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Manuel Farach

Provident Funding Associates v. MDTR, Case No. 2D17-337 (Fla. 2d DCA 2018).

The Second District adopts the reasoning of *Forero v. Green Tree Servicing, LLC*, 223 So. 3d 440 (Fla. 1st DCA 2017), and holds the phrase "and all subsequent payments" has a different meaning in a later action and can avoid a res judicata defense because the passage of time has caused the actual missed payments to be different.

5F, LLC v. Boca Grande Isle LLC, Case Nos. 2D17-949, 2D17-1155 (Fla. 2d DCA 2018).

Unless there is an express delegation of authority to a property owners association to amend restrictive covenants, restrictive covenants can only be amended by the consent of all the property owners in a subdivision.

Robles v. Federal National Mortgage Association, Case No. 3D17-2798 (Fla. 3d DCA 2018).

A court can enter a default without a hearing.

Florida Power & Light Company v. McRoberts, Case No. 4D17-2399 (Fla. 4th DCA 2018).

An agent's apparent authority to bind a principal to a real estate contract must be reasonable notwithstanding a jury's finding apparent agency existed.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PROVIDENT FUNDING ASSOCIATES, L.P., Appellant, v. MDTR, as trustee under the 6925 Alta Vista Land Trust and BETTY JEAN GROVES, Appellees.	)	Case No. 2D17-337

Opinion filed October 12, 2018.

Appeal from the Circuit Court for Pasco County; Declan Mansfield, Judge.

Cynthia L. Comras, David Rosenberg, and Jarrett Cooper of Robertson, Anschutz & Schneid, P.L., Boca Raton, for Appellant.

Mark P. Stopa of Stopa Law Firm, Tampa (withdrew after briefing); Isaac Manzo of Manzo & Associates, P.A., Orlando (substituted as counsel of record), for Appellee MDTR, as trustee under the 6925 Alta Vista Land Trust.

No appearance for remaining Appellee.

SALARIO, Judge.

This is a residential foreclosure case brought by Provident Funding Associates, L.P., a mortgage servicer, against Betty Groves and MDTR, as trustee under the 6925 Alta Vista Land Trust. Provident appeals from a final order granting MDTR's motion for involuntary dismissal. The trial court incorrectly held that this case is barred by res judicata. We reverse and remand for further proceedings.

I.

In September 2007, Ms. Groves borrowed $110,000 from Provident Funding Group, Inc., which we refer to here as the lender. The debt was evidenced by a note between Provident and Ms. Groves and secured by a mortgage on residential real property in New Port Richey, Florida. At some point, Ms. Groves stopped making regular payments of principal and interest on the loan, which led to two separate civil actions filed by Provident to foreclose on Ms. Groves' mortgage.

The first case was filed on September 22, 2010 and named Provident as plaintiff and Ms. Groves and any unknown parties with an interest in the property secured by the mortgage as defendants. The complaint alleged that Ms. Groves defaulted under the note by failing to make the "October 1, 2008 payment and all payments due thereafter" and sought to foreclose the mortgage. Provident failed to respond to requests for admission Ms. Groves served on it and, by virtue of that failure, was deemed to have admitted that it was not the owner or holder of the note and that it lacked standing to sue for foreclosure. Based on those technical admissions, the trial court entered a final summary judgment in Ms. Groves' favor on May 9, 2012. Provident did not appeal, and a motion for relief from judgment was denied.

On April 1, 2015, Provident filed a second foreclosure case, which is the case that gives rise to this appeal. The complaint names Ms. Groves and MDTR as defendants and alleges that at some point MDTR became the owner of the property secured by the mortgage. It asserts that the note is in default because "the payment due May 1, 2010, and all subsequent payments" have not been made.

MDTR filed an answer and, later and with leave of court, an amended answer to Provident's complaint. The amended answer asserted that MDTR was without knowledge of and was therefore denying all of the allegations of Provident's complaint, including its allegation that MDTR was the owner of the property that was the subject of Provident's mortgage. MDTR also asserted several affirmative defenses, including a defense that Provident's foreclosure action was barred by res judicata.

The trial court held a nonjury trial on January 9, 2017. At the beginning of trial, Provident moved to drop Ms. Groves as a party. The court granted the motion, and the trial proceeded with MDTR as the sole defendant. MDTR requested that the trial court take judicial notice of the complaint and final judgment from the first foreclosure case Provident filed, and without objection, the trial court did so.

The sole witness at the trial was Joseph Tami, a foreclosure operation manager for Provident. Based on Mr. Tami's testimony, the trial court admitted into evidence the original note, which contained an undated, blank endorsement from the lender; the mortgage; a default notice dated December 19, 2014, and addressed to Ms. Groves; and a loan disbursement and payment log. Mr. Tami's testimony also established that the loan was in default as of May 1, 2010. There was no testimony or documentary evidence admitted concerning what interest MDTR had in the property, if any, or the circumstances under which it had acquired that interest.

At the end of Provident's case-in-chief, MDTR moved for an involuntary dismissal. It argued, among other things, that the action was barred by res judicata by virtue of the final judgment in the first foreclosure case and the fact that the complaint in the second case alleged an initial default date (May 1, 2010) before the first case was even filed. The trial court reserved ruling and asked MDTR whether it intended to put on any evidence. MDTR advised that it did not, and the parties continued arguing about involuntary dismissal. The trial court agreed with MDTR and dismissed Provident's claim as barred by res judicata. It expressly declined to address MDTR's other arguments for involuntary dismissal. This is Provident's timely appeal.

II.

We review an order granting a motion for involuntary dismissal de novo. Deutsche Bank Nat'l Tr. Co. v. Kummer, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016). We hold that the doctrine of res judicata does not apply here, and that the trial court thus improvidently dismissed the action, because MDTR failed to prove the required element of identity of parties and because the supreme court's decision in Singleton v. Greymar Associates, Inc., 882 So. 2d 1004 (Fla. 2004), precludes application of res judicata on the facts that this case presents.[1]

[1]The timing and substance of the order of involuntary dismissal are unusual. An involuntary dismissal tests whether the plaintiff has made a prima facie case and is typically presented and resolved at the conclusion of the plaintiff's evidence. See Fla. R. Civ. P. 1.420(b) (describing timing and resolution of motion for involuntary dismissal); May v. PHH Mortg. Corp., 150 So. 3d 247, 248 (Fla. 2d DCA 2014) ("When confronted with a motion for involuntary dismissal, the trial court must determine whether or not the plaintiff has made a prima facie case."). Here, the trial court entered an order of involuntary dismissal after Provident and MDTR were both finished with the evidentiary portion of the trial (MDTR having declined to put on evidence), when it could have simply rendered a final judgment on the basis of an affirmative defense rather than a deficiency in Provident's prima facie case. See Kummer, 195 So. 3d at 1175 n.2 ("We would further note that the timing of the court's involuntary dismissal of Deutsche Bank's

The doctrine of res judicata provides that a judgment on the merits in an earlier suit bars a later suit on the same cause of action between the same parties or others in privity with those parties. Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) (quoting Kimbrell v. Pate, 448 So. 2d 1009, 1012 (Fla. 1984)). It applies when the later suit shares four "identities" with the earlier one: (1) the "identity of the thing sued for," (2) the "identity of the cause of action," (3) the "identity of persons and parties to the action," and (4) the "identity of the quality of the persons for or against whom the claim is made." Bryan v. Fernald, 211 So. 3d 333, 335 (Fla. 2d DCA 2017) (quoting Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004)). Further, courts may decline to apply the doctrine in limited circumstances when it would "defeat the ends of justice." State v. McBride, 848 So. 2d 287, 291 (Fla. 2003). Res judicata is an affirmative defense, and the burden of proof is borne by the party asserting it. Fla. R. Civ. P. 1.110(d); Nunez v. Alford, 117 So. 2d 208, 209–10 (Fla. 2d DCA 1960).

Here, MDTR failed to carry its burden of proof on the element of identity of parties. Identity of parties for res judicata purposes exists when the parties in the later action were also parties in the first action or, if not, were in privity with those parties. See Bryan, 211 So. 3d at 336; Linn-Well Dev. Corp. v. Preston & Farley, Inc., 710 So. 2d 578, 580 (Fla. 2d DCA 1998). Indisputably, MDTR was not a party to Provident's initial foreclosure action—only Ms. Groves was. So the question is whether MDTR is in

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complaint—after both parties had rested their respective cases, when the court could just as easily rendered a final judgment on the merits—was unusual and perhaps not in keeping with the 'best practice' in nonjury trials of ruling on such a motion at the conclusion of the plaintiff's case."). We need not sort through these aspects of the trial court's order to resolve this case. As demonstrated in the text, MDTR bore the burden of proof on res judicata, and it both failed to carry that burden and ran into a legal obstacle posed by the supreme court's Singleton decision.

privity with Ms. Groves. To be in privity with a party to an earlier lawsuit, "one must have an interest in the action such that she will be bound by the final judgment as if she were a party." Pearce v. Sandler, 219 So. 3d 961, 965 (Fla. 3d DCA 2017); see also Stogniew v. McQueen, 656 So. 2d 917, 920 (Fla. 1995) (applying the same test in the context of the related doctrine of collateral estoppel).

Although the generality of that statement may make it challenging to apply in some cases, that is not a problem that we have here. In this case, there was no evidence presented at the trial that in any way bore upon what interest MDTR may have had in the prior foreclosure action. We are led to believe by some statements the parties' lawyers made during the trial that MDTR may have acquired in a bankruptcy some ownership interest in the property that is the subject of Provident's mortgage, but those statements were disputed and are not evidence of anything. See Heller v. Bank of Am., NA, 209 So. 3d 641, 644 (Fla. 2d DCA 2017) ("Without a stipulation by the parties, the trial court cannot rely on an unsworn statement of counsel to make a factual determination."). The evidentiary record is wholly silent as to what interest, if any, MDTR had in the subject matter of the prior litigation, how it acquired that interest, or anything else that would permit a court to make a determination one way or the other about whether MDTR had an interest in the first foreclosure action such that it would have been bound by a judgment in that action. There was thus no evidentiary basis bearing on the element of identity of parties upon which the trial court could have invoked res judicata to dismiss Provident's second foreclosure action. See, e.g., Massey v. David, 831 So. 2d 226, 234 (Fla. 1st DCA 2002) ("Because the record does not conclusively establish that Mr. David would have been bound by an adverse result .

. . earlier in the present proceeding . . . , the trial court erred in granting summary judgment on the basis of res judicata and collateral estoppel.")

Furthermore, the supreme court's decision in Singleton poses a separate, free-standing stumbling block to MDTR's invocation of res judicata in this case. That decision establishes that res judicata does not bar a subsequent foreclosure action on the same mortgage based on a distinct period of default. 882 So. 2d at 1006–07. The complaint here falls within this rule because it is based on a period of default (May 1, 2010 and all payments thereafter) that is different and distinct from the period of default alleged in the first action (October 1, 2008 and all payments thereafter).

In Singleton, a mortgagee filed a first foreclosure action based on payment defaults between September 1, 1999 and February 1, 2000. Id. at 1005. That case was dismissed with prejudice, and the mortgagee later brought a second foreclosure action for a default beginning April 1, 2000. Id. The trial court rejected the mortgagor's defense that the second foreclosure action was barred by res judicata and granted summary judgment to the mortgagee. Id. The Fourth District affirmed. Id.

At the supreme court, the mortgagor's argument was that when a mortgagee accelerates the entire balance due on the mortgage after a payment default and sues for foreclosure, the entire loan balance is at issue, and an adverse judgment is res judicata as to any subsequent claim to recover on the note and mortgage.[2] See id. at 1006 (discussing Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468, 472–73 (Fla. 2d DCA 1963)). The supreme court disagreed and held that "[w]hile it is true that a

[2]Both of the foreclosure actions that Provident filed with respect to Ms. Groves' note and mortgage were based on the acceleration of the entire amount due under the note.

foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated on subsequent and different defaults present a separate and distinct issue" such that the second action "is not necessarily barred by res judicata." Singleton, 882 So. 2d at 1007. The court explained:

> For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. In those instances, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.

Id. (emphasis added). It recognized that this approach to applying res judicata to an accelerated mortgage loan represents a "seeming variance from the traditional law of res judicata" and justified that variance based on equitable considerations and the "unique nature of the mortgage obligation." Id. The court concluded that "justice would not be served" if res judicata could "essentially insulate" a mortgagee from a follow-on foreclosure suit based on subsequent payment defaults. Id. at 1007–08.

Under Singleton, Provident's second foreclosure action is not barred by res judicata. The final judgment in the first foreclosure action did not make any determination that would invalidate the note and mortgage or preclude Provident from ever suing upon the note and mortgage; at most, it determined (based on a failure to answer requests for admission) that Provident lacked standing at the time the first foreclosure action was filed and at the time Provident failed to respond to Ms. Groves' requests for admission. Thus, after the first action was resolved in Ms. Groves' favor,

she and the lender were returned to their presuit contractual relationship under which she was obligated to make regular payments of principal and interest on the note. See id. at 1007. And as in Singleton, the second foreclosure complaint here is based on a separate and distinct period of default on that payment obligation from the period of default alleged in the first action.

The trial court appears to have concluded otherwise because the period of default alleged in the second complaint (the May 1, 2010 payment and all subsequent payments) predates and overlaps with the time the first foreclosure action was pending (it was dismissed on May 9, 2012). We disagree. The complaint in this case was filed on April 1, 2015, and by its terms—namely, that Ms. Groves had defaulted on all payments subsequent to the May 1, 2010 payment—included payments Ms. Groves missed for nearly three years after the first foreclosure action was resolved. On its face, then, it alleged defaults outside the period the initial foreclosure was pending.

In that regard, the First District's decision in Forero v. Green Tree Servicing, LLC, 223 So. 3d 440 (Fla. 1st DCA 2017), is on point. There, the plaintiff brought two foreclosure actions alleging "December 1, 2008 and all subsequent payments" as the period of default. Id. at 441–42. After it voluntarily dismissed both actions—the second voluntary dismissal operating as an adjudication on the merits under Florida Rule of Civil Procedure 1.420(a)(1)—it filed a third one also alleging defaults from "December 1, 2008 and all subsequent payments." Id. at 442. Applying Singleton, the First District held that res judicata did not bar the third action even though all three complaints alleged "December 1, 2008 and all subsequent payments" as the default period. Id. at 443–44. Its reasoning is persuasive and equally applicable here:

> The additional payments missed by the time the third action was filed, which were not bases for the previous actions because they had not yet occurred, constitute separate defaults upon which the third foreclosure action may be based. Additionally, acceleration of the note occurred at a different time. Accordingly, even though the same phrase was used to describe the default in each action—"December 1, 2008 and all subsequent payments"—the meaning of the phrase expanded as time progressed and additional payments were missed.

Id. at 444 (emphasis added). We agree and hold that Provident's second complaint here alleged defaults that were separate and distinct from those alleged in the complaint in the first action.[3] See also U.S. Bank Nat'l Ass'n v. Amaya, 43 Fla. L. Weekly D1637, D1638 (Fla. 3d DCA 2018) (reversing a final judgment in the mortgagor's favor and holding that res judicata did not apply where first and second complaints alleged default dates of May 1, 2008 and "all subsequent payments" in part because the allegation "that 'all subsequent payments have not been paid' after the May 1, 2008 default, thereby including the 'subsequent and different defaults' after the filing of, and subsequent dismissal, of the previous action contemplated by Singleton" (quoting U.S. Bank's verified amended complaint)).

The trial court believed that the supreme court's decision in Bartram v. U.S. Bank National Ass'n, 211 So. 3d 1009 (Fla. 2016), required a different result. It misread that case. In Bartram, the supreme court relied on Singleton in holding that the statute of limitations on foreclosure claims does not bar a mortgagee from filing a

[3]We express no opinion on whether or to what extent the preclusive effect of the judgment in the first action may limit or prohibit Provident from having payment defaults that were embraced by the allegations of the first complaint or that occurred while the first action was pending in the amount of indebtedness to be established in this action. Depending on how the proceedings on remand unfold, this may be an issue the trial court will have to resolve based on the pleadings, evidence, and legal arguments offered by the parties.

successive foreclosure action based on a default that occurred subsequent to the dismissal of the initial action so long as the subsequent action is timely as to the subsequent default. 211 So. 3d at 1012. It is precisely because Singleton holds that a subsequent default creates a distinct cause of action that the Bartram court concluded that the five-year statute of limitations runs from the date of each new default. Id. at 1019. And applying Bartram, our court has held that even where a successive foreclosure complaint alleges a default outside the limitations period, so long as it contains language like "all subsequent payments," it alleges payment defaults within the limitations period such that dismissal of the action on the basis of the statute of limitations is improper. See, e.g., Desylvester v. Bank of N.Y. Mellon, 219 So. 3d 1016, 1020 (Fla. 2d DCA 2017) ("Nevertheless, the allegations of the complaint in the underlying action that the borrowers were in a continuing state of default at the time of the filing of the complaint was sufficient to satisfy the five-year statute of limitations."); Bollettieri Resort Villas Condo. Ass'n v. Bank of N.Y. Mellon, 198 So. 3d 1140, 1142 (Fla. 2d DCA 2016) ("Although the initial default occurred more than five years prior to the bank's foreclosure complaint, the bank affirmatively alleged that Graham has failed to make any subsequent payments due on the note."). Simply put, nothing in Bartram supports the proposition that the judgment in the action on the first payment default bars the prosecution of a subsequent action based on a later payment default alleged to include a date certain and all subsequent payments.[4]

[4]The same is true of the trial court's reliance on GMAC Mortgage, LLC v. Whiddon, 164 So. 3d 97 (Fla. 1st DCA 2015). That case involved the dismissal of a subsequent action that was based on the same period of default. Id. at 98–101. The court there affirmed the dismissal of the subsequent action because the plaintiff had failed to allege a separate default sufficient to give rise to a new cause of action. Id. As demonstrated in the text, that is not the case here.

III.

In sum, because MDTR failed to carry its burden of proving identity of parties and because this foreclosure action was based on a period of default separate and distinct from that which formed the basis of the previous foreclosure action, the trial court erred in dismissing this claim as barred by res judicata.[5] We reverse the order of involuntary dismissal and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.

[5]We decline to reach MDTR's tipsy coachman arguments and leave them for the trial court to consider in the first instance on remand. See HSBC Bank USA, Nat'l Ass'n v. Nelson, 246 So. 3d 486, 489 (Fla. 2d DCA 2018). To the extent MDTR seeks to defend on the basis of collateral estoppel, we note that the law requires mutuality of parties there as well. See Stogniew, 656 So. 2d at 919.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

5F, LLC; and MOUNT MASSIVE, LLC,

Appellants,

v.

BOCA GRANDE ISLE LLC; THREE SISTERS ISLE LLC; REDFISH ALLEY, LLC; OSPREY ALLEY LLC; GORDON BURNS; MARIE BURNS; ELIZABETH GHRISKEY; JOHN SAMUELS and DIANE SAMUELS, as trustees of the JS RESIDENTIAL TRUST AGREEMENT DATED DECEMBER 13, 2012, and the DS RESIDENTIAL TRUST AGREEMENT DATED DECEMBER 13, 2012; ANN S. AIKENS, MARTIN L. KATZ, and JOSEPH AVIV, as trustees of the ROBERT AIKENS REVOCABLE TRUST; and ALAN PIKE, as trustee of the CHAD RUSTAN PIKE 2012 REVOCABLE TRUST,

Appellees.

Case Nos. 2D17-949
2D17-1155
CONSOLIDATED

BOCA GRANDE ISLES PROPERTY OWNERS ASSOCIATION, INC.,

Appellant,

v.

BOCA GRANDE ISLE LLC; THREE

SISTERS ISLE LLC; REDFISH ALLEY LLC; OSPREY ALLEY LLC; ALAN PIKE, as trustee of the CHAD RUSTAN PIKE 2012 REVOCABLE TRUST; REYNOLDS GUYER; BOB HALL; JOHN JACKOBOICE; LYNN KIEFFER; STEVE KIEFFER; JAY PROOPS; LINDA WIGGIN; THREE SISTERS HOMEOWNERS ASSOCIATION, INC.; RON STRICH; CHRIS JOHNSON; and JEFF DEATERLY,

Appellees.

Opinion filed October 12, 2018.

Appeal from the Circuit Court for Lee County; John E. Duryea, Jr., Judge.

Jason A. Lessinger and Bradley J. Ellis of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellants 5F, LLC and Mount Massive, LLC.

J. Matthew Belcastro of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for Appellant Boca Grande Isles Property Owners Association, Inc.

John A. DeVault, III, Michael E. Lockamy, and John G. Woodlee of Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Jacksonville; and Richard W. Hawthorne of Richard W. Hawthorne, Jacksonville, for Appellee Boca Grande Isle LLC.

David B. Weinstein and Ryan T. Hopper of Greenberg Traurig, P.A., Tampa, for Appellees John Samuels, Diane Samuels, Gordon Burns, and Marie Burns.

Christopher L. Ulrich of Cummings & Lockwood, LLC; and Marve Alaimo of Porter, Wright, Morris, & Arthur, Naples, for Appellee Elizabeth Ghriskey.

No appearance for remaining Appellees.

ROTHSTEIN-YOUAKIM, Judge.

We affirm the trial court's entry of final summary judgment in favor of the plaintiffs[1] on count one of the complaint and the plaintiffs/counterclaim defendants[2] on count one of the amended counterclaim in Case No. 15-CA-001157. The restrictions on the use of Lot 99 of Boca Grande Isles (BGI), as set forth in the 1974 Declaration of Restrictions that binds all of the lot owners of BGI (the Declaration), run with the land and may be amended only upon the unanimous consent of all of the lot owners of BGI. See Van Loan v. Heather Hills Prop. Owners Ass'n, 216 So. 3d 18, 23 (Fla. 2d DCA 2016) ("Because there was no express delegation of authority to the [property owners association] to amend the restrictive covenants, the restrictive covenants can only be amended by the consent of all the property owners in the subdivision." (citing Roth v.

[1]Boca Grande Isle LLC, Three Sisters Isle LLC, Redfish Alley LLC, and Osprey Alley LLC. (During the pendency of this appeal, the property owned by Boca Grande Isle LLC was transferred to Alan Pike as trustee of the Chad Rustan Pike 2012 Revocable Trust. The appellants' motion to join the trustee as an appellee to these proceedings was granted.)

[2]The counterclaim defendants included the four plaintiffs plus additional counterclaim defendants Gordon and Marie Burns, Elizabeth Ghriskey, John and Diane Samuels as trustees of the JS and DS Residential Trusts, and Robert Aikens. (Mr. Aikens passed away during the course of the litigation and his property was transferred to Martin L. Katz and Joseph Aviv as trustees of the Robert Aikens Revocable Trust.)

Springlake II Homeowners Ass'n, 533 So. 2d 819, 820 (Fla. 4th DCA 1988))). The plaintiffs' and counterclaim defendants' later purchases of their lots did not effect a novation of the Declaration to the extent that it sets forth restrictions that run with the land and constitute a contract among all of the lot owners. Cf. Jakobi v. Kings Creek Vill. Townhouse Ass'n, 665 So. 2d 325, 327 (Fla. 3d DCA 1995) (holding, in the context of personal contractual obligations between a townhouse owner and the master and townhouse associations, that the transfer of a townhouse deed, "rather than effecting a mere assignment, constituted a novation of the bylaws and declaration of covenants and restrictions as between the Master Association, the Townhouse Association, and the owner" (emphasis added)).

Because we hold that affirmance is warranted on this basis, we do not comment on the trial court's alternative conclusion, as set forth at paragraphs 30 through 36 of the magistrate judge's thorough and well-reasoned report and recommendation of September 1, 2016.

Affirmed.

NORTHCUTT and SALARIO, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed October 10, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2798
Lower Tribunal No. 17-991

Ralph Robles and Norma Robles,
Appellants,

vs.

Federal National Mortgage Association, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

Pomeranz & Associates, P.A., and Mark L. Pomeranz (Hallandale), for appellants.

Popkin & Rosaler, P.A., and Daniel S. Stein and Mary Pascal Stella (Deerfield Beach), for appellee.

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

ROTHENBERG, C.J.

Ralph and Norma Robles (collectively, "the appellants") appeal from a summary final judgment of foreclosure entered on November 27, 2017 in favor of the appellee, Federal National Mortgage Association ("Fannie Mae"). The summary judgment of foreclosure followed the order of a judicial default entered on June 22, 2017. For the reasons that follow, we affirm.

BACKGROUND

Ralph Robles ("Robles") executed a note in favor of Bank of America, N.A. on September 16, 2005. The note was secured by real property located in Miami, Florida. Fannie Mae is the owner and holder of the note. Robles stopped making payments on the note on February 1, 2012, and defaulted on the note; Fannie Mae initiated a foreclosure action on January 12, 2017; and the appellants were served with the complaint on January 26, 2017.

On February 15, 2017, counsel representing the appellants filed a notice of appearance, a notice of unavailability, and a motion for a thirty-day extension of time to file an answer, which was unopposed and granted on May 1, 2017, thereby giving counsel until May 31, 2017 to file an answer. When no answer was filed by the appellants, Fannie Mae filed an *ex parte* motion for a default on June 16, 2017. Despite being captioned as "*ex parte*," the motion was served on all parties, including counsel for the appellants. Counsel for the appellants, who does not dispute that he was served with the motion, took no action, filed no answer, and

did not move for an extension of time. On June 22, 2017, the trial court entered a default and the order was sent to all parties, including the appellants' counsel. Again, counsel for the appellants took no action, including failing to petition the trial court to set aside the order of default, even though it is undisputed that he received the order indicating that a default had been entered.

Four months after the entry of the default and the trial court's notice to the appellants and their counsel, Fannie Mae filed a motion for summary judgment of foreclosure. Thereafter, on October 27, 2017, Fannie Mae filed a notice of hearing setting its motion for summary judgment of foreclosure for November 27, 2017, and served all parties, including counsel for the appellants. Again, the appellants took no action, and on November 27, 2017, the trial court entered a final judgment of foreclosure. This appeal followed.

STANDARD OF REVIEW

The parties agree that the question of whether a judgment is void is reviewed *de novo*. Infante v. Vantage Plus Corp., 27 So. 3d 678, 680 (Fla. 3d DCA 2009). Foreclosure judgments based on an order of default are reviewed for an abuse of discretion. Jacaranda, LLC v. Green Tree Servicing, LLC, 203 So. 3d 964, 965 (Fla. 2d DCA 2016).

The appellants contend that because they filed a motion for an extension of time, they were entitled to a hearing prior to the entry of a default. Because there

was no hearing, they contend that the entry of the default and the default final judgment are void. The appellants also contend that the judicial default entered by the trial court amounted to a sanction, and thus the trial court was required to consider the requisite factors announced in Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993). As will be discussed below, because the appellants failed to file a **responsive pleading**, no hearing was required, and because they received notice and an opportunity to be heard, the default was properly entered, and the judgment is not void. We also reject the argument that the default was issued as a sanction, thus requiring consideration of the Kozel factors.

ANALYSIS

The true purpose of the entry of a default is to speed the cause of action and to prevent a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. Coggin v. Barfield, 8 So. 2d 9, 11 (Fla. 1942). It is well-established that under rule 1.500(b), Florida Rules of Civil Procedure, when a party against whom affirmative relief is sought has appeared in the action by filing or serving "any papers," no default may be entered against such party without prior notice of the application for default. Int'l Energy Corp. v. Hackett, 687 So. 2d 942-43 (Fla. 3d DCA 1997); see also Jacaranda 203 So. 3d at 966. This rule has been interpreted to require sufficient notice to afford an opportunity to be heard. McClenon v. Zartemi, 710 So. 2d 737, 739 (Fla. 3d DCA 1998); Green Solutions

Int'l Inc. v. Gilligan, 807 So. 2d 693, 696 (Fla. 5th DCA 2002); Zeigler v. Huston, 626 So. 2d 1046, 1048 (Fla. 4th DCA 1993).

> Failure to provide notice of a default when "any paper" has been filed renders

the default void. M.W. v. SPCP Grp. V, LLC, 163 So. 3d 518, 522 (Fla. 3d DCA 2015). The appellants' motion for an extension of time constitutes "any paper." Thus, the appellants were entitled to receive sufficient notice of Fannie Mae's application for a court default. This notice requirement was satisfied in the instant case when the appellants, through their counsel, were served with the motion seeking a default. This notice was sent on June 16, 2017 and, after hearing nothing from the appellants, the trial court entered the default on June 22, 2017. The appellants do not suggest, and we do not find, that the appellants did not receive sufficient notice and an opportunity to be heard.

Contrary to the appellants' argument, there is no requirement to conduct a hearing prior to the entry of a default where the non-moving party has failed to defend the action. See Picchi v. Barnett Bank of S. Fla., N.A., 521 So. 2d 1090, 1091 (Fla. 1988); Fierro v. Lewis, 388 So. 2d 1361, 1362 (Fla. 5th DCA 1980). Although the filing of a notice of appearance or a motion for an extension of time constitutes "any paper" requiring notice prior to the entry of a default, they are not "responsive pleadings" reflecting the intent to defend the merits of the action and

requiring a hearing prior to the entry of the default. See Geer v. Jacobson, 880 So. 2d 717, 719 (Fla. 2d DCA 2004) (finding that a motion for extension of time does not constitute a responsive pleading for purposes of rule 1.190(a)); see also Ziff v. Stuber, 596 So. 2d 754, 755 (Fla. 4th DCA 1992) (finding that a notice of appearance constitutes a non-responsive paper).

The case of Lisca v. Florida Atlantic Construction, Inc., 219 So. 3d 872 (Fla. 4th DCA 2017), is instructive. In that case, Lisca failed to file an answer, or some other substantive response, to the counter-claim despite being given multiple opportunities to do so. Id. at 878. Instead, Lisca filed a motion to dismiss, and when that motion was denied, he filed multiple motions for extensions of time and for reconsideration. Id. There, like here, Lisca was also provided with notice of the plaintiff's motion for a default, id., and when Lisca failed to file a responsive pleading, the trial court entered a default against him. Id. at 873. On appeal, the Fourth District Court of Appeal noted that under rule 1.500(b), trial courts are permitted to enter defaults against parties who engage in dilatory practices such as the filing of numerous non-responsive motions, and based upon the record, affirmed the entry of the default. Id.

Here, the record reflects that the appellants took no action after receiving their thirty-day extension of time; receiving notice that Fannie Mae was seeking a judicial default based on their failure to respond to the complaint; and receiving

notice that based on the default, Fannie Mae was seeking to set, and had set, for hearing, its motion for summary judgment. In fact, the *only* documents filed by the appellants from the time the action was filed, until the entry of the final judgment, were the motions referenced above: counsel's notice of appearance, counsel's notice of unavailability, and the motion seeking an extension of time to file an answer to the foreclosure complaint. These documents contain no *indicia* that Robles intended to defend against the foreclosure action. We, therefore, conclude that the trial court committed no error by entering the order of default without first conducting a hearing.

We are likewise unpersuaded by the appellants' argument that the order of default entered in this case was entered as a sanction. The record in the instant case is devoid of any suggestion that the order of default in the instant case was entered as a sanction. Instead, the record unambiguously reflects that the default was entered due to appellants' failure to file a responsive pleading, establish excusable neglect, or otherwise defend against the foreclosure action. Accordingly, we conclude that the appellants received more than sufficient notice and failed to take action, and thus the record supports the entry of the order of default.

CONCLUSION

Based on this record, we find that: (1) the appellants received sufficient notice that Fannie Mae was seeking a default against them for failing to file an answer or other responsive pleading to its foreclosure action; (2) despite this notice, the appellants filed no responsive pleading; (3) because the appellants filed no responsive pleading they were not entitled to a hearing prior to the entry of the default; (4) the order of default did not constitute a sanction; and (5) the default was warranted. Accordingly, we find no error and affirm.

Having found no error, we likewise find that the appellants are not entitled to an award of attorney's fees.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FLORIDA POWER & LIGHT COMPANY,
Appellant,

v.

SAMUEL J. MCROBERTS,
Appellee.

No. 4D17-2399

[October 10, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Martin H. Colin and David E. French, Judges; L.T. Case No. 50-2014-CA-012762-XXXX-MB.

Charles L. Schlumberger, Senior Litigation Counsel, and Robert Sendler, Juno Beach, for appellant.

Alan B. Rose, L. Louis Mrachek, Gregory S. Weiss, and Michael W. Kranz of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A., West Palm Beach, for appellee.

KUNTZ, J.

An agent must have authority to bind its principal. The issue presented in this appeal is whether the alleged agent had authority to bind FPL, the principal, while tailgating outside a football game. We conclude the appellee failed to establish the individual at the tailgate party had actual or apparent authority to enter into a brokerage contract on FPL's behalf. Thus, we reverse and remand for entry of a directed verdict in favor of FPL.

Background[1]

Samuel McRoberts attended a tailgate party before the Florida State Seminoles played the Virginia Tech Hokies in Tallahassee. Jorge "Buck"

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[1] We present the facts in the light most favorable to McRoberts. *See State, Dep't of Children & Family Servs. v. Amora*, 944 So. 2d 431, 435 (Fla. 4th DCA 2006).

Martinez also attended. McRoberts knew from either reading the paper or online that Martinez was FPL's "senior project director of development."

McRoberts "couldn't wait to talk to him" because FPL was "the biggest company in the state of Florida and the biggest land owner." Before the game started, he talked to Martinez for "right around 30 minutes." During the conversation, he asked Martinez about FPL's process for purchasing land and "kind of hammer[ed] him a little bit" about whether FPL was looking to make any acquisitions. Martinez "was really ramped up on talking about clean energy" and the "incredible tax incentives . . . for clean energy development." Martinez told him that FPL was looking to acquire property for clean energy projects but that for FPL to take advantage of federal tax incentives, it would have to be a joint venture. This excited McRoberts, who "wanted to sell him some land."[2]

As Martinez walked into the stadium, McRoberts approached him and they spoke for "two or three minutes." McRoberts "went up and [ ] said [to Martinez], you realize I make my living off real estate commissions, right?" Martinez responded in the affirmative. McRoberts asked Martinez if he would pay him "a reasonable real estate commission, a fair real estate fee for introducing you to the ultimate property that you would be able to put your power plant on and integrate your 300 megawatts of commercial solar?" Martinez responded, "okay," and they "shook on it. I mean, we shook hands. It was a solid handshake."

During this conversation, McRoberts divulged the property's location. But, according to McRoberts, Martinez explained that FPL could not immediately enter into a transaction unless it was a joint venture. In response, McRoberts asked if Martinez would "protect" him "for a reasonable finder's fee if I can pinpoint for you who the main joint venture investor would be?" Martinez responded with "an emphatic yes." A specific commission was not discussed—only that Martinez would protect McRoberts. Still, McRoberts gave Martinez the investor's name.[3]

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[2] Martinez denies that FPL has ever entered into a joint venture on renewable energy projects.

[3] According to Martinez, FPL learned about the property through the friend and professional acquaintance of a colleague at FPL. The FPL colleague and the friend met while the friend was serving as the executive director of a large governmental entity in South Florida. The two also served on boards together. Martinez, his FPL colleague, and the friend all testified that the friend approached the FPL colleague to introduce an investor related to the property FPL ultimately acquired.

When the discussion concluded, Martinez instructed: "Don't call me on my office number and don't call me on my cell number. I want to give you a cell number. You can reach me on that cell number, but don't call me next week, because I'm not going to be available next week, but call me the following week." McRoberts thought it was "the weirdest thing ever" that Martinez "didn't want me to call him on his cell phone" or at the office; it "seemed strange." But "strange" or not, McRoberts complied.

Although McRoberts asked for a business card, Martinez did not give him one. Instead, Martinez wrote a phone number on the back of one of McRoberts's business cards. When McRoberts called the number, a man named Christopher answered. Christopher testified at trial that he has never had any contracts with FPL. He and Martinez both testified that the only time they met each other before trial was at Christopher's deposition.

Martinez had "no clue who [Christopher] was" and had never communicated with him. But McRoberts testified that he called the number listed on the business card on more than one occasion and after each call, Martinez returned his call from a different phone number. McRoberts assumed Martinez was not calling directly because Martinez "wanted to keep the deal quiet with him."

Yet McRoberts called FPL's general residential customer service phone number more than twenty-one times over an extended period, purportedly trying to reach Martinez. He first called the general customer service number on Christmas Day and left a message for Martinez "because [he] wanted to remember that [he] tried to" reach him.

He also called Martinez's cell phone. McRoberts testified that he spoke to Martinez when he called his cell phone, but felt as though Martinez was "pushing [him] off." After a few calls, they stopped communicating, and McRoberts made no efforts to memorialize or follow through with the agreement.

FPL eventually purchased the property that McRoberts purportedly told Martinez about at the tailgate party—3,127 acres for $40 million in June 2011 and another 4,667 acres for $35 million in May 2013. FPL did not pay McRoberts a commission, so he sued FPL for breach of contract and unjust enrichment. The circuit court denied FPL's motion for summary judgment on the breach of contract claim, but granted FPL summary judgment on the unjust enrichment claim.

As a result, the only claim remaining for trial was the breach of contract claim. McRoberts alleged FPL breached the contract formed at the tailgate

party. FPL argued that McRoberts had nothing to do with the deal and did not provide the lead or contact that led to FPL's purchase of the property. McRoberts prevailed at trial, and the jury awarded him $1.5 million in damages.

Analysis

FPL argues the court erred when it denied FPL's summary judgment motion and later its motion for directed verdict on Martinez's authority to enter into a contract on FPL's behalf. We agree.

It is a plaintiff's burden to establish the authority of an agent to act on the principal's behalf. *Lee v. Melvin*, 40 So. 2d 837, 838 (Fla. 1949) ("When plaintiff in a civil action seeks to recover upon a contract alleged by him to have been made with the defendant through the latter's agent, the burden of proof is upon plaintiff to show the authority of the agent for making the contract." (internal citation omitted)).

An agent's authority can be actual or apparent. Actual authority "exists when a principal delegates authority to an agent by expressly authorizing the agent to do a delegable act." Richard A. Lord, 12 Williston on Contracts § 35:10 (4th ed.); *see also* Restatement (Third) of Agency § 2.01 (Am. Law Inst. 2006). To establish actual authority, a plaintiff must prove: "(1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." *Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990) (citing Restatement (Second) of Agency § 1 (Am. Law. Inst. 1957)).

Apparent authority is defined as the authority that "the principal knowingly permits the agent to assume or which he holds the agent out as possessing." *H. S. A., Inc. v. Harris-In-Hollywood, Inc.*, 285 So. 2d 690, 692–93 (Fla. 4th DCA 1973) (quoting *Fidelity & Cas. Co. v. D.N. Morrison Constr. Co.*, 156 So. 385, 387 (Fla. 1934)). To establish apparent authority, a plaintiff must prove: "(1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party relying on the representation." *Lensa Corp. v. Poinciana Gardens Ass'n, Inc.*, 765 So. 2d 296, 298 (Fla. 4th DCA 2000) (citing *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So. 2d 416, 418 (Fla. 5th DCA 1982)).

Simply put, McRoberts failed to establish the first element of both actual and apparent authority.[4] That is, it was not reasonable to assume Martinez had the authority to bind FPL, and the circumstances surrounding the purported agreement lend no credibility to the reasonableness of assuming his authority.

In *Lensa*, we explained that a third party's reliance on the apparent authority of an agent must be reasonable. 765 So. 2d at 298 (citing *Rushing v. Garrett*, 375 So. 2d 903, 906 (Fla. 1st DCA 1979)). The fact that the transaction did not occur in the ordinary course of business influenced our conclusion in *Lensa*. *See id.*

Here, it was not reasonable for McRoberts to conclude that Martinez had the authority to act on FPL's behalf at a tailgate party—FPL is a company that McRoberts described as "the biggest company in the state of Florida and the biggest land owner." McRoberts testified that he knew of Martinez's position "from reading it in the paper," that he "might have seen it online somewhere," and that he "knew [Martinez] had a very high position in development." That, however, does not establish that FPL held out Martinez as having the authority to enter into the contract.

This transaction was not in the ordinary course of business—it allegedly occurred outside a Florida State University football game. It is unreasonable to assume that an employee of the company McRoberts described as "the biggest company in the state of Florida" would have the authority to bind his employer to a multi-million dollar obligation at a tailgate party. Nor is it reasonable to assume that a highly regulated utility would conduct business in this manner.

Similarly, the actual conversation does not support Martinez's authority to bind FPL. According to McRoberts, Martinez told McRoberts not to call him at the office or on his cell phone. McRoberts himself testified that this instruction was "strange" and described it as "the weirdest thing ever." Martinez also declined McRoberts's request for a business card, opting instead to write down a phone number for an unknown person on the back of McRoberts's own card. Based on the instructions not to call Martinez at the office or on his cell phone, McRoberts tried to communicate with him by leaving messages on FPL's general customer service line. This evidence could not reasonably show that Martinez had the authority to bind FPL.

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[4] The parties use the terms apparent authority and apparent agency interchangeably.

Finally, FPL never ratified Martinez's authority to bind it. In *Perper v. Sonnabend*, 221 F.2d 142 (5th Cir. 1955), the Fifth Circuit applied Florida law and found that a plaintiff failed to establish that a hotel manager had actual or apparent authority to enter into a real estate sales contract. *Id.* at 144. In that case, the hotel manager explicitly informed the broker that he had authority to enter the contract. *Id.* at 143. But, an agent cannot bind a principal solely through her own actions. *See id.* at 144. Instead, the principal must ratify the agent or the authority of the agent to act. *Id.* at 145; *see also Pan-Am. Constr. Co. v. Searcy*, 84 So. 2d 540, 542–43 (Fla. 1955). In *Perper*, the principal did not ratify the act of the agent. 221 F.2d at 145. As a result, the agent did not bind the principal. *Id.* So too here.

FPL undertook no action after the purported agreement to ratify the agreement or Martinez's authority to act on its behalf. "There was no formal act by" FPL, or even an informal act by FPL, "which would denote the holding out of [Martinez] as possessing the authority to act on its behalf." *See Lensa*, 765 So. 2d at 299 (Gross, J., concurring) (internal quotation omitted).

Conclusion

The court erred in denying the motion for directed verdict, as the evidence at trial was insufficient for a jury reasonably to conclude that Martinez had actual or apparent authority to act as FPL's agent. Thus, FPL is entitled to the entry of a directed verdict in its favor.

Reversed and remanded.

MAY, J., concurs.
CIKLIN, J., dissents with opinion.

CIKLIN, J., dissenting.

I respectfully disagree with the majority's decision to divest the empaneled jury of its fact-finding responsibility to determine whether authority existed in the fact situation before us. This case presents a classic "he said – he said" factual dispute where the parties' testimony and evidence were diametrically opposed. McRoberts presented sufficient evidence to support a positive conclusion. Therefore, I must respectfully dissent from the majority's conclusion that the factual determination should have been taken out of the jury's hands.

There existed a jury question as to actual or apparent authority; i.e., whether Martinez was acting within the scope of his employment with FPL or reasonably appeared to be doing so.

> Three elements are needed to establish an apparent agency: (1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance upon such representation. *See Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So. 2d 416, 418 (Fla. 5th DCA 1982). The reliance of a third party on the apparent authority of a principal's agent must be reasonable and rest in the actions of or appearances created by the principal, *see Rushing v. Garrett*, 375 So. 2d 903, 906 (Fla. 1st DCA 1979), and "not by agents who often ingeniously create an appearance of authority by their own acts." *Taco Bell of California v. Zappone*, 324 So. 2d 121, 124 (Fla. 2d DCA 1975).

Lensa Corp., 765 So. 2d at 298. "The question of whether acts are within the scope of an agent's apparent authority is a *question of fact*, the resolution of which will not be set aside unless clearly erroneous." *Hobbs Const. & Dev., Inc. v. Colonial Concrete Co.*, 461 So. 2d 255, 259 (Fla. 1st DCA 1984) (emphasis added).

As I see it, only the first element was meaningfully disputed by FPL on appeal. However, McRoberts's testimony clearly supported this element. It is crucial to keep in mind that "[a]n agent's authority may be implied or apparent; *it need not be conferred in express terms*." *Sugarland Real Estate, Inc. v. Beardsley*, 502 So. 2d 44, 45 (Fla. 2d DCA 1987) (emphasis added). McRoberts testified that he knew that Martinez was "the Senior Project Director of Development for Florida Power and Light" because he read it in the paper and saw it on FPL's website. By listing on its website that Martinez held the position of Senior Director of Development for FPL for the entire state, and by publishing his position in the newspaper, FPL's own actions reasonably represented that Martinez had authority to contract for land for new projects. Or at a minimum, this was sufficient evidence from which a jury could reasonably infer that Martinez had authority to bind FPL to a land deal. If not the *Senior* Project Director of Development, then who?

Further, Martinez told McRoberts that FPL purchases land way ahead of time and holds it for future use, and that FPL was seeking to place any new power plants as close to the main power grid as possible. While not a direct assertion from FPL, this knowledge of FPL's plans with respect to

acquisition of property boosted the reasonableness of McRoberts's belief in Martinez's authority.

As the majority points out, this deal occurred at a tailgate party and not in the ordinary course of business. However, this fact does not make McRoberts's reliance unreasonable; rather, it merely prevents application of a *presumption* of authority. *See Lensa Corp.*, 765 So. 2d at 298 ("As to acts in the ordinary course of business, courts have consistently recognized that a presumption of authority exists in the case of acts made or done by presidents."). Furthermore, the jury may very well have determined that it was not unreasonable for parties to enter into a business deal at a sporting event. It is certainly not unheard of for businesses to enter into deals at golf courses, in restaurants, or in other traditionally social settings. Indeed, many major companies purchase boxes or suites at sports stadiums and arenas for the purpose of furthering their business.

The majority also points out that there was no ratification of FPL's actions, but ratification is not a necessary element of apparent or implied authority.

"A motion for directed verdict should be granted only when the evidence viewed in the light most favorable to the non-moving party shows that *a jury could not reasonably differ as to the existence of a material fact . . . .*" *State, Dep't of Children & Family Servs. v. Amora*, 944 So. 2d 431, 435 (Fla. 4th DCA 2006) (emphasis added). "If there is *any* evidence to support a possible verdict for the non-moving party, a directed verdict is improper." *Stringer v. Katzell*, 674 So. 2d 193, 195 (Fla. 4th DCA 1996) (emphasis added). The credibility of the witnesses and weight of the competing evidence are concerns for the jury, not the jurist. *See id.* (finding "trial court violated these principles by viewing the evidence in a light favorable to the moving parties").

McRoberts's testimony constituted evidence from which a jury could reasonably find apparent authority. Contrary to the majority's conclusion, the trial court did not err in denying the motion for directed verdict and allowing the jury to do its job by reconciling conflicting testimony.

I would affirm.

* * *

Not final until disposition of timely filed motion for rehearing.