies or sells the property. The question before us, therefore, is whether, as the Estate asserts, federal law effectively supersedes the mortgage contract's contrary terms.

---

[3] In its petition for injunctive relief, the Estate acknowledged that "[a]t the time of the execution of the [r]everse [m]ortgage, the only borrower of the reverse[] mortgage was Caldwell." Lest there be any uncertainty, the petition reiterated that "there is absolutely no doubt that Plaintiff Vanessa Jones is the non-borrowing surviving spouse [and] that she did not qualify for the age requirement (62) to even apply for a reverse mortgage." The Estate also attached to the petition an affidavit in which Vanessa described her "status" as "a non-debtor spouse." Indeed, even the Estate's brief to this Court repeatedly refers to Vanessa as a "non-borrowing spouse." Br. of Appellant at 1, 3, 5, 6, 9.

In a surprising turnabout, the Estate asserted for the first time at oral argument that, in fact, Vanessa *could* be deemed a "Borrower" entitled to protection under the mortgage contract. Even assuming that the Estate's new argument doesn't fall victim to a waiver analysis, we reject it. Not only does the very first page of the mortgage contract define the term "Borrower" to mean Caldwell, but the Estate's new contention is contradicted by its repeated and consistent concessions (1) that Caldwell was "the only borrower," (2) that Vanessa was a "non-borrowing spouse," and, indeed, (3) that Vanessa wasn't even old enough to qualify for a reverse mortgage.

As an initial matter, we agree with the Estate that § 1715z-20(j) reflects Congress's "intent" to safeguard widowed spouses like Vanessa. Subsection (j) not only protects "homeowner[s]" from displacement but also expressly defines the term "homeowner" to include "the spouse of the homeowner." 12 U.S.C. § 1715z-20(j). Indeed, we can assume (without deciding) that HUD shouldn't have insured the mortgage contract at issue here because it failed to protect the widowed non-borrower from displacement following the death of her borrower spouse.

Even so, we cannot grant the Estate the relief it seeks. While Congress might well have "inten[ded]" for non-borrower surviving spouses to enjoy protection under HUD-insured mortgages, § 1715z-20(j)'s plain language applies only to HUD and speaks only to what the Secretary can and cannot do: "*The Secretary may not insure* a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary." 12 U.S.C. § 1715z-20(j) (emphasis added). Without respect to whether it was properly insured under § 1715z-20(j), the mortgage contract here created and embodies an independent legal relationship between Live Well and Caldwell. Section 1715z-20(j) says nothing about private contractual obligations one way or the other, and

thus cannot be read to alter or affect the enforceability of the mortgage contract or its terms.

No matter how compelling we may find the Estate's arguments as a matter of public policy, we must apply the "plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). So even assuming that HUD insured Caldwell's mortgage in violation of § 1715z-20(j), Live Well still had a private *contractual* right—independent of the statute—to demand immediate payment and, if necessary, pursue foreclosure.

IV

For the foregoing reasons, we hold that the district court properly granted Live Well's motion to dismiss. Even if (as we have assumed) HUD shouldn't have insured Caldwell's mortgage, 12 U.S.C. § 1715z-20(j) does not alter or limit Live Well's right to foreclose under the terms of its valid mortgage contract.[4]

[4] In so holding, we are in good company. *See, e.g.*, *Jeansonne v. Generation Mortg. Co.*, 644 F. App'x 355, 357 (5th Cir. 2016) ("[W]hile HUD may have violated § 1715z-20(j) by insuring a reverse mortgage that failed to protect … the non-borrowing spouse … this would not affect [the lender's] right to foreclose under the terms of the contract it executed with [the borrower]."); *In re D'Alessio*, 2018 WL 2972340, at *5 (Bankr. D. Mass. June 11, 2018) ("While § 1715z-20(j) speaks to the circumstances under which HUD should properly insure a reverse mortgage, nothing in the statute speaks to when a lender is allowed to foreclose.") (internal quotations omitted); *Pikaart v. Fin. Freedom*, 2017 WL 5624747, at *4 (W.D. Mich. Oct. 31, 2017) (lender was entitled to foreclose against non-borrowing spouse under the terms of the mortgage contract, and § 1715z-20(j) did not affect that right); *Fed. Nat'l Mortg. Ass'n v. Takas*, 2017 WL 3016785, at *5 (D. Utah July 14, 2017) ("By its terms, Section 1715z-20(j) does not apply to lenders and does not affect the validity or enforceability of the terms of contracts between lenders and borrowers."); *Harris v. Castro*, 2015 WL 13547618, at *3 (N.D. Ga. Nov. 19, 2015) (denying request for TRO because the lender "ha[d] a separate security deed which is not contingent upon the validity or [e]ffect of" § 1715z-20(j) or its implementing regulations); *Bombet v. Donovan*,

AFFIRMED.

2015 WL 1276555, at *5 (M.D. La. Mar. 19, 2015) "[W]hile HUD may have violated 12 U.S.C. § 1715z-20(j) when it insured [the] reverse mortgage, this did not render the mortgage contract … legally unenforceable or invalid."); *Aldi v. Wells Fargo Bank, N.A.*, 2015 WL 3650297, at *7 (D. Conn. Feb. 17, 2015) ("[T]he Court agrees with defendants that 12 U.S.C. § 1715z-20(j) governs HUD's insurance of reverse mortgages, not the independent contractual relationship between mortgagors and mortgagees."); *Kizler v. Liberty Reverse Mortg.*, 2014 WL 12561056, at *7 (C.D. Cal. May 5, 2014) ("Despite Plaintiff's arguments to the contrary, 12 U.S.C. § 1715z-20(j) does not strip lenders of the right to foreclose.").

Supreme Court of Florida

No. SC17-954

THE BANK OF NEW YORK MELLON, etc.,
Petitioner,

vs.

DIANNE D. GLENVILLE a/k/a DIANE D. GLENVILLE a/k/a DIANE GLENVILLE, et al.,
Respondents.

September 6, 2018

CANADY, C.J.

This case involves a dispute between the former record owners of certain real property and a subordinate lienholder over surplus funds resulting from a judicial foreclosure sale of the property. The crux of the dispute is whether the subordinate lienholder timely filed its claim to the surplus amount under the provisions of chapter 45, Florida Statutes (2015), governing judicial sales. The statute requires that a claim to surplus funds be filed within "60 days after the sale." The specific issue presented is whether the sixty-day period begins upon the public auction of the property, the clerk's issuance of the certificate of title, or some other event.

This Court has for review *Bank of New York Mellon v. Glenville*, 215 So. 3d 1284, 1285 (Fla. 2d DCA 2017), in which the Second District Court of Appeal concluded that, under section 45.031, the subordinate lienholder's claim was untimely because it was not filed within sixty days of the public auction. In so holding, the Second District certified conflict with *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878, 881 (Fla. 4th DCA 2016), in which the Fourth District Court of Appeal concluded that the sixty-day period does not begin until the clerk issues and files the certificate of title. This Court granted discretionary review based on the certified conflict. This Court has jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

We conclude that the sixty-day period begins upon the clerk's issuance of the certificate of disbursements—something the clerk is tasked with doing "[o]n filing a certificate of title." § 45.031(7)(a), Fla. Stat. Section 45.032(3), Florida Statutes (2015)—which neither *Glenville* nor *Straub* considered—makes clear beyond any doubt that the sixty-day period begins upon issuance of the certificate of disbursements. Accordingly, we quash *Glenville*. We also disapprove the certified conflict case of *Straub* to the extent the Fourth District held that the sixty-day period begins upon the issuance of the certificate of title as opposed to the certificate of disbursements.[1]

1. We note that during the most recent legislative session, the Legislature passed Committee Substitute for Committee Substitute for House Bill 1361. Among other things, the bill amends sections 45.031 and 45.032, as well as certain

I. BACKGROUND

Before presenting the facts and procedural history of *Glenville* and then discussing *Straub*, we provide an overview of the general procedures for judicial foreclosure sales.

Judicial Foreclosure Procedures—Generally

Section 45.031, Florida Statutes (2015)—titled "Judicial sales procedure"—as well as certain other sections of the Florida Statutes, address judicial foreclosure sales and set forth the procedures that "may be followed as an alternative to any other sale procedure if so ordered by the court." § 45.031, Fla. Stat. Under section 45.031, the trial court, "[i]n the order or final judgment," "shall direct the clerk to sell the property at public sale on a specified day." § 45.031(1)(a), Fla. Stat. A notice of sale shall then be published at certain times and shall contain certain information, including "[t]he time and place of sale." § 45.031(2), Fla. Stat. The winning bidder is required to post a deposit "[a]t the time of the sale" and must pay the remaining balance within a prescribed period. § 45.031(3), Fla. Stat. "After a sale of the property," the clerk is required to "promptly file a certificate of sale."

---

related sections of the Florida Statutes, to revise (lengthen) the time period within which subordinate lienholders and other persons must file a claim to the surplus amount. The bill, which provides for an effective date of July 1, 2019, was signed by Governor Scott on March 21, 2018. *See* ch. 2018-71, Laws of Fla. We do not address this legislation.

§ 45.031(4), Fla. Stat. "If no objections to the sale are filed within 10 days after filing the certificate of sale," the clerk is then required to file a "certificate of title." § 45.031(5), Fla. Stat. Upon the filing of the certificate of title, "the sale shall stand confirmed." § 45.031(6), Fla. Stat. "On filing a certificate of title," the clerk is then required to disburse the proceeds "in accordance with the order or final judgment" and file a "certificate of disbursements." § 45.031(7)(a)-(b), Fla. Stat. "If there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided in this section [45.031] and ss. 45.0315-45.035." § 45.031(7)(d), Fla. Stat.

Section 45.031 was amended in 2006 to require that the final judgment of foreclosure, the notice of sale, and the certificate of disbursements include certain language informing subordinate lienholders and other persons claiming a right to any surplus funds that they must file a claim with the clerk of court within "60 days after the sale." *See* ch. 2006-175, § 1, at 2, 3, 5, Laws of Fla. (amending § 45.031(1)(a), (2)(f), (7)(b), Fla. Stat., respectively). Section 45.031 does not define "sale" or "60 days after the sale." But as the cross-references in section 45.031(7)(d) indicate, other sections of chapter 45 also govern surplus funds. Those other sections include section 45.032, which sets forth detailed requirements and procedures relating to the disbursement of surplus funds. As addressed more

fully below, section 45.032 itself prescribes a sixty-day period in the specific context of the filing of claims for surplus funds—a sixty-day period beginning upon the issuance of the certificate of disbursements. *See* § 45.032(3), Fla. Stat.

***Glenville*—the Case on Review**

Respondents, Diane and Mark Glenville, were the defendant property owners in a foreclosure action. *Glenville*, 215 So. 3d at 1285 n.1. Petitioner, The Bank of New York Mellon, f/k/a The Bank of New York, as Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee on behalf of the Certificateholders of the CWHEQ, Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D (Mellon), was the holder of a second mortgage on the property. A first mortgage on the property was held by JP Morgan Chase, and a third mortgage on the property was held by Florida Housing Finance Corporation (Florida Housing).

In May 2014, JP Morgan Chase brought a foreclosure action against the Glenvilles, seeking to foreclose its interest under the first mortgage. A Final Judgment of Foreclosure was entered against the Glenvilles on May 28, 2015. The final judgment set a public auction date of July 2, 2015, and—in accordance with section 45.031(1)(a), Florida Statutes—included the requisite statement regarding a potential surplus. The public auction was held on July 2, 2015. The clerk issued the certificate of sale on July 6, 2015, after the holiday weekend. On July 14, 2015, the clerk issued the certificate of title. And on July 29, 2015, the clerk

issued the certificate of disbursements, which, in accordance with section 45.031(7)(b), Florida Statutes, included the requisite language regarding surplus funds. The certificate of disbursements reflected a surplus of $86,093.27.

On August 4, 2015, Florida Housing filed a claim asserting its right to $20,573.64 of the surplus amount. On September 1, 2015—sixty-one days after the public auction—the Glenvilles filed a Verified Claim for Mortgage Foreclosure Surplus. In their motion, the Glenvilles admitted that Florida Housing's claim was timely and requested that the trial court issue an order disbursing $20,573.64 of the surplus to Florida Housing and the remainder to the Glenvilles. The next day, on September 2, 2015, Mellon filed a claim asserting its right to the entire surplus amount. Mellon's claim was filed more than sixty days after the public auction but within sixty days of the clerk's filing of each of the following: the certificate of sale, the certificate of title, and the certificate of disbursements. No other relevant claims to the surplus were filed.

On November 2, 2015, the trial court held a hearing on the parties' competing claims for the surplus. On November 5, 2015, the trial court issued an Order to Disburse Surplus Funds, directing the clerk to disburse $20,573.64 of the

surplus to Florida Housing, and the balance to the Glenvilles.[2] The trial court rejected Mellon's claim as untimely under section 45.031 because it "was not submitted within 60 days of the foreclosure sale held on July 2, 2015." Mellon appealed to the Second District, arguing "that a foreclosure sale is not complete until the clerk issues the certificate of sale." *Glenville*, 215 So. 3d at 1285. Mellon thus contended that its claim was timely because it was filed within sixty days of issuance of the certificate of sale.

The Second District rejected Mellon's argument and affirmed the trial court's order denying Mellon's claim for surplus funds. *Id.* The Second District primarily focused on section 45.031(7)(b) and concluded that the statutory provision unambiguously provided that the cutoff for submitting claims for surplus funds is sixty days from the date of the public auction. *Id.* at 1285-86. The Second District observed that section 45.031(7)(b) "only refers to the 'sale,' not the 'certificate of sale,' " and then noted that "section 45.031 assigns particular and distinct meanings to the terms 'sale' and 'certificate of sale' and does not use them interchangeably." *Id.* at 1286. For example, the Second District noted that section 45.031(4) uses the two terms separately and distinctly in the same sentence. *Id.*

2. The trial court's order reflects a surplus of $90,564.93, as opposed to the $86,093.27 surplus amount reflected in the certificate of disbursements. The actual amount of the surplus is not relevant to the legal issue presented in this case.

Thus, according to the Second District, adopting Mellon's argument would not only render section 45.031(4) meaningless but "confuse the meaning of other subsections of the statute." *Id.* The Second District then supported its conclusion by noting that two of its previous decisions used the public auction "as the start date for the sixty-day period." *Id.* (citing *Mathews v. Branch Banking & Tr. Co.*, 139 So. 3d 498, 499-500 (Fla. 2d DCA 2014); *Dever v. Wells Fargo Bank Nat'l Ass'n*, 147 So. 3d 1045, 1047 (Fla. 2d DCA 2014)).

The Second District also rejected a separate argument from Mellon that the sixty-day period should begin from the day the clerk issues the certificate of title. The Second District concluded that Mellon waived that argument by not raising it prior to rehearing. *Id.*[3] Nevertheless, the Second District noted that Mellon's purportedly waived argument was consistent with the Fourth District's recent decision in *Straub*, which held that the sixty-day cutoff period begins when the clerk issues and files the certificate of title. *Id.* at 1287. The Second District then certified conflict with *Straub*, while opining that *Straub*'s construction of the term "sale" "confuses the meaning of several subsections of section 45.031." *Id.* (citing § 45.031(1)(a), (2), (3), (5), and (6), Fla. Stat.).

3. The Second District also rejected Mellon's reliance on certain cases that involved "a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031." *Glenville*, 215 So. 3d at 1287.

Straub—the Certified Conflict Case

In *Straub*, the subordinate lienholders filed their claims to the surplus more than sixty days after the public auction and the filing of the certificate of sale, but not more than sixty days after the clerk's filing of the certificate of title. *Straub*, 182 So. 3d at 880. The trial court determined that the subordinate lienholders' claims were timely. *Id.* at 879. On appeal to the Fourth District, the homeowner argued that the claims were untimely because the sixty-day period in section 45.031 "begins to run when the property is purchased at the auction and the certificate of sale is filed." *Id.* at 880. The Fourth District in *Straub* rejected the homeowner's argument and concluded—without mentioning the certificate of disbursements—that the sixty-day period begins to run upon the issuance and filing of the certificate of title. *Id.* at 881. *Straub* began by noting that the case presented "an issue of first impression under today's version of section 45.031." *Id.* at 880. *Straub* then looked to *Allstate Mortgage Corp. of Florida v. Strasser*, 286 So. 2d 201 (Fla. 1973), in which this Court interpreted a previous version of section 45.031. *Straub*, 182 So. 3d at 880-81.

In *Strasser*, this Court interpreted the meaning of the term "sale" in section 45.031(1), Florida Statutes (1971), but in the context of the right of redemption. *Strasser*, 286 So. 2d at 201. The statutory language at issue was added in 1971 and provided as follows: "In cases when a person has an equity of redemption, the

court shall not specify a time for the redemption, but the *person may redeem the property at any time before the sale*." *Id.* at 202 (quoting § 45.031(1), Fla. Stat. (1971)). After a default judgment was entered against the property owner in an action to foreclose a mechanic's lien, the property was sold at public auction. *Id.* at 201-02. The clerk issued a certificate of sale the day after the auction. *Id.* at 202. Several days later, before the certificate of title was issued, the circuit court ordered the clerk to accept the property owner's payment in redemption. *Id.* at 202, 203. The corporation that purchased the property at public auction appealed the trial court's order. *Id.* at 202. On appeal, the Third District Court of Appeal affirmed the trial court, concluding that the Legislature intended the term "sale" to refer to the actual transfer of ownership that takes place upon the issuance of the certificate of title. *Id.* at 202-03. The Third District first noted that the 1971 statutory amendment was in derogation of the common law right to redeem property up until the entry of an order confirming the sale and thus must be strictly construed. *Id.* at 202. The Third District then noted that the Legislature neither defined the term "sale" nor indicated its intended meaning, so the Third District looked to various definitions before concluding that the Legislature intended the term "sale" to refer to the actual transfer of ownership. *Id.* at 202-03. And the Third District observed that, under section 45.031(3), Florida Statutes (1971), the transfer of ownership takes place upon the issuance of the certificate of title. *Id.* at

203. On review, this Court affirmed the decision of the Third District by quoting the Third District's analysis and then concluding that the district court "correctly interpreted" section 45.031(1), Florida Statutes (1971). *Id.*

After reviewing *Strasser*, the Fourth District in *Straub* concluded that *Strasser*'s reasoning should control the interpretation of the term "sale" in "today's version of [section 45.031]"—that is, the transfer of ownership completed upon filing of the certificate of title. *Straub*, 182 So. 3d at 881. *Straub* recognized that the Legislature had partially superseded *Strasser* in 1993 by enacting section 45.0315, which codified the right of redemption and provided that the property could be redeemed at "any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure." *Id.* (quoting § 45.0315, Fla. Stat. (2014)). But *Straub* concluded that the Legislature merely "created a specific window for exercising the right of redemption" and that nothing in the enactment of section 45.0315 suggested that the Legislature "intended to change the plain meaning of the word 'sale' used elsewhere in the statute." *Id.*

II. ANALYSIS

The certified conflict issue presented in this case requires us to construe the term "60 days after the sale," as used in section 45.031, Florida Statutes (2015). This issue is one of statutory interpretation, which is a pure question of law that

this Court reviews de novo. *See Borden v. E.-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006).

In 2006, in an apparent response to the growing number of foreclosure sales that were resulting in surplus amounts, the Legislature amended chapter 45, Florida Statutes, by enacting "[a]n act relating to foreclosure proceedings." Ch. 2006-175, Laws of Fla. (title). As indicated above, the 2006 act amended section 45.031 to require that certain statements regarding potential surplus amounts be included in the final judgment of foreclosure, the notice of sale, and the certificate of disbursements. *See* ch. 2006-175, § 1, at 1-6, Laws of Fla. The 2006 act also created several new statutory sections within chapter 45 to specifically address foreclosure surplus funds. And the 2006 act amended existing section 45.031(7) to add paragraph (d) to directly cross-reference those new statutory sections. *See* ch. 2006-175, § 1, at 6, Laws of Fla. Namely, section 45.031(7)(d), Florida Statutes (2015), provides that "[i]f there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided in this

section [45.031] and ss. 45.0315-45.035."[4] The newly created statutory sections include section 45.032, titled "Disbursement of surplus funds after judicial sale."

Because we find section 45.032—and in particular subsection 45.032(3)—to be dispositive of the conflict issue, we begin by examining the relevant provisions of section 45.032. We then explain why section 45.032(3) requires the conclusion that the sixty-day period in section 45.031(7)(b)—and elsewhere in section 45.031—begins to run upon the issuance of the certificate of disbursements.

Section 45.032

As an initial matter, section 45.032(1) defines certain terms that apply not just for purposes of section 45.032 but "[f]or purposes of ss. 45.031-45.035." Section 45.032(1)(c) specifically defines the term "surplus" to mean "the funds remaining *after payment of all disbursements* required by the final judgment of foreclosure and *shown on the certificate of disbursements*." (Emphasis added.)

Among other things, section 45.032(2) then "establishe[s] a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds *after payment of subordinate lienholders who have timely filed a claim*." (Emphasis added.)

4. Section 45.0315, which addresses the right of redemption, is the only cross-referenced section that was in existence before the effective date of the 2006 act.

Section 45.032(3) then references a very specific sixty-day period: "During *the 60 days after the clerk issues a certificate of disbursements*, the clerk shall hold the surplus pending a court order." (Emphasis added.) Each of the three paragraphs in subsection (3) go on to reference this sixty-day period in the specific context of the filing of claims for surplus funds. Paragraph (a) provides, in part, as follows: "*If the owner of record claims the surplus during the 60-day period and there is no subordinate lienholder*, the court shall order the clerk to deduct any applicable service charges from the surplus and pay the remainder to the owner of record." § 45.032(3)(a), Fla. Stat. (emphasis added). Paragraph (b) then provides, in part, as follows:

> *If any person other than the owner of record claims an interest in the proceeds during the 60-day period* or if the owner of record files a claim for the surplus but acknowledges that one or more other persons may be entitled to part or all of the surplus, *the court shall set an evidentiary hearing to determine entitlement to the surplus*.

§ 45.032(3)(b), Fla. Stat. (emphasis added). Finally, paragraph (c) provides, in part, that "[*i*]*f no claim is filed during the 60-day period*, the clerk shall appoint a surplus trustee from a list of qualified surplus trustees as authorized in s. 45.034." § 45.032(3)(c), Fla. Stat. (emphasis added).[5]

5. "Surplus trustees" are third-party trustees who must be approved by the Department of Financial Services and whose primary duty "is to locate the owner of record within 1 year after appointment." *See* § 45.034(1), (6), Fla. Stat.

Lastly, the Legislature made clear that disputes over surplus funds have no bearing on the validity of the foreclosure sale itself and "do not in any manner affect or cloud the title of the purchaser at the foreclosure sale of the property." § 45.032(5), Fla. Stat.

Statutory Interpretation

In concluding that the sixty-day period referenced in section 45.031 is triggered by the public auction, the Second District in *Glenville* did not take into account the specific sixty-day period identified in section 45.032(3). Instead, the Second District focused largely on what it considered to be a clear meaning of section 45.031(7)(b) that avoided confusing the meaning of other subsections of section 45.031. *Glenville*, 215 So. 3d at 1286-87. Similarly, the Glenvilles point to numerous instances in section 45.031 in which the term "sale" refers to the public auction, and they appear to urge this Court to follow the principle that presumes "that when the legislature uses the same term multiple times in the same statute, that term carries the same meaning each time it is used." *Nat'l Auto Serv. Centers, Inc. v. F/R 550, LLC*, 192 So. 3d 498, 507 (Fla. 2d DCA 2016) (citing *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000)). On the other hand, Mellon's various arguments can be summed up as follows: in no event should the sixty-day period begin before the issuance of the certificate of sale.

We agree with Mellon that the sixty-day period is not triggered by the public auction. In doing so, we conclude that the sixty-day period in section 45.031(7)(b) must be understood in a way that is consistent with the sixty-day period in section 45.032(3). Ultimately, there cannot be two different sixty-day cutoff periods for filing claims for surplus funds.

As with any matter involving an issue of statutory interpretation, courts must first look to the actual language of the statute and "examine the statute's plain meaning." *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *A.R. Douglass, Inc., v. McRainey*, 137 So. 157, 159 (Fla. 1931). Here, the Second District concluded that the meaning of the term "sale" as used in section 45.031(7)(b) clearly and unambiguously referred to the public auction, given the Legislature's use of the same term in "*other subsections of the statute*." *Glenville*, 215 So. 3d at 1286 (emphasis added). But the Second District stopped short in its consideration of relevant provisions of the statutory scheme for judicial sales. This Court has long recognized that the "plain language" approach

> is subject to the qualification that if a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in pari

> materia, the Court will examine the entire act and those in pari materia in order to ascertain the overall legislative intent.
>
> When construing a particular part of a statute it is only when the language being construed in and of itself is of doubtful meaning or doubt as to its meaning is engendered by apparent inconsistency with other parts of the same or a closely related statute that any matter extrinsic the statute may be considered by the Court in arriving at the meaning of the language employed by the Legislature.

Fla. State Racing Comm'n v. McLaughlin, 102 So. 2d 574, 575-76 (Fla. 1958) (emphasis omitted) (quoting lower court's order).

Section 45.032 is "closely related" to section 45.031. *Id.* at 576. The two sections are manifestly designed to work in tandem. Not only was section 45.032 created in the same legislation in 2006 that added the statutory language at issue to section 45.031, but that legislation also amended section 45.031 to create two separate cross-references to section 45.032 and other related sections of chapter 45, including a cross-reference in the specific context of foreclosure surpluses. *See* § 45.031(7)(d), Fla. Stat. The two statutory provisions are without doubt part of the same statutory scheme—that is, they are *in pari materia*, "in the same matter."

So looking to section 45.032 to understand the meaning of section 45.031 is proper because section 45.031, section 45.032, and several other sections of chapter 45 together comprise a statutory scheme relating to judicial foreclosure sale procedures. *See Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1234 (Fla. 2009) ("[B]ecause we are dealing with an entire statutory scheme for granting and terminating charters, we do not look at only one portion of

the statute in isolation but we review the entire statute to determine intent."). In the end, looking to section 45.032 "is in accord with the principle that we 'give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.' " *Id.* (quoting *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007)). A harmonization of section 45.031 and section 45.032 leads to the conclusion that the sixty-day period for the filing of claims to surplus funds begins upon the issuance of the certificate of disbursements—that is, after the sale has been confirmed through the issuance of the certificate of title, and after the actual surplus amount has been determined. *See* §§ 45.031(6), 45.032(1)(c), Fla. Stat. We thus disagree with *Glenville*'s conclusion that the only reasonable interpretation of "60 days after the sale" as used in section 45.031 is that it means sixty days from the public auction.

Our case law has already recognized that the term "sale" in chapter 45 must be understood in light of the specific context in which it is used. In *Strasser* we examined a previous version of section 45.031 and concluded that the undefined term "sale" in the specific context there referred to the transfer of ownership occurring upon the filing of the certificate of title. *See Strasser*, 286 So. 2d at 202-03. The point established in *Strasser* is underlined by the fact that the term "sale" is undefined not just in section 45.031 but in all of chapter 45, and there are other related instances in chapter 45 in which the term cannot be understood to mean the

public auction itself. For example, section 45.0315, which addresses the right of redemption, provides that certain persons "may cure the mortgagor's indebtedness and *prevent a foreclosure sale*" "[a]t any time *before the later of* the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure." (Emphasis added.) In other words, a "sale" can still be "prevent[ed]" even after the public auction.

Interpretation of the sixty-day provision of section 45.031(7)(b) in light of the sixty-day provision of section 45.032(3) is also supported by the rule that "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994). Section 45.031 is clearly the more general statute. Section 45.031 is generally titled "Judicial sales procedure" and covers far more than foreclosure surpluses. Section 45.032, on the other hand, is specifically titled "Disbursement of surplus funds after judicial sale" and solely addresses foreclosure surpluses. Indeed, the very definition of the term "surplus" is found in section 45.032. Under this Court's longstanding approach to statutory interpretation, section 45.032(3) controls the relevant sixty-day period.

Our reasoning regarding the conflict issue also requires that we disapprove the reasoning of *Straub*. *Straub* correctly determined that the sixty-day cutoff period does not begin until after the actual transfer of ownership of the property,

but *Straub* erroneously concluded that the sixty-day period begins upon the issuance of the certificate of title. Although the Legislature may have contemplated that the certificate of disbursements would be issued on the same day as the certificate of title, *see* § 45.031(7)(a), Fla. Stat. (requiring the clerk to file the certificate of disbursements "[o]n filing a certificate of title"), that will not always be the case, as *Glenville* demonstrates. And section 45.032(3) provides that the actual triggering event is the issuance of the certificate of disbursements.

III. CONCLUSION

We conclude that "60 days after the sale," as used in chapter 45 in the context of claims to surplus funds, means sixty days after the clerk issues the certificate of disbursements. Mellon's claim to the surplus was timely filed before the expiration of that sixty-day period. Accordingly, we quash the Second District's decision in *Glenville*. And we disapprove the reasoning of *Straub*, which is inconsistent with our reasoning here.

It is so ordered.

PARIENTE, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
LEWIS, J., concurs in result.

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

Application for Review of the Decision of the District Court of Appeal – Certified Direct Conflict of Decisions

Second District - Case No. 2D15-5198

(Manatee County)

Anthony R. Smith, Kathryn I. Kasper, and Kendra J. Taylor of Sirote & Permutt, P.C., Winter Park, Florida,

for Petitioner

Sheryl A. Edwards of The Edwards Law Firm, PL, Sarasota, Florida,

for Respondents

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D15-3358

EDWARD F. BOROWSKI, JR.,

Appellant,

v.

JEFFREY E. FERRER,

Appellee.

On appeal from the Circuit Court for Duval County.
Karen K. Cole, Judge.

September 5, 2018

OSTERHAUS, J.

Edward F. Borowski, Jr. appeals an order denying his motion to amend the final summary judgment. The final judgment at once enjoined his next-door neighbor, Jeffrey E. Ferrer, from blocking access to his side-yard easement with a fence, but then authorized Mr. Ferrer to build a new fence along a different line that would also obstruct access to his easement. We reverse because the judgment authorizes Mr. Ferrer to rebuild the fence in a place that would obstruct access to the easement.

I.

Mr. Borowski filed suit in the Circuit Court of Duval County against his next-door neighbor, Mr. Ferrer, seeking the removal of a fence that interfered with an easement that provided a four-foot

swath that allowed Mr. Borowski to access the side of his house. The Covenants and Restrictions provides Mr. Borowski with "a four (4) foot perpetual easement within the lot line of the adjoining lot . . . for the purpose of construction and maintaining the dwelling and lawn between the dwelling and side lot line."

Prior to the fall of 2012, Mr. Ferrer had a fence between his property and Mr. Borowski's property, connecting to Mr. Borowski's residence. Mr. Borowski was able to access the side of his property through a gate in the fence. After a neighborly conflict arose, however, Mr. Ferrer refused to permit Mr. Borowski access through the gate. After unsuccessful attempts to resolve the issue through the homeowners' association, Mr. Borowski filed suit and sought injunctive relief.

When Mr. Borowski sought summary judgment on his claim, the court held a hearing and entered final summary judgment for Mr. Borowski. Well, sort of. The order at once required Mr. Ferrer to "remove the portion of his fence which encroaches upon property owned by his next-door neighbor," but went on to say that "[i]f Defendant elects to rebuild a fence to replace the removed one, he shall build it on his property lines . . . ." The order's approval of a new fence built along the property line renewed the prospect that Mr. Borowski's four-foot perpetual easement on Mr. Ferrer's lot would remain blocked by a fence. And so, Mr. Borowski filed a motion to rehear and amend the final summary judgment, requesting the fence be built "no less than four (4) feet within Defendant's adjoining property line." But the court denied Mr. Borowski's motion.

II.

One reason that this court will reverse and remand orders that are appealed is to correct internal inconsistencies. *See, e.g.*, *Mitchell v. XO Commc'ns.*, 966 So. 2d 489, 490 (Fla. 1st DCA 2007) ("Because the . . . final order is inconsistent in its findings of fact and conclusions of law, we REVERSE the final order and REMAND for additional proceedings."); *City of W. Palm Beach Fire Dep't v. Norman*, 711 So. 2d 628, 630 (Fla. 1st DCA 1998) ("[T]he order is internally inconsistent. In one part of the order, the judge awarded temporary partial disability benefits from February 4,

1995, through March 1996 and in another part of the order, the judge awarded these benefits from February 4, 1995, through the present and continuing. This inconsistency must be corrected on remand."); *S. Fla. Water Mgmt. Dist. v. Ciacci*, 647 So. 2d 203, 205 (Fla. 1st DCA 1994) ("[T]he order is internally inconsistent. Because of this inconsistency . . . we reverse and remand for further clarification . . . ."). This rule applies equally to cases involving property disputes. *See, e.g.*, *Anderson v. Oldham*, 622 So. 2d 544, 545 (Fla. 5th DCA 1993) (striking an order because the owner of the servient estate was not entitled to construct a privacy fence directly on an easement, but only on his own property immediately westerly thereof).

As with the fence built on an easement in *Anderson*, the order below gave Mr. Ferrer authorization to rebuild a fence "on" the property line, which would obstruct and interfere with Mr. Borowski's right of access to his four-foot easement on Mr. Ferrer's lot. By enjoining Mr. Ferrer from obstructing Mr. Borowski's access to his easement in one paragraph, but allowing Mr. Ferrer to build a new fence that would similarly obstruct the easement in a later paragraph, the court's order created an internal inconsistency, which must be corrected. If Mr. Ferrer constructs a fence between the parties' properties, it cannot be built on the property line, which would block access to the easement. Rather, the fence must preserve Mr. Borowski's four-foot easement on Mr. Ferrer's lot.

III.

For these reasons, we reverse and remand for further consideration consistent with this opinion.

REVERSED and REMANDED.

WINOKUR and M.K. THOMAS, JJ., concur.

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

R. Kyle Gavin, Liles Gavin, P.A., Jacksonville, for Appellant.

Jeffrey E. Ferrer, pro se, Appellee.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-1553

STERLING BREEZE OWNERS' ASSOCIATION, INC.,

Appellant/Cross-Appellee,

v.

NEW STERLING RESORTS, LLC and STERLING BREEZE, LLC,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Bay County.
James B. Fensom, Judge.

September 5, 2018

OSTERHAUS, J.,

Sterling Breeze Owners' Association brought declaratory, quiet title, and unjust enrichment claims against the company owning commercial space on the ground floor of its high-rise condominium building in Panama City Beach. The Association alleged that New Sterling Resorts, LLC's four ground-floor commercial parcels could not be owned in fee simple outside of the condominium form of ownership. And it sought to oust New Sterling Resorts from the building and to have its property transferred to the Association's members. The Association also asserted an unjust enrichment claim because New Sterling

Resorts failed to pay for its share of utilities and other expenses in the building. The outcome below was mixed. Each party won a claim and lost a claim. The trial court granted summary judgment for New Sterling Resorts on the declaratory and quiet title claims. But it ruled for the Association on the unjust enrichment claim after a bench trial. Both parties have appealed. We now affirm in part and reverse in part.

I.

In 2008, a developer recorded a declaration of condominium for a new 22-story high-rise on Panama City Beach called Sterling Breeze. According to the Declaration of Condominium, the building included 145 residential units and common elements, which were part of the condominium, as well as four ground-floor "associated commercial parcels" (ACPs), which were not part of the condominium. The developer retained fee simple ownership of the four ACPs, which were particularly described in the Declaration (as well as in an "Associated Commercial Parcels Easement and Reservation" agreement between the Association and the developer which was attached to the Declaration). The Easement and Reservation Agreement provided that the ACPs would be used for commercial purposes in the building. The ACPs's owner would "maintain at its cost and expense the interior of the [ACPs], [as well as be] responsible for all expenses for services including, but not limited to, utilities related to the use thereof."

Some six years later, in August 2014, the Association sued to nullify the Declaration's reservation of the ACPs. By that time, New Sterling Resorts operated one of the four ground-floor parcels as a wine bar, another as a guest gym, and a third as a laundry facility. The fourth ACP was being used for storage. The Association challenged the Declaration's original reservation, asserting that because the ACPs were airspace, they could not be privately owned in fee simple apart from the condominium. It asked that the ACPs be divested from New Sterling Resorts and given to the Association's members as tenants in common.

The Association also brought an unjust enrichment claim to recoup unpaid expenses for utilities, maintenance, and security benefits provided to the ACPs, which New Sterling Resorts hadn't paid.

The court ultimately disposed of the declaratory relief and quiet title claims by granting summary judgment in favor of New Sterling Resorts. After a bench trial, the court ruled for the Association on the unjust enrichment claim and awarded it $332,752.93 in damages.

II.

A.

The circuit court's order granting summary judgment involves a pure question of law that we review de novo. *Hill v. Suwannee River Water Mgmt. Dist.*, 217 So. 3d 1100, 1102 (Fla. 1st DCA 2017).

The Association would oust New Sterling Resorts from its property on the theory that Florida's common law doesn't allow air space to be owned in fee simple separate and apart from the ground surface. But we disagree that this case turns on common law property principles. Here, the developer identified and recorded the disputed property in 2008 under Florida's condominium law, chapter 718, Florida Statutes. The Declaration of Condominium submitted land that it particularly described to the condominium form of ownership—including the common elements and many airspace-residential units in the high-rise building—while reserving other airspace on the ground-floor for the developer outside of condominium ownership. Not only did the Declaration of Condominium particularly identify and reserve the ACPs for ownership separate from the condominium, but the Association signed an easement and reservation agreement attached to the Declaration acknowledging that the ACPs would be commercial space reserved by the developer. And so, irrespective of how the common law might have addressed separate owners of surface space and airspace, the disputed airspace in this case was identified and reserved via a declaration of condominium and associated agreement recorded under chapter 718, Florida Statutes, which specifically addresses airspace. *See Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1268 (Fla. 2013) (recognizing that the common law yields where it is inconsistent with state law). Resolution here thus depends on the statute.

Under the Declaration of Condominium filed in this case, almost all of the airspace in the 22-story high-rise was made part of the condominium. But four airspace parcels were carved out in the Declaration and reserved for ownership outside of the condominium. Consistent with this arrangement, Florida's condominium law recognizes that condominiums may encompass both airspace and portions of airspace. The statute's definition of "condominium property" includes "*lands* . . . subjected to condominium ownership, whether or not contiguous." § 718.103(13), Fla. Stat. (emphasis added). *See also Beach Club Towers Homeowners Ass'n v. Jones*, 231 So. 3d 566, 570-71 (Fla. 1st DCA 2017) (relying on the definition of condominium property). In turn, the statute's definition of "land" provides that a declaration of condominium may include "all or any portion of the airspace" as condominium property:

> "Land" means the surface of a legally described parcel of real property and includes, *unless otherwise specified in the declaration* and whether separate from or including such surface, **airspace** lying above . . . such surface. However, *if so defined in the declaration*, the term **"land" may mean all or any portion of the airspace** . . . and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit.

§ 718.103(18), Fla. Stat. (emphasis added). Contrary to the Association's argument, neither the definition of "condominium property," nor "land," requires that all of the airspace be included within condominium ownership. Rather, the statute contemplates that portions of airspace may be included or excluded, which is what occurred here. The declaration in this case subjected most (but not all) of the airspace to condominium ownership, which is permissible under the statute.

We therefore agree with the trial court's statutory interpretation and decision to grant summary judgment on the declaratory and quiet title claims here. Florida law does not require divestment of the ACPs from New Sterling Resorts.

B.

We also agree with New Sterling Resorts' legal argument on its cross-appeal. The Association prevailed on an unjust enrichment claim based upon New Sterling Resorts' failure to pay ACP-related expenses for utilities, maintenance, security, and the like. But however blameworthy New Sterling Resorts' conduct might be, an unjust enrichment claim cannot prevail in this case because a contract prescribes the parties' rights and responsibilities for such expenses.

Florida law is clear that "a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter." *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008). And in this case, paragraph seven of the ACP Easement and Reservation agreement, which was appended to the Declaration of Condominium, obligated the owner of the ACPs to "be responsible for all expenses for services including, but not limited to, utilities related to the use thereof." In other words, the agreement specifically addresses the expenses for unpaid services and utilities sought in the Association's lawsuit. Because a contract covers this matter, we reverse and remand the judgment on Count III and direct that judgment be entered for New Sterling Resorts on this quasi-contractual claim.

III.

For these reasons, this appeal is AFFIRMED in part, REVERSED in part, and REMANDED with directions.

WETHERELL and RAY, JJ., concur.

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

John Cottle and Leslie D. Sheekley of Becker & Poliakoff, P.A., Fort Walton Beach, for Appellant/Cross-Appellee.

John P. Daniel, Terrie L. Didier, and Joseph A. Passeretti of Beggs & Lane, RLLP, Pensacola, for Appellee/Cross-Appellant.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES JAY FORBES and FAY ANNETTE FORBES,

Appellants,

v.

PRIME GENERAL CONTRACTORS, INC., a Florida corporation,

Appellee.

Case No. 2D17-353

Opinion filed September 7, 2018.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

P. Brandon Perkins and E. Carson Lange of Rogers Towers P.A., Fort Lauderdale, for Appellants.

No appearance for Appellee.

SALARIO, Judge.

This is an appeal from a final judgment on a claim for breach of contract. James and Fay Forbes sued Prime General Contractors, Inc. for breach after Prime walked off a home construction job. The Forbeses sought damages that included payments they made to Prime under the contract, payments they made for updated

architectural plans, certain other expenses, and a loss of equity in their home. After a bench trial, the trial court found that Prime had materially breached its contract with the Forbeses but declined to award these three items of damage. We reverse the damage award in the final judgment and remand with instructions to award the Forbeses such damages as will restore them to the position they enjoyed right before they inked their contract with Prime. We affirm the judgment in all other respects.

The Forbeses and Prime signed a written contract under which Prime agreed to renovate the Forbeses' home in accord with plans drawn up by an architect. In exchange, the Forbeses agreed to pay Prime a total of $276,000 in five separate draws. Under the draw schedule, the Forbeses were to pay (a) 25% of the contract price upon signing, (b) 25% upon completion of demolition, (c) 25% upon completion of the "dry-in" stage of construction,[1] (d) 15% after roofing and siding installation, and (e) the remaining 10% upon completion of the job. The contract provided that "any alteration or deviation from this agreement must be made in writing and signed by the Parties." Prime began the job as agreed, and the Forbeses paid the first two contract draws—totaling $138,000. They also paid an additional $6000 for updated architectural plans.

Under the contract, the Forbeses should not have had to pay anything more until the dry-in phase of the project was done. Unfortunately, things hit a snag before then. Prime said that the cost of the materials it needed to do the job had gone

[1]The contract defines the "dry-in" stage as "demo, framing rough-in electric, plumbing and mechanical, roof sheeting and felt and exterior windows and doors if available."

up. It told the Forbeses that the work would now cost at least $550,000—almost twice the original contract price—and demanded that the Forbeses immediately pay the third draw plus an additional $31,450 for work Prime had already done and for which the Forbeses had already paid. Prime presented the Forbeses with a written change order making these adjustments. The Forbeses refused to sign it and told Prime that they were prepared to move forward at the contract price. Prime refused and walked off the job, leaving the Forbeses' home unfinished and uninhabitable.

Because they could not live in their home, the Forbeses began renting a house nearby so that they had somewhere to stay. In the meantime, they looked for another contractor to finish the work on their home—ultimately talking with five potential candidates to perform the service—but none was willing to handle the job. After five months of living in a rental with no luck getting the work on their house finished, the Forbeses bought a new house and moved into it. They were unable, however, to pay a mortgage on their new house and another mortgage on the home that Prime left uninhabitable. So they let the uninhabitable home go into foreclosure. At the time they contracted with Prime, the Forbeses had about $45,000 in equity in the house. That equity was lost in the foreclosure.

The Forbeses sued Prime for breach of contract, and the case went to a bench trial at which the evidence was consistent with the facts related above. The Forbeses argued that Prime materially breached the contract by demanding payments to which it was not entitled under the contract and thereafter walking off the job. Prime contended, among other things, that the Forbeses also failed to perform under the contract, to which the Forbeses answered that they were entitled to suspend performance due to Prime's material breach. The Forbeses requested the following

items of damages: $138,000 in payments made pursuant to their contract with Prime, $6000 for updated architectural plans, $45,000 of lost equity in their home, $5600 in rent, and various other expenses incurred in reliance on their contract with Prime. It is clear from the damages the Forbeses requested that they were asking to be put in the position they would have occupied had they not contracted with Prime in the first place. Prime asserted and litigated at trial an affirmative defense that the Forbeses failed to mitigate their damages.

About a month after the bench trial wrapped, the trial court entered a final judgment. It found that Prime had materially breached the contract as the Forbeses argued. However, it awarded the Forbeses as damages only the $5600 in rent they paid while searching for a new contractor. The trial court explained that "[t]he purpose of contract damages is to put the injured party in as good a position as that in which full performance would have put him" and concluded that the Forbeses

> failed to offer persuasive or credible evidence at trial of the difference between the market value of the home had it been completed, less such part of the contract price that has not been paid, and the value of the construction that has been furnished by [Prime] thus far.

The court also found, without elaboration, that the Forbeses "made a financial decision not to engage in reasonable mitigation efforts" with respect to their damages.

This is the Forbeses' timely appeal of the final judgment. They argue two points: (1) by looking to place them in the position they would have occupied had Prime fully performed instead of the position they would have occupied had they never contracted with Prime, the trial court used an incorrect method of calculating damages; and (2) the trial court's finding that the Forbeses failed to mitigate their damages is unsupported by the evidence. We review the first point de novo, see Tubby's Customs,

Inc. v. Euler, 225 So. 3d 405, 407 (Fla. 2d DCA 2017), and the second for competent substantial evidence, cf. RNK Family Ltd. P'ship v. Alexander-Mitchell Assocs., 890 So. 2d 297, 299 (Fla. 2d DCA 2004). See also Craigside, LLC v. GDC View, LLC, 74 So. 3d 1087, 1089 (Fla. 1st DCA 2011) ("While the parties are entitled to de novo review of the trial court's rulings with respect to the legal effect of the contract, we are bound by the trial court's findings of fact in a case, like the present one, where competent, substantial evidence supports the findings."). Both points have merit.

Method of calculating damages. In calculating damages, the trial court erred by failing to honor the Forbeses' choice to deem the contract totally breached and recover those damages that would restore them to the position they occupied immediately before contracting with Prime. When one party to a contract commits a material breach, the nonbreaching party has the option to treat the breach "as a breach of the entire contract—in other words, an entire or total breach."[2] Hyman v. Cohen, 73 So. 2d 393, 397 (Fla. 1954) (quoting 12 Am. Jur. Contracts § 389); see also 24 Richard A. Lord, Williston on Contracts § 64:27 (4th ed. 2018). From the perspective of the nonbreaching party, there are two main consequences of that decision: (1) the nonbreaching party may suspend his or her own performance of the contract, see Rector v. Larson's Marine, Inc., 479 So. 2d 783, 785 (Fla. 2d DCA 1985), and (2) the nonbreaching party can elect one of two damage remedies in a suit for breach, see City of Miami Beach v. Carner, 579 So. 2d 248, 251 (Fla. 3d DCA 1991).

When a party seeks damages for a total breach, "[h]e may treat the contract as void and seek the damages that will restore him to the position he was in

[2]No one in this appeal has challenged the trial court's finding that Prime materially breached its contract with the Forbeses.

immediately prior to entering the contract." Rector, 479 So. 2d at 785; see also McCray v. Murray, 423 So. 2d 559, 561 (Fla. 1st DCA 1982). Or, in the alternative, he may instead "affirm the contract, 'insist upon the benefit of his bargain, and seek the damages that would place him in the position he would have been in had the contract been completely performed.' " Tubby's Customs, 225 So. 3d at 407 (quoting Citizen's Prop. Ins. Corp. v. Amat, 198 So. 3d 730, 734 (Fla. 2d DCA 2016)). In the case of a breached construction contract like Prime's contract with the Forbeses, the benefit-of-the-bargain remedy is "either the reasonable cost of completion, or the difference between the value the construction would have had if completed and the value of the construction that has been thus far performed." Rector, 479 So. 2d at 785 (citing Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037 (Fla. 1982) (adopting section 346(1)(a) of the Restatement (First) of Contracts (Am. Law Inst. 1932), to cases involving breach of a construction contract)).

Here, the final judgment on its face shows that the trial court believed that the Forbeses were entitled only to the benefit-of-the-bargain remedy. As reflected in the language from its final judgment quoted above, the trial court concluded that the Forbeses were entitled to be put in the position they would have occupied had Prime fully performed and that they had failed to present evidence to establish the key factors that go into that remedy in a construction contract case.

But the reason the Forbeses did not produce that evidence was because they did not seek benefit-of-the-bargain damages. They sought to be put in the position they would have occupied had they never contracted with Prime. It was clear at trial that the Forbeses regarded the breach as total; indeed, they were explicit that they were entitled to suspend their own performance under the contract. And the damages they

asked the court to award—return of payments made under the contract and the equity in their home at the time of contracting—were of a type that regarded the contract as void and attempted to restore the Forbeses to their precontractual situation. Those damages were inconsistent with an affirmance of the contract and request for damages approximating full performance. Cf. Sec. & Inv. Corp. of the Palm Beaches v. Droege, 529 So. 2d 799, 802 (Fla. 4th DCA 1988) ("If the two remedies are inconsistent or mutually exclusive, . . . then the mere choice of one remedy and . . . pursuit of one remedy to judgment . . . operates as an election."); McCray, 423 So. 2d at 561 (holding that a trial court did not err in failing to instruct a jury on benefit-of-the-bargain damages where the evidence supported damages to restore plaintiff to his original condition). In the final analysis, then, the remedy the Forbeses chose and pursued was not the remedy the trial court either considered or awarded.

Mitigation of damages. We agree with the Forbeses that the trial court's finding that they failed to mitigate damages was mistaken. The concept of mitigation is often used, as it appears to have been in this case, to refer to the doctrine of avoidable consequences. In contract cases, there is really no "duty to mitigate" because the claimant "is not compelled to undertake any ameliorative efforts"; rather, he is merely prevented from recovering damages he "could have reasonably avoided." Sys. Components Corp. v. Fla. Dep't of Transp., 14 So. 3d 967, 982 (Fla. 2009) (quoting The Florida Bar, Florida Civil Practice Damages § 2.43, at 2–30 (6th ed. 2005)); see also Penton Bus. Media Holdings, LLC v. Orange County, 236 So. 3d 495, 496 (Fla. 5th DCA 2018). The word "reasonably" is important. See Fla. Std. Jury Instr. (Contract & Bus.) 504.9 (requiring a jury to consider which damages could have been avoided through the plaintiff's reasonable efforts). The doctrine of avoidable consequences

does not allow a trial court to reduce damages "based on what 'could have been avoided' through Herculean efforts." Sys. Components, 14 So. 3d at 982. It applies only where a claimant fails to undertake measures to avoid damages that are available to him without undue effort or expense. Id.

Here, there is no competent substantial evidence that the Forbeses could have taken any measure without undue effort or expense to avoid the damages they sought. When Prime walked off the job, the Forbeses were left with an uninhabitable home that no other contractor would finish. At that point, the money they paid for Prime's work and updated plans was sunk; to avoid that loss they would have had to have been able to finish the home, and there was no evidence that they could have done that with another contractor at the price at which Prime was contractually required to do it.

With respect to the lost equity, the Forbeses spent five months living in a rental property as they searched for someone to finish the renovations. After that proved futile, they used their remaining resources to buy a new home rather than continue to make rent payments indefinitely. On the evidence here, had the Forbeses not bought the new house and instead continued paying rent without end, they still would have found themselves unable to continue paying the mortgage on the home that Prime left uninhabitable. This record establishes no course of action available to the Forbeses without undue effort or expense to avoid their damages. Thus, there was no competent substantial evidence to support a damage reduction based on the doctrine of avoidable consequences here. See, e.g., Graybar Elec. Co. v. Stratton of Fla., Inc., 509 So. 2d 1133, 1134 (Fla. 2d DCA 1987) (reversing a final judgment in which the trial

court erroneously applied the doctrine of avoidable consequences despite "insufficient evidence to support the application of that doctrine").

In sum, the trial court's use of the wrong method for calculating damages together with its erroneous application of the doctrine of avoidable consequences denied the Forbeses the full amount of damages to which they were entitled. We reverse the damages award and remand this case to the trial court for entry of an amended final judgment awarding those damages it finds, after hearing any arguments the parties decide to make, are necessary to place the Forbeses in the position they occupied immediately before they contracted with Prime. In all other respects, the final judgment is affirmed.

Affirmed in part; reversed in part; remanded with instructions.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed September 5, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1205
Lower Tribunal No. 17-11259

Inter American Coal, S.A., etc.,
Appellant,

vs.

SHE DDF2-FL2, LLC, etc.,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Jacqueline Hogan Scola, Judge.

Diaz, Reus & Targ, LLP, and Michael Diaz, Jr., Chad S. Purdie, and Roland Potts, for appellant.

Agentis, PLLC, and Christopher B. Spuches and Alexander G. Strassman, for appellee.

Before SUAREZ, EMAS, and FERNANDEZ, JJ.

SUAREZ, J.

This is an appeal from a final judgment of foreclosure granted in favor of Appellee, SHE DDF2-FL2, LLC ("SHE"). Appellant, Inter American Coal, S.A.

("Inter American"), argues that SHE's predecessor in interest, NWL 2016 EVERGREEN, LP ("NWL"), did not comply with the statutory requirements for service of process by publication, and therefore, the trial court did not have jurisdiction over Inter American. Because we find that Inter American waived its objection to service of process by seeking affirmative relief inconsistent with its objection, we affirm.

In May 2017, NWL filed a complaint for foreclosure. Inter American, a Panamanian company, was included on the complaint because it also held a mortgage on the property. In June 2017, NWL filed a sworn statement for service of process by publication, detailing the steps taken in attempting to serve Inter American. See §§ 49.031 (sworn statement as a condition precedent for service by publication), 49.051 (sworn statement requirements when the defendant is a corporation), Fla. Stat. (2018). Appellant SHE was later substituted for NWL as the Plaintiff.

Following constructive service by publication, SHE obtained a clerk's default against Inter American and then filed a motion for final summary judgment. Before the hearing on SHE's motion, Inter American appeared through counsel and moved to quash service of process and set aside the default. In addition to challenging the sworn statement's compliance with the requirements set forth in section 49.051, Florida Statutes, Inter American argued that it had lien

priority over SHE's lien on the property. Inter American also asserted that it had lien priority in its response in opposition to SHE's motion for final summary judgment and again at the hearing on said motion. The trial court ultimately found that SHE was the primary lienholder,[1] denied Inter American's motion to quash, and granted SHE's motion for final summary judgment.

"It is well-settled that '[a] judgment entered without valid service is void for lack of personal jurisdiction . . . .'" Alvarado v. Cisneros, 919 So. 2d 585, 587 (Fla. 3d DCA 2006) (quoting Great Am. Ins. Co. v. Bevis, 652 So. 2d 382, 383 (Fla. 2d DCA 1995)). "Nevertheless, a defendant may waive a timely objection to personal jurisdiction by seeking affirmative relief . . . inconsistent with an initial defense of a lack of personal jurisdiction." Id.; see also TBI Caribbean Co. Ltd. v. Stafford-Smith, Inc., 239 So. 3d 103 (Fla. 3d DCA 2017).

Here, Inter American repeatedly sought affirmative relief on the merits of the foreclosure case by arguing that it had lien priority over SHE. For instance, at the hearing on the motion for final summary judgment, Inter American argued as follows:

> [INTER AMERICAN]: Yes. Just to clarify one more point also. We filed our motion to quash and set aside the default on Monday and what we filed yesterday was our response in opposition to the motion for summary judgment. We believe that we have a meritorious defense

[1] Inter American has not challenged the trial court's determination as to lien priority.

> in this case which is that the priority of the liens here is in question given that there was a lien that occurred in 2016 through a mortgage by the plaintiff, then there was –
>
> THE COURT: Uh-huh.
>
> [INTER AMERICAN]: Which would make up the junior lienholder to the first original mortgage. But during this proceeding, during this case the plaintiff's counsel entered into a forbearance agreement and pursuant to that forbearance agreement issued another lien for an additional $500,000. And it's our position that given the inequitable result that that would have and the prejudice that would result therefrom for our client, that's the priority of the entire -- the partial or -- a part of or the entirety of that lien is in question.

Although described as a "meritorious defense," Inter American's attempt to prioritize its lien was a request for affirmative relief in that it was "relief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." Sampson Farm Ltd. P'ship v. Parmenter, 238 So. 3d 387, 392 (Fla. 3d DCA 2018) (quoting Heineken v. Heineken, 683 So. 2d 194, 197 (Fla. 1st DCA 1996)). Moreover, seeking such relief was inconsistent with Inter American's jurisdictional objection because it was a request to adjudicate the merits of the foreclosure action. See TBI Caribbean, 239 So. 3d at 106 (Fla. 3d DCA 2017). We therefore hold that in seeking to prioritize its lien, Inter American waived its objection to service of process.[2]

[2] Because we find that Inter American waived its objection, we do not address the

Affirmed.

---

sufficiency of service of process.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WELLS FARGO BANK, N.A.,
Appellant,

v.

JOSEPH B. ELKIND, a/k/a **JOSEPH ELKIND, TIMOTHY M. DONOVAN, BADABRA, LLC,** and **UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY,**
Appellee.

No. 4D17-1213

[September 5, 2018]

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Judge; L.T. Case No. CACE 15-018182.

Michael K. Winston and Dean A. Morande of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellant.

Bruce K. Herman of The Herman Law Group, P.A. Fort Lauderdale, for appellee, Joseph B. Elkind a/k/a Joseph Elkind.

ON MOTION FOR REHEARING

PER CURIAM.

We grant appellant's motion for rehearing, withdraw our opinion dated July 18, 2018, and substitute the following.

The bank filed a verified complaint to foreclose a mortgage against the borrower, who raised several affirmative defenses, including lack of standing. Thereafter, the bank voluntarily dismissed the complaint without prejudice, but gave no reason for the dismissal.

The borrower moved for prevailing party attorney's fees and costs pursuant to the loan documents and section 57.105, Florida Statutes. The bank argued in opposition that the borrower was precluded from recovering attorney's fees based on the note or mortgage after taking the position that the bank lacked standing. Following a hearing, the trial court

entered a final order awarding the borrower $35,880 in attorney's fees and costs.

On appeal, the bank contends that the trial court erred by awarding prevailing party attorney's fees and costs to the borrower because the borrower failed to demonstrate that both he and the bank were entitled to enforce the note and mortgage, emphasizing that the borrower argued to the contrary below by raising the affirmative defense that the bank lacked standing.

The bank relies on *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896, 899 (Fla. 4th DCA 2017), which held that "[a] party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract."

However, there is a difference between prevailing on the merits on a standing issue and an undifferentiated voluntary dismissal of a lawsuit prior to any merits determination. The bank's voluntary dismissal took this case out of *Glass*. Standing was never litigated below and the trial court never made a finding that the bank or the borrower were not parties to the contract. Because the borrower did not prevail on his argument that dismissal was required because the bank lacked standing to sue on the contract, he is not precluded from recovering fees based on a provision in the same contract. *Glass*, 219 So. 3d at 899. Accordingly, we affirm the order awarding fees. We leave for another day the issue of whether the borrower's victory on the attorney's fee issue here would collaterally estop him from raising standing in a future foreclosure on the same mortgage and note.

GROSS, CONNER and KLINGENSMITH, JJ., concur.

* * *