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Manuel Farach

FF Cosmetics FL, Inc. v. City of Miami Beach, Case Nos. 15-14394 & 15-15256 (11th Cir. 2017).
The commercial First Amendment rights of retailers to distribute handbills and solicit business on public sidewalks outweighs the interests of municipality in aesthetics and order.

Schweitzer v. Comenity Bank, Case No. 16-10498 (11th Cir. 2017).
The Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., allows for the partial revocation of consent to be called by an automatic telephone dialing system.

Whitney Bank v. Grant, Case No. 1D16-5112 (Fla. 1st DCA 2017).
The five-year statute of limitations period in Florida Statute section 95.11(2)(b), and not the one-year statute of limitations of Florida Statute section 95.11(5)(h), applies in actions for deficiency proceedings arising out a short sale (as opposed to deficiency actions arising out of a foreclosure sale).

Emerald Coast Utilities v. Bear Marcus Pointe, LLC, Case No. 1D15-5714 (Fla. 1st DCA 2017).
There is no "excusable neglect" to permit the filing of belated appeal when the error to timely see the final judgment email is due to the law firm's computer system not being correctly configured to receive and store emails.

Partridge v. Nationstar Mortgage, LLC, Case No. 2D16-3081 (Fla. 2d DCA 2017).
A plaintiff may not use the Clerk of the Court as a bailee for a negotiable instrument instead of properly assigning the note to the new plaintiff.

Stonepeak Partners, LP v. Tall Tower Capital, LLC, Case No. 2D16-4204 (Fla. 2d DCA 2017).
The breach of a non-disclosure agreement by a foreign defendant without substantial connections to Florida does not subject the defendant to long-arm jurisdiction unless the breach of the agreement consists of communications into Florida related to the breach.

The Bank of New York Mellon v. Simpson, Case No. 3D16-2445 (Fla. 3d DCA 2017).
Generalized allegations of fraud in an industry without specific allegations of fraud in the case at bar are not sufficient to support a Florida Rule of Civil Procedure 1.540 motion for relief based on fraud of a party.\

Pace v. Bank of New York Mellon Trust Company National Association, Case No. 5D16-748 (Fla. 5th DCA 2017).
Allegations in a complaint, including claims of interference with a contractual relationship, are covered by the absolute judicial immunity rule; alleged statements made by a process server when serving the complaint may be covered by qualified immunity if the statements are pertinent to the judicial proceedings.

Garcia v. Navy Federal Credit Union, Case Nos. 5D16-1350 & 5D16-3055 (Fla 5th DCA 2017).
The Fifth District agrees with the Third District that Florida Rule of Civil Procedure only applies to final, not interlocutory orders, and may not be used to collaterally attack non-final orders such as post-judgment writs of possession.

Saunders v. St. Cloud 192 Pet Doc Hospital, LLC, Case No. 5D17-45 (Fla. 5th DCA 2017).
An agreement to arbitrate all claims "arising out of or related to" a contractual agreement is limited to issues arising out of the contract itself, and does not encompass claims arising out of performance of the contract itself.

Third District Court of Appeal

State of Florida

Opinion filed August 9, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2445
Lower Tribunal No. 11-32903

The Bank of New York Mellon, etc.,
Appellant,

vs.

Keith A. Simpson,
Appellee.

An appeal from a non-final order from the Circuit Court for Miami-Dade County, Eric William Hendon, Judge.

Lapin & Leichtling, LLP and Adam B. Leichtling and Anne Janet Hernandez Anderson, for appellant.

Jacobs Keeley, PLLC and Bruce Jacobs and Court Keeley, for appellee.

Before SUAREZ, EMAS, and LOGUE, JJ.

SUAREZ, J.

The Bank of New York Mellon ["BNYM"] appeals from the lower court's order vacating the December 6, 2013 Consent Final Judgment of Foreclosure, as

well as the Settlement and Release Agreement between BNYM and homeowner Keith A. Simpson ["Simpson"]. We reverse and remand for reinstatement of the Final Judgment.

Simpson defaulted on his mortgage in 2011. In 2013 the parties entered into a Settlement and Release Agreement [SRA] by which the Simpsons agreed to enter into a Consent Final Judgment in exchange for an extended foreclosure sale date and BNYM's waiver of its right to seek a deficiency judgment. The SRA included a full release of BNYM from any and all claims that could be asserted in the foreclosure action. The SRA required any modifications or amendments to be made within 30 days; none were.

At the time that BNYM and Simpson entered into the SRA, the foreclosure trial was imminent, and Simpson's attorney at the time, Ms. Barrow, was attempting to renegotiate the loan with the Bank. The record clearly shows that Attorney Barrow advised Simpson that he would not prevail at the foreclosure trial, and that a reasonable legal strategy would be to "buy time" in between the final judgment and foreclosure sale date in order to negotiate new loan terms. Simpson entered into the Settlement and Release with the Bank, secured a delayed sale date and in return the Bank agreed it would not seek a deficiency judgment against him. The court rendered Final Consent Judgment in foreclosure.

Simpson subsequently sought to delay the sale date, to vacate the sale, then after many motions and a new attorney (his current attorney, Bruce Jacobs), sought to challenge the SRA and Final Consent Judgment via rule 1.540(b) for mistake, inadvertence or fraud. Simpson's counsel now alleges that, at the time Simpson entered into the mortgage and note with BNYM, there was ongoing fraud committed by other banks; if he could have engaged in discovery during the foreclosure, he argued, he could have provided evidence of this.[1] After hearing argument from both parties at the September 26, 2016 evidentiary hearing, the trial court agreed with Simpson's counsel that the general allegations of fraud in the mortgage banking industry warranted vacating the SRA and Final Consent Judgment in this case, putting the parties back into their pre-foreclosure status. This appeal ensued.

The standard of review of a 9.130(a)(5) appeal of a motion filed under Florida Rule of Civil Procedure 1.540(b) is usually abuse of discretion. However,

> The principles of law to be applied in an action to set aside a contract for unilateral mistake or fraud are more stringent than the standards that have so far been established for the setting aside of a judgment pursuant to Rule 1.540, when the judgment entered pursuant to that rule is not based on a settlement.

Smiles v. Young, 271 So. 2d 798, 801 (Fla. 3d DCA), cert. denied, 279 So. 2d 305 (Fla. 1973). The record in the case before us shows that Simpson entered into the

[1] Mr. Jacobs was not Simpson's attorney during the foreclosure proceedings.

valid SRA with BNYM well before Simpson's current counsel Jacobs was hired. Simpson argues on appeal that the SRA and Final Consent Judgment should be vacated because, if Simpson had known before he entered into the SRA about his current counsel's "investigations" into the general mortgage banking industry, he would never have signed it, but hired Jacobs instead. The generalized allegations of fraudulent practices in the mortgage industry now asserted by Simpson in his Rule 1.540 motion and here on appeal were known and could have been discovered by due diligence at the time the foreclosure suit was pending between 2011 and 2013. This Court has held to the principle that that Rule 1.540(b) does not have as its purpose or intent the reopening of lawsuits to allow parties to state new claims or offer new evidence omitted by oversight or inadvertence. See Miami Nat. Bank v. Sobel, 198 So. 2d 841, 842 (Fla. 3d DCA 1967).

Furthermore, at the Rule 1.540 hearing Simpson's counsel did not set forth any "clear and convincing" evidence that BNYM committed fraud in the underlying mortgage and note documents – there is no evidence in the record that this mortgage and note were fraudulently rendered, or that the assignments were manufactured or robo-signed. E.g., McGill v. Boulevard & Bay Land & Development Co., 130 So. 460 (1930) ("Where fraud is asserted as a defense or ground for relief against a mortgage, the burden of proving it is upon the party asserting the same, and the proof thereof must be clear and convincing. . . .").

Merely invoking current counsel's "investigations" into certain alleged fraudulent practices of the mortgage banking industry at that time does not meet the legal standards for evidence of fraud *in this case*. The record contains no specific allegations or any factual evidence that BNYM committed any fraud with regard to Simpson's mortgage. Additionally, Simpson did not present any evidence of duress in entering into the SRA. To establish duress, he must prove that the SRA was effected involuntarily and was not an exercise of free will, and that this condition of mind was caused by improper or coercive conduct by the other party. See City of Miami v. Kory, 394 So. 2d 494 (Fla. 3d DCA 1981). Simpson did not prove either element of duress. To the contrary, testimony from Simpson and his then-attorney Ms. Barrow shows that Simpson's decision to enter into the SRA and Consent Final Judgment was a tactical litigation strategy to buy more time for an extended sale date in order to seek a loan modification.[2] Simpson did not argue

[2] The record shows that Simpson's initial counsel in the foreclosure, Ms. Barrow, represented her client competently, filed all necessary documents and pleadings, asserted valid defenses to foreclosure, and negotiated effectively for her client given his circumstances at the time. Simpson now argues that Barrow failed to plead fraud or mistake in the foreclosure proceedings. Failure to plead available defenses, however, is not a basis for relief from a judgment or decree under Rule 1.540(b). Attorney Barrow did plead lack of standing by challenging the assignments. Furthermore, discovery was ongoing when Simpson made the decision to end the litigation by settling. There is no record showing of ineffective or incompetent representation as Simpson's current attorney Jacobs suggests of Ms. Barrow on appeal. Simpson was competently represented by counsel, had full access to discovery (in fact, the record reveals that he made full use of his discovery rights up until deciding to enter into the SRA), and he had every right to reject the settlement offer until he could adequately explore his defenses.

that the SRA is ambiguous or unclear, and he did not ask to set the SRA aside. He did not file any affidavits; he has not preserved any argument regarding the SRA's validity or interpretation.

Simpson's motion to vacate the Final Judgment was based on allegations made by his current attorney that have no specific relation to the facts of this case, during a time when Simpson was not represented by that attorney, and are merely generalized complaints about the mortgage banking industry. The SRA was entered into by Simpson with full knowledge, and the releases therein are valid and effective to bar the claims he raised in the Motion to Vacate, including those generalized references to an "investigation of the mortgage banking industry" in which his current counsel is engaged. The issues Simpson now raises are not valid bases under Rule 1.540 to relieve him from the Consent Final Judgment or from his agreements in the SRA. He cannot use the rule to allow him to avoid the consequences of his decision to settle litigation, even if he regards it as a "bad" settlement in retrospect.

We therefore reverse the order on appeal and instruct the trial court on remand to deny Simpson's amended Motion to Vacate Final Judgment, direct the court to reinstate the SRA and Final Consent Judgment in foreclosure and grant BNYM's Amended Motion to Enforce Order enforcing the parties' Settlement Agreement and General Release of Claims.

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

EMERALD COAST UTILITIES AUTHORITY,

Appellant,

v.

BEAR MARCUS POINTE, LLC; A FLORIDA LIMITED LIABILITY COMPANY,

Appellee.

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

CASE NO. 1D15-5714

_____/

Opinion filed August 10, 2017.

An appeal from the Circuit Court for Escambia County.
Gary L. Bergosh, Judge.

Bradley S. Odom and Richard D. Barlow of Odom & Barlow, P.A., Pensacola, for Appellant.

Major B. Harding and Erik M. Figlio of Ausley & McMullen, Tallahassee; William A. Fixel of Fixel & Willis, Tallahassee, for Appellee.

PER CURIAM.

In this appeal from an order denying its motion for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(b), appellant claims that the trial

court abused its discretion in not vacating and reentering its order assessing attorneys' fees, which appellant alleged to have never received, so that appellant could file a timely notice of appeal. Finding no abuse of discretion, we affirm.

On March 18, 2014, the trial court rendered an order assessing attorneys' fees against appellant in an eminent domain proceeding. On March 20, 2014, the clerk of the court served the order by email sent to the email addresses designated by counsel for each party. On May 12, 2014, appellant filed a motion for relief from the order, requesting the trial court to vacate and reenter the order to allow appellant to file a timely notice of appeal because appellant did not receive a copy of the order until after expiration of the time to appeal.

At the hearing on appellant's motion, Lendy Davis, the IT director for the clerk of the court, testified that the log from the clerk's e-service system indicated that emails containing the order were sent to the primary and secondary email addresses designated by appellant's attorneys at 7:28 p.m. on March 20, 2014. The clerk's email server contacted the email server for the domain of these addresses and handed off the messages to the recipient server. Davis explained that if the email had not been accepted by the recipient server, an error message would have been generated notifying the clerk's office that the email had not been delivered. The log contained no such error message. Davis did not know what happened after the email was accepted by the recipient server.

William Hankins testified that he provided IT consulting services for appellant's counsel—the law firm of Odom & Barlow P.A.—beginning in 2007. In 2011, about two months after the firm installed its Microsoft Exchange server with a built-in email filtering system, the email filtering system was configured to drop and permanently delete emails perceived to be spam without alerting the recipient that the email was deleted. Hankins advised Richard Barlow that the firm's email system should not be configured to permanently drop and delete emails without alerting the recipient that the email was dropped because the built-in spam filtering on the server was very unreliable and created the risk of identifying and filtering legitimate emails as spam (false positives). Although Hankins believed that it was better to hire a third party that handled spam filtering on a full-time basis, Barlow rejected his recommendation to use a third-party vendor because he did not want to spend the extra money.

Hankins reviewed the transaction logs from the clerk's server to Odom & Barlow's server and concluded that the order assessing attorneys' fees was properly delivered to the Odom & Barlow server. Hankins opined that it was possible that the server deleted the email as spam.

Importantly, in 2015, Hankins recommended that the firm get an online backup system that would have cost approximately $700 to $1200 a year. This

recommendation was rejected. Eventually, Hankins stopped working for Odom & Barlow because the firm rejected his recommendations.

Stephen Reyes testified that he was a shareholder in the firm of Saltmarsh, Cleveland & Gund and managed the information system consulting arms of the firm. Reyes reviewed the email log printouts provided by the clerk's office and saw no evidence that the clerk's office made any mistake or was negligent in the service of the emails in question. He also reviewed five work stations and a server at the law firm of Odom & Barlow did not find any of the emails, and did not find any evidence of destruction of the emails.

Reyes conceded that it was fairly unusual for a company to configure their system to not create any email logs and that if the server had been configured differently, he could have had complete logs from the period in question to determine whether the server had received the emails from the clerk's server. He also noted that the server was not configured to back up data or configuration files and that it was unusual for a business to operate a server system with absolutely no back up or disaster recovery process. If the server had backup data or configuration files, this would have provided information about additional emails and correspondence and changes in the email system itself. He suggested that a law firm that maintained confidential and highly sensitive information for clients have a backup or disaster recovery process.

Reyes could not make a definitive determination whether the emails from the clerk's office were received by Odom & Barlow's server because the firm did not maintain logs or archive or backup emails. If he had complete logs, he would have been able to determine whether the emails had been received. However, Reyes acknowledged that the absence of any error messages, bounce-backs, or retries in the clerk's server logs made it more likely that the emails were received by Odom & Barlow's server. Moreover, if Odom & Barlow's server had received other emails from the clerk's server, this would indicate that there was effective communication between the two systems. Given the totality of the information he had, Reyes believed that it was more likely than not that the server received the emails.

James Todd testified that he helped design, implement, and support email systems. Todd explained that when sending an email, the sending server would look up the recipient server and establish a connection with the recipient server to make sure it was there and accepting messages. If there were no issues, the recipient server would send an "okay" message for the sending server to transmit the data. Once the data was received, the recipient server would send an "okay" message letting the sending server know that it got the data. This activity was referred to as a "handshake," after which everything was under the control of the recipient. Todd testified that this was the equivalent of placing a piece of mail into a mailbox.

Todd reviewed the transaction logs from the clerk's server to Odom & Barlow's server and concluded that an email attaching an order assessing attorneys' fees was properly delivered to and received by the Odom & Barlow server on March 20, 2014, without any error messages or bounce-backs. According to Todd, after the handshake, an email went through any email filtering system that was in place. An email filtering system could be configured to delete emails perceived to be spam and to alert recipients of the receipt of email identified as spam. These settings were in the exclusive control of the email recipient. Thus, after a handshake occurred, the email could be filtered out as spam or delivered to the recipient.

Based on the information he reviewed, Todd concluded that the law firm of Odom & Barlow did not properly implement and utilize its email filtering system. It was his understanding that Odom & Barlow's email filtering system was set to drop and delete emails identified as spam. He did not recommend this setup to any business of any kind because it resulted in data loss. In fact, he testified that he would require the client to sign a waiver exonerating him from responsibility if the client insisted on implementing such an email filtering system.

Joe Fixel, lead counsel for appellee, testified that his firm filed a motion for attorneys' fees that was the subject of a hearing in January 2013. At the conclusion of the hearing, the trial court asked the parties to submit proposed orders. The court did not enter its own orders until March 2014. While they were waiting for the court

to act, Fixel's office had a protocol where an assigned paralegal would check the court's website every three weeks to see if the court had taken any action or entered any orders. Fixel also contacted opposing counsel, Richard Barlow, and suggested they file a joint motion for a case management conference to make sure the case had not slipped through the cracks. When Barlow categorically refused to join such a motion, he consulted with co-counsel who filed a motion for status conference. However, before the status conference occurred, the orders were received by email by all three attorneys and the paralegal who were assigned to the case at his firm. When the attorneys' fees award had not been paid within thirty days as ordered by the court, his paralegal contacted opposing counsel, whose office requested copies of the orders.

At the hearing, appellant argued that it was entitled to relief from the attorneys' fees order because it never received the order in time to file a timely appeal. Appellee responded that appellant was not entitled to relief because appellant's ability to file a timely appeal was not hindered by any action attributable to the trial court or the clerk, but was attributable to the actions of appellant's counsel. Afterwards, the trial court entered an order denying relief. This appeal followed.

Under Florida Rule of Civil Procedure 1.540(b), Florida courts have discretion to set aside a final judgment, decree, order, or proceeding based on

"mistake, inadvertence, surprise or excusable neglect." Handel v. Nevel, 147 So. 3d 649, 651 (Fla. 3d DCA 2014). In Pompi v. City of Jacksonville, 872 So. 2d 931 (Fla. 1st DCA 2004), this court held that the appellants' failure to file a timely appeal constituted excusable neglect entitling appellants to relief from judgment under rule 1.540(b) where appellants' counsel made a mistake in reading the file stamp on the judgment, which was much less noticeable than the recording stamp. Id. at 933. While agreeing that the clerk bore no responsibility for counsel's error, this court noted "the fact that a deputy court clerk made precisely the same mistake when reporting the filing date on the telephone is at least some indication that counsel's error was excusable." Id.

Subsequently, in Hollifield v. Renew & Co., Inc., 18 So. 3d 616 (Fla. 1st DCA 2009), this court observed that the trial court had no authority to grant relief from judgment where the neglect in failing to take a timely appeal occurred entirely within the office of the party's counsel and no action attributable to the court or its personnel contributed to counsel's neglect to take a timely appeal. Id. at 617 (citing David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co., 972 So. 2d 275, 280 (Fla. 2d DCA 2008)). In doing so, this court distinguished Pompi, "whose holding applied to cases where the court or court staff substantially contributed to counsel's failure to file a timely notice of appeal." Id.

We agree with appellant that this language is dicta in light of the true holding in Hollifield that rule 1.540(b) did not authorize the trial court to grant relief from an interlocutory order. Id. However, because we conclude that appellant failed to demonstrate any excusable neglect, it is unnecessary to address whether rule 1.540(b) requires proof that some action attributable to the court or its personnel contributed to counsel's neglect to take a timely appeal.

"Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.'" Elliott v. Aurora Loan Servs., LLC, 31 So. 3d 304, 307 (Fla. 4th DCA 2010) (quoting Somero v. Hendry Gen. Hosp., 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985)). However, "[t]he law requires certain diligence of those subject to it, and this diligence cannot be lightly excused." John Crescent, Inc. v. Schwartz, 382 So. 2d 383, 385 (Fla. 4th DCA 1980). "A conscious decision not to comply with the requirements of law cannot be 'excusable neglect' under the rule or any other equivalent requirement." Peterson v. Lake Surprise II Condo. Ass'n, 118 So. 3d 313 (Fla. 3d DCA 2013). Likewise, gross neglect is not excusable. Brivis Enters., Inc. v. Von Plinski, 8 So. 3d 1208, 1209 (Fla. 3d DCA 2009); Hornblower v. Cobb, 932 So. 2d 402, 406 (Fla. 2d DCA 2006); Lehner v. Durso, 816 So. 2d 1171, 1173 (Fla. 4th DCA 2002); Otero v. Gov't Emps. Ins. Co., 606 So. 2d 443, 444 (Fla. 2d DCA 1992).

Although appellant claims that its counsel received no notice of the order assessing attorneys' fees until after expiration of the time to appeal, Lendy Davis, William Hankins, and James Todd testified that they reviewed emails logs from the clerk's server and concluded that the emails attaching the order assessing attorneys' fees were electronically served by the clerk's office on March 20, 2014, and received without error by Odom & Barlow's server. Although Stephen Reyes testified that he could not make a definitive determination whether the emails were received by Odom & Barlow's server because the firm maintained neither email logs nor archive or backup emails, he conceded that it was more likely than not that the server received the emails. Based on this evidence, the trial court could conclude that the order assessing attorneys' fees was received by Odom & Barlow's server, which was the equivalent of placing a physical copy of the order in a mailbox.

In addition, testimony was presented that the spam filter of Odom & Barlow's server was deliberately configured in such a way that it could delete legitimate emails as spam without notifying the recipient, despite Odom & Barlow being warned against this configuration. Specifically, William Hankins advised against this configuration because the built-in spam filtering on the server was very unreliable and created the risk of identifying and filtering legitimate emails as spam. Hankins also recommended that Odom & Barlow hire a third party to handle spam filtering on a full-time basis and purchase an online backup system. However, these

recommendations were rejected because the firm did not want to spend the additional money. Stephen Reyes noted that the server had the ability to generate email logs, but was specifically configured not to create logs in order to save drive space.

Based on this testimony, the trial court could conclude that Odom & Barlow made a conscious decision to use a defective email system without any safeguards or oversight in order to save money. Such a decision cannot constitute excusable neglect. See Bequer v. Nat'l City Bank, 46 So. 3d 1199 (Fla. 4th DCA 2010) (reversing an order setting aside a default final judgment based on excusable neglect where the bank's inaction was not the result of a "system gone awry," but rather of a "defective system altogether").

Finally, testimony was presented that opposing counsel, Joe Fixel, had a protocol where an assigned paralegal would check the court's website every three weeks to see if the court had taken any action or entered any orders. If Odom & Barlow had a similar procedure in place, the firm would have received notice of the order assessing attorneys' fees in time to appeal. The neglect of Odom & Barlow's duty to actively check the court's electronic docket was not excusable. See Yeschick v. Mineta, 675 F.3d 622, 629-30 (6th Cir. 2012) (holding that counsel's neglect in not checking the docket was not excusable because the parties had an affirmative duty to monitor the docket to keep apprised of the entry of orders that they may wish to appeal); Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 413 (4th Cir. 2010)

(holding that counsel's computer problems did not constitute excusable neglect where counsel failed to actively monitor the court's docket or find some other means by which to stay informed of docket activity).

Moreover, Fixel also contacted Richard Barlow about filing a joint motion for a case management conference. Had Barlow not rejected this request, it is likely that Odom & Barlow would have received notice of the order assessing attorneys' fees in time to appeal. In short, there was an absence of "any meaningful procedure in place that, if followed, would have avoided the unfortunate events that resulted in a significant judgment against" appellant. Hornblower, 932 So. 2d at 406. Accordingly, the trial court did not abuse its discretion in denying appellant's rule 1.540(b) motion.

AFFIRMED.

MAKAR, JAY, and M.K. THOMAS, JJ., CONCUR.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 15-14394 & 15-15256

D.C. Docket No. 1:14-cv-22072-JLK

FF COSMETICS FL, INC.,
a Florida corporation,
d.b.a. Forever Flawless Cosmetics 1,
TIMELESS COSMETICS FL, INC.,
a Florida corporation,
BRILLIANCE NEW YORK, LLC,
a New York limited liability company,
f.k.a. Brilliance New York, Inc.,
OCEANE FL COSMETICS, INC.,

Plaintiffs - Appellees,

versus

CITY OF MIAMI BEACH,

Defendant - Appellant.

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

(August 10, 2017)

Before MARCUS and DUBINA, Circuit Judges, and GOLDBERG,[*] Judge.

DUBINA, Circuit Judge:

In this consolidated interlocutory appeal, Appellant City of Miami Beach ("City") challenges the district court's order granting Appellees FF Cosmetics FL Inc., Timeless Cosmetics FL Inc., Brilliance New York LLC, and Oceane FL Cosmetics Inc.'s ("Retailers") renewed motion for a preliminary injunction, and denying the City's motions for clarification and for reconsideration. The preliminary injunction enjoins the enforcement of two City ordinances that restrict commercial solicitation and handbilling in sections of five streets in the Historic Art Deco District.

After careful review, and having the benefit of oral argument, we affirm.

I. BACKGROUND

Retailers operate cosmetic stores along Lincoln Road in the City of Miami Beach's Historic District. Each store depends on solicitation as its primary, and most effective, form of advertisement, employing several greeters to stand outside the storefront and attract potential customers inside. Reports of the greeters' methods range from benign salutations, offers of free samples, and distribution of handbills to allegations of cat-calling, harassment, and uninvited touching. There

[*] Honorable Richard W. Goldberg, Judge of the United States Court of International Trade, sitting by designation.

is no evidence presented to suggest that the Retailers engaged in direct sales pitches of products outside of the stores.

The City is not primarily concerned with the individual actions of Retailers, but rather with the collective effects of the numerous greeters employed by many stores and restaurants along Lincoln Road and certain other areas of the City's Historic District. Visitors, storeowners, and residents of the Historic District testified to the annoyance, inconvenience, and general unpleasantness of being barraged with menus, free samples, and comments from greeters. The record shows that individuals expressed concerns about the effects on tourism, property values, quality of life, and the unique aesthetic of the City's Historic District.

In response to the flood of complaints stemming from solicitation and handbilling activities in the Historic District, the City began enforcing Section 74-1, an anti-solicitation ordinance, and Section 46-92, an anti-handbilling ordinance. Testimony from the Director of Code Compliance for the City indicated that the number of complaints in the Historic District increased substantially, resulting in Code Compliance staff being pulled from other locations to deal with the commercial solicitation problem.

After receiving a number of citations pursuant to Section 74-1 and Section 46-92, Retailers brought suit against the City under 42 U.S.C. § 1983, challenging the constitutionality of the ordinances. Specifically, Retailers argued that the

ordinances were overbroad, unconstitutionally vague, and violative of the Due Process Clause, the Equal Protection Clause, and the First Amendment. Retailers sought permanent injunctive relief, as well as damages incurred from fines and lost business resulting from the enforcement of the ordinances. Retailers also filed for a preliminary injunction.

Both parties agreed to stay litigation pending the outcome of the City's attempts to amend the ordinances at issue. The City held public hearings to address the problem and employed other fact-finding tactics, such as requesting public feedback on social media, searching review websites such as Yelp, and reviewing past complaints filed with the City.

The City presented evidence showing that it considered a number of alternative prohibitions. First, the former Assistant City Manager testified that the City considered "free speech 'bubbles,' which would essentially require that any commercial solicitation activities take place beyond a minimum threshold distance surrounding a pedestrian." As to the viability of this regulation, he stated,

> "[Free speech bubbles] would have never worked. First of all, what's the difference between 2 feet 8 inches and 3 feet? Evidentiary problem at a hearing. And it's so congested now. It's a popular street, all of them are, it would be a looser [sic]. You can't keep that level of distance from people on Lincoln Road without bumping into somebody else's zone. You know, it doesn't exist in the one person vacuum so we just didn't feel that that was feasible."

Second, the former Assistant City Manager stated the City considered creating zones in which commercial solicitation would be permitted. This idea was ultimately rejected because, "enforcement is a problem. We tried not to write something that we couldn't understand how to enforce. If everybody is just in this box, it becomes a bazaar. There would be yelling. It would have had the opposite effect in my opinion."

Finally, the former Assistant City Manager testified that the City considered banning only aggressive solicitation, but determined that establishing an "aggressive" standard would be an enforcement nightmare, and that it wouldn't solve the problem of the volume of solicitation.

Ultimately, the City amended both ordinances to read as follows:

> **Sec. 74-1. Soliciting business in public.**
>
> (a) *Prohibitions*. It shall be unlawful to solicit any person for the purpose of inducing such person to purchase any property, real or personal, or any food, beverage, or service, or to solicit such person to enter any place of business for the purpose of inducing or attempting to induce such person to purchase any property, real or personal, or any food, beverage, or service.
>
> This Section shall apply when the solicitor or the person being solicited is located on any public right-of-way, which means and includes, but is not limited to, any street, sidewalk, street corner, curb, bicycle path, or pedestrian walkway, in any of the following areas in the City of Miami Beach. This Section shall also apply to any doorway, stairway, window or other opening of a building abutting on or adjacent to such right-of-way, in any of the following areas in the City of Miami Beach:
>
> (1) The area bounded on the north by, but not including, 17th Street, bounded on the east by, but not including, Washington Avenue,

bounded on the south by Lincoln Lane, and bounded on the west by Alton Road;

(2) Ocean Drive from 5th to 15th Streets;
(3) Collins Avenue from 5th to 15th Streets;
(4) Washington Avenue from 5th to Lincoln Road;
(5) All cross streets and bystreets bounded on the north by 15th Street, bounded on the east by Ocean Drive, bounded on the south by 5th Street, and bounded on the west by Washington Ave;
(6) Española Way from Pennsylvania Avenue to Collins Avenue; and
(7) Lummus Park.

Sec. 46-92. Litter; definitions; prohibitions on litter; penalties for litter and commercial handbill violations; commercial handbill regulations, fines, and rebuttable presumptions; seizure and removal of litter by the city; enforcement; appeals; liens.

(a) *Definitions*. The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

. . .

(3) *Handbill* means any handbill, flyer, paper, document, dodger, circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter or object that conveys any information, except that "handbill" shall not include a newspaper or its contents.

(4) *Commercial handbill* means any handbill that conveys any information about any good or service provided by a business.

. . .

(g) *Prohibitions on commercial handbill distribution*.

(1) *Historic Areas*. It shall be unlawful for any person to distribute commercial handbills on the right-of-way in any of the following areas in the City of Miami Beach:

a. The area bounded on the north by, but not including, 17th Street, bounded on the east by, but not including, Washington

Avenue, bounded on the south by Lincoln Lane, and bounded on the west by Alton Road;

b. Ocean Drive from 5th to 15th Streets;
c. Collins Avenue from 5th to 15th Streets;
d. Washington Avenue from 5th to Lincoln Road;
e. All cross streets and bystreets bounded on the north by 15th Street, bounded on the east by Ocean Drive, bounded on the south by 5th Street, and bounded on the west by Washington Ave;
f. Española Way from Pennsylvania Avenue to Collins Avenue; and
g. Lummus Park.

The prohibitions in this subsection (g) shall apply to the distribution of commercial handbills on any right-of-way, including but not limited to any doorway, stairway, window or other opening of a building abutting on or adjacent to such right-of-way. All rights-of-way identified as prohibited areas shall include the entire width of the right-of-way, including all sidewalks.

(2) *Sidewalk cafes*. Commercial handbills shall not be distributed on the right-of-way:

a. Within 20 feet in any direction from the outside perimeter of any approved sidewalk cafe (as indicated in the approved site plan attached to the city-issued permit); and
b. On any right-of-way within the approved sidewalk cafe.

(3) *Beaches*. Commercial handbills shall not be distributed on any city beach east of the dunes.

The effect of the amendments was to limit the commercial solicitation and handbilling prohibitions to within defined boundaries in the Historic District. The Amended Ordinances regulate approximately 11.75% of the Art Deco District, 5.7% of the City's Historic District, and 3% of the City of Miami Beach. All other previous restrictions on solicitation and handbilling were rescinded.

As support for the amended ordinances, the City cited ten interests: (1) protecting the historic character of the District; (2) developing the high-end retail and high-end sidewalk café promenades in the District; (3) promoting luxury tourism; (4) minimizing harassment of pedestrians along the public right-of-way; (5) minimizing congestion; (6) reducing litter; (7) improving the aesthetic of the District for residents and visitors; (8) protecting pedestrians' right to be left alone; (9) maintaining the unique ambiance of the District; and (10) encouraging expansion in other areas of the City where commercial solicitation is allowed.

On December 3, 2014, Retailers filed an amended complaint and renewed their motion for a preliminary injunction, seeking to invalidate the amended ordinances. The district court held five hearings over the course of several months and ultimately granted Retailers' motion for a preliminary injunction. Critically, the district court held–while acknowledging that the City's interests are substantial and that the ordinances directly advance those interests–that the ordinances were not narrowly tailored, and thus that Retailers were likely to succeed on the merits. Additionally, the district court found that Retailers were likely to succeed on their claim that the anti-handbilling ordinance was facially overbroad. The City filed motions for clarification and reconsideration, which the district court denied. In this appeal, the City challenges the district court's grant of a preliminary injunction with respect to the amended ordinances.

II. STANDARDS OF REVIEW

Preliminary injunctions are reviewed for an abuse of discretion, and the legal conclusions on which they are based are reviewed de novo. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Whether a regulation is narrowly tailored is a legal question that is reviewed de novo. *See Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1251 n.17.

Generally, if a district court makes a clearly erroneous finding of fact it is an abuse of discretion. However, we review issues of constitutional fact de novo. *Am. Civil Liberties Union of Fla.*, 557 F.3d at 1198. Thus, if we disagree with the district court's findings of fact as to whether the ordinance is more extensive than necessary, the decision to enter a preliminary injunction is an abuse of discretion. *See Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) ("In cases involving first amendment claims, an appellate court must make an independent examination of the whole record. . . . [A]n appellate court is not bound by the 'clearly erroneous' standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary."); s*ee also Am. Civil Liberties Union of Fla.*, 557 F.3d at 1198 ("[W]e review *de novo* the core constitutional fact relating to the Board's motive. That means if we disagree with the district court's finding about the

Board's motive, its decision to enter a preliminary injunction was an abuse of discretion.").

III. DISCUSSION

"A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). A preliminary injunction is an "extraordinary and drastic remedy" and should not be granted unless "the movant clearly establishe[s] the 'burden of persuasion' as to each of the four prerequisites." *Id*. (quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir.1998)) (quotations omitted). Although the initial burden of persuasion is on the moving party, the ultimate burden is on the party who would have the burden at trial. *See Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 1800 (1993) (noting that a party who seeks to uphold a commercial speech restriction bears the burden of justifying it).

The district court correctly noted that an ongoing violation of the First Amendment constitutes an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 2690 (1976). Likewise, the district court correctly

concluded that in this case the injury to Retailers' First Amendment rights outweighs the City's interests in aesthetics. *See KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Finally, the district court correctly ruled that enjoining the ordinances, if they were found to be in violation of the First Amendment, would advance the public's interest in freedom of speech. *See id.* at 1272-73.

Thus, the critical question we must decide is whether Retailers are substantially likely to prevail on the claims that Sections 74-1 and 46-92 violate the First Amendment.[1]

A. THE DISTRICT COURT DID NOT ERR IN FINDING THAT RETAILERS WERE LIKELY TO SUCCEED ON THE MERITS WITH RESPECT TO SECTION 74-1.

The law is clear that commercial speech is afforded lesser protections than those traditionally given to noncommercial speech. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477, 109 S. Ct. 3028, 3033 (1989). Thus, a restriction on commercial speech is valid under the First Amendment if (1) the speech is not misleading and does not concern unlawful activity, (2) the government has a substantial interest in restricting the speech, (3) the regulation directly advances the asserted government interest, and (4) the regulation "is not

[1] Retailers make several other arguments as to why Sections 74-1 and 46-92 should be struck down as unconstitutional. Specifically, Retailers argue that (1) Section 46-92 is underinclusive, (2) the ordinances are void for vagueness, and (3) the ordinances violate equal protection. We find these arguments unpersuasive.

more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980).

As an initial matter, the district court correctly discerned that the solicitation ordinance targets commercial speech. *See id.* at 561, 100 S. Ct. at 2349 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"). Furthermore, the district court also correctly found that Retailers' commercial speech falls under the protection of the First Amendment.[2]

Moreover, the district court correctly found that the City's asserted interests are substantial: "substantial witness testimony" demonstrated that "solicitations and handbilling in Miami Beach's historic district is a problem that exists in fact, and that it causes annoyance and aesthetic harm." *See also Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806, 104 S. Ct. 2118, 2129 (1984) ("[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."); *Messer v. City of*

[2] The City alleges that Retailers' speech is false and misleading, and provided expert witness testimony showing that Retailers' claims about the ingredients and effectiveness of the products sold were "preposterous." However, the district court did not abuse its discretion in finding that there was no evidence proving that these sales pitches were made outside of the store. Because the ordinance seeks to prohibit commercial solicitation on the public right-of-way–not to regulate the efficacy of cosmetics–the district court correctly held that Retailers showed a substantial likelihood of success on their claim that this commercial speech was entitled to First Amendment protection. *See Edenfield*, 507 U.S. at 765, 113 S. Ct. at 1797 ("We need not parse [Plaintiff's] proposed communications to see if some parts are entitled to greater protection than the solicitation itself. This case comes to us testing the solicitation, nothing more. That is what the State prohibits and [Plaintiff] proposes.").

Douglasville, Ga., 975 F.2d 1505, 1510 (11th Cir. 1992) ("A government has a more significant interest in the aesthetics of designated historical areas than in other areas.").

Relatedly, the district court correctly noted that the anti-solicitation ordinance likely directly advances the City's interest, finding that "[t]he City adduced sufficient evidence . . . that the anti-solicitation ordinance has helped to reduce solicitations." *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S. Ct. 2404, 2422 (2001) (permitting the use of consensus, anecdotes, and "simple common sense" to justify speech restrictions) (quotations omitted). As such, the only remaining question is whether Section 74-1 is narrowly tailored to serve the substantial interests of the City. Because the preliminary record shows that the City disregarded numerous and obvious less-burdensome alternatives, the district court did not err when it concluded that Section 74-1 is not narrowly tailored.

The City bears the burden of demonstrating that Section 74-1 is appropriately tailored in light of the substantial interests it seeks to achieve. *See Edenfield*, 507 U.S. at 770-71, 113 S. Ct. at 1800. To survive First Amendment scrutiny, a commercial speech prohibition must employ "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not

necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480, 109 S. Ct. at 3035 (quotations and citation omitted). "By declining to impose . . . a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) traditionally subject to governmental regulation." *Id.* at 480-81, 109 S. Ct. at 3035 (quotations omitted).

In *Fox*, the Supreme Court provided concrete examples of what does and does not violate the First Amendment. The Court explained,

> None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding far less restrictive and more precise means. On the other hand, our decisions *upholding* the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. Rather, we said that it was up to the legislature to decide that point, so long as its judgment was reasonable. Similarly, in *Metromedia, Inc. v. San Diego*, where we upheld San Diego's complete ban

> of off-site billboard advertising, we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics.

Id. at 479, 109 S. Ct. at 3034 (citations and quotations omitted) (emphasis in original).

Similarly, this court has upheld prohibitions on commercial speech despite the availability of potentially less-restrictive alternatives. *See, e.g.*, *Messer*, 975 F.2d at 1511 (upholding a complete ban on off-premises signs in the City of Douglasville's historic district); *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528, 1532 (11th Cir. 1985) ("The district court also reached an erroneous conclusion under the fourth part of the *Central Hudson* analysis. It found that less restrictive means were available to effectuate the desired goals because the city could have employed time, place and manner restrictions on the operation of advertising vehicles rather than impose an outright ban. . . . In this case, Fort Lauderdale has not attempted to prohibit any advertising that offers no threat to traffic safety or aesthetic improvement: each advertising vehicle and craft contributes to the problem.").

However, there is a significant distinction between failing to employ less-restrictive means and completely disregarding obvious less-burdensome alternatives. While our analysis is "limited to whether the means are reasonably and narrowly drawn to further the objective," and we "should not attempt to

speculate as to whether less restrictive means exist," *Harnish v. Manatee Cty.*, 783 F.2d 1535, 1540 (11th Cir. 1986), "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13, 113 S. Ct. 1505, 1510 n.13 (1993). By ignoring far less restrictive and precise means, it is likely that an ordinance burdens substantially more speech than necessary. *See Fox*, 492 U.S. at 479, 109 S. Ct. at 3034.

Here, we affirm the preliminary injunction prohibiting the enforcement of Section 74-1 because the record suggests that the ordinance is not narrowly tailored–specifically that the City failed to consider numerous and obvious less-burdensome alternatives.[3] We need not speculate about potential alternatives because this preliminary record is replete with numerous and obvious less-burdensome options. The City itself offered these alternatives for the trial court's consideration. Thus, for example, the former Assistant City Manager testified that "things like charitable solicitations" are allowed in the same areas but are regulated

[3] The district court found that Section 74-1 was a disfavored "blanket ban," and consequently not narrowly tailored. It is unclear whether Section 74-1 is a blanket ban, and whether such status warrants an injunction. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508, 101 S. Ct. 2882, 2893 (1981) (stating that a blanket ban is permissible when it is "the most direct and perhaps only effective approach"). Because the record suggests that there are numerous and obvious less-burdensome alternative commercial speech restrictions, we conclude that Section 74-1 is not narrowly tailored, and we decline to reach the blanket ban issue.

by permits. Further, artists and vendors are allowed to sell their goods, but they are regulated "by a lottery," "they are spaced appropriately," their "volume is regulated," and "[t]he footprint[s] of the[ir] display[s] . . . [are] also heavily regulated." The City offered no explanation why it did not even consider these less-restrictive alternatives, which currently regulate charities, artists, and vendors, or why these alternatives could not also be used to regulate commercial solicitation.

Comparing Section 74-1 to the Key West ordinance at issue in *Sciarrino v. City of Key West* further highlights the existence of numerous and obvious less-burdensome alternatives. 83 F.3d 364 (11th Cir. 1996). While the Key West ordinance completely banned solicitation on public parking lots and public beaches, solicitation "was significantly restricted, but not banned, on five historic streets heavily trafficked by pedestrians." *Id.* at 366. Importantly, Key West allowed solicitation through a permitting system, which gave each business a certain number of solicitation permits and set other restrictions on solicitation. *See id*. Again, here, the City failed to even address the potential viability of such a system. While the law does not require the use of the least-restrictive means, such as a permitting system, an ordinance cannot be said to be narrowly tailored if the record shows that obvious less-burdensome alternatives were completely disregarded.

In short, the clear availability of obvious less-restrictive alternatives suggests, as it did to the district court on this preliminary record, that Retailers have established a substantial likelihood of success on the merits. As such, we affirm the grant of a preliminary injunction with respect to Section 74-1.

B. THE DISTRICT COURT CORRECTLY FOUND THAT RETAILERS WERE LIKELY TO SUCCEED ON THE MERITS WITH RESPECT TO SECTION 46-92.

Unlike Section 74-1, the district court proceeded directly to an overbreadth analysis when it considered Section 46-92, the anti-handbilling ordinance. To determine whether Section 46-92 is unconstitutionally overbroad, first it must be determined that the ordinance regulates more than just commercial speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S. Ct. 1186, 1191-92 (1982). Second, if non-commercial speech is prohibited, there must be a substantial risk that Section 46-92 will have an impermissible chilling effect on protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13, 93 S. Ct. 2908, 2916 (1973). Although overbreadth challenges are a disfavored mechanism for invalidating an ordinance, given the fact that Section 46-92 prohibits the distribution of "any handbill that conveys any information about any good or service provided by a business," the district court properly found that Retailers showed a substantial likelihood of success on their claim that the handbilling ordinance was overbroad.

In *Dimmitt*, we noted that the "overbreadth doctrine does not apply where the *entire* scope of the statute restricts only commercial speech." *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1571 (11th Cir. 1993) (emphasis in original). However, "[w]here the statute governs both commercial and noncommercial speech . . . a litigant with a commercial speech interest may nonetheless qualify by virtue of the overbreadth rule to assert the speech rights of third parties with noncommercial speech interests." *Id.*

The Supreme Court in *Fox* considered the State University System of New York's (SUNY's) prohibition of "private commercial enterprises [] operat[ing] on State University campuses or in facilities furnished by the University." *Fox*, 492 U.S. at 471-72, 109 S. Ct. at 3030 (quotations omitted). SUNY defined prohibited commercial speech as speech "where the end result is the intent to make a profit by the invitee." *Id*. at 482, 109 S. Ct. at 3036 (quotations omitted). The Court concluded that such a broad definition covered more than just "speech that proposes a commercial transaction," e.g., newspapers, and political advertisements. *Id*. (emphasis omitted). As such, the prohibition regulated both commercial and non-commercial speech and was subject to an overbreadth attack. *Id*.

Similarly, in *Solomon*, we found that Section 29-100(b)(2) of the Gainesville code, which prohibited "street graphics: signs or any other street graphics displaying any statement, word, character or illustration of an obscene, indecent or

immoral nature," regulated both commercial and non-commercial speech. *Solomon v. City of Gainesville*, 763 F.2d 1212, 1213 (11th Cir. 1985). This court looked at the stated intent, "to authorize street graphics, large enough to sufficiently convey a message about the owner or occupants of a particular property, the products or services available on such property, or the business activities conducted on such property, yet small enough to preserve and protect the natural beauty of the City and limit distractions to motorists," *id.* at 1214 (quotations and alteration omitted), and concluded "[n]owhere does the ordinance explicitly differentiate between commercial and non-commercial speech. Indeed, owners or occupants of a particular property in Gainesville may wish to display a street graphic with no commercial purposes but which involves protected speech." *Id*.

In contrast, while not analyzing the language under an overbreadth challenge, this court upheld the Key West ordinance that defined off-premise canvassing as the "distribution of information or solicitation of customers . . . in connection with a business." *Sciarrino*, 83 F.3d at 370.

Here, Section 46-92 prohibits the "distribution of commercial handbills," defined as "any handbill that conveys any information about any good or service provided by a business." The district court found that the prohibition extends to non-commercial speech. Specifically, the district court provided a number of

examples of non-commercial speech seemingly prohibited by Section 46-92, such as an animal-rights activist protesting McDonalds, the distribution of bumper stickers protesting the Seaquarium's treatment of whales, and a food critic who distributes flyers listing restaurant reviews in order to attract more visitors to her website.

By defining commercial handbills to include any information about a business, the language of Section 46-92 is similar to the prohibition in *Fox*. The ordinance seemingly covers more than just speech proposing a commercial transaction. Although the City argues that the ordinance distinguishes between commercial and non-commercial messages because it explicitly targets only commercial speech, the City's definition of "commercial handbilling" is problematic. The language is unlike the prohibition in *Sciarrino* where the text of the ordinance clearly stated that the prohibition applies when the target audience is a "customer." In contrast, a prohibition on "any" message about "any" good or service provided by a business can reasonably be read to prohibit non-commercial messages. Thus, Retailers have shown a substantial likelihood of success on their claim that Section 46-92 is susceptible to an overbreadth attack.

To succeed on an overbreadth challenge, Retailers "bear[] the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198

(2003) (quoting *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234 (1988)). The overbreadth doctrine is designed to remedy the chilling effects of overbroad statutes–statutes that "have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Taxpayers for Vincent*, 466 U.S. at 798, 104 S. Ct. at 2125. Given the threat to freedom of expression, traditional rules of standing are altered to permit litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2916. Thus, a statute found to be overbroad is "totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 613, 93 S. Ct. at 2916.

The Supreme Court, however, has recognized the overbreadth doctrine as "strong medicine" that should be "employed . . . sparingly and only as a last resort." *Id.* Thus, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S. Ct. at 2918. The fact that there may be some conceivable

impermissible applications is not enough to render a statute overbroad. *Taxpayers for Vincent*, 466 U.S. at 800, 104 S. Ct. at 2126.

In *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, the Supreme Court struck down an ordinance banning all First Amendment activity within Los Angeles International Airport as unconstitutional under the overbreadth doctrine. 482 U.S. 569, 574-75, 107 S. Ct. 2568, 2572 (1987). The Court found that the resolution

> [D]oes not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. . . . [I]t prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution.

Id.

Similarly, here, the prohibition on "any" message about "any" good or service provided by a business is overbroad. Section 46-92 burdens substantially more speech than necessary to further the City's interests. As the district court correctly points out, everything from a PETA demonstrator passing out flyers about a fast-food chain's treatment of animals to a Rabbi distributing a list of restaurants that serve kosher meals could potentially be prohibited under Section 46-92.

Moreover, there is no evidence in the record that this traditional non-commercial speech presents the same problems that commercial handbilling does.

The City acknowledges that the problems stem from commercial handbilling and it seeks to regulate only commercial handbilling. However, Section 46-92 is not worded in a sufficiently narrow manner to target only commercial handbilling. Thus, the district court correctly concluded that Retailers showed a substantial likelihood of success on their claim that Section 46-92 is overbroad.

IV. CONCLUSION

For the aforementioned reasons, we affirm the district court's order granting the preliminary injunction.

AFFIRMED.

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

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

DONCARLOS GARCIA and
ANNE GARCIA,

Appellants,

v. Case Nos. 5D16-1350 &
5D16-3055

NAVY FEDERAL CREDIT UNION and
56 COTTONWOOD COURT LAND TRUST,

Appellees.

_____/

Opinion filed August 11, 2017

Appeal from the Circuit Court
for Flagler County,
C. David Hood, Jr., Judge.

Paul Alexander Bravo, of P.A. Bravo,Coral
Gables, for Appellants.

Melissa A. Giasi, of Kass Shuler, P.A.,
Tampa, for Appellee, Navy Federal Credit
Union.

No Appearance for Appellee, 56
Cottonwood Court Land Trust.

PER CURIAM.

In this consolidated appeal, Doncarlos and Anne Garcia appeal the trial court's entry of final judgment of foreclosure in favor of Navy Federal Credit Union ("NFCU") (5D16-1350). The Garcias also appeal the trial court's denial of their motion to vacate the

writ of possession issued to 56 Cottonwood Court Land Trust (the "Trust") following the foreclosure sale (5D16-3055). We affirm the final judgment of foreclosure without further comment. For the following reasons, we sua sponte dismiss the portion of the appeal concerning the writ of possession for lack of appellate jurisdiction.

In November 2003, the Garcias executed a home equity line of credit agreement, secured by a second mortgage on their property, permitting them to borrow up to $75,000 from NFCU. The Garcias defaulted by failing to make the payment due October 1, 2007, and all subsequent payments. After a two-day bench trial, the trial court entered final judgment of foreclosure for NFCU. At the foreclosure sale in April 2016, the Trust submitted the winning bid for $230,000. The Flagler County Clerk issued a writ of possession to the Trust the following August. The Garcias then filed a verified emergency motion to vacate the writ of possession pursuant to Florida Rule of Civil Procedure 1.540(b), arguing, *inter alia*, that they did not receive proper notice of the foreclosure sale. The trial court denied the Garcias' motion.

Rule 1.540(b) permits a party to move to vacate a "final judgment, decree, order, or proceeding" on several grounds. Fla. R. Civ. P. 1.540(b). The rule does not, however, authorize a trial court to grant relief from a non-final order. Hialeah Hotel, Inc. v. Woods, 778 So. 2d 314, 315 (Fla. 3d DCA 2000) ("Rule 1.540 applies only to final judgments, not to interlocutory orders."). Moreover, "[a]n order entered on a motion to vacate a non-final order, even where the motion mislabels the non-final order as final, is not reviewable under Florida Rule of Appellate Procedure 9.130(a)(5)." Bennett's Leasing, Inc. v. First St. Mortg. Corp., 870 So. 2d 93, 98 (Fla. 1st DCA 2003); see also Hi-Tech Mktg. Group, Inc. v. Thiem, 659 So. 2d 479, 479 (Fla. 4th DCA 1995) ("Appellant seeks review of a

non-final order denying its motion to vacate a non-final order striking its pleadings as a discovery violation sanction. This is not a 'final order' as contemplated by rule 1.540(b) Florida Rules of Civil Procedure; therefore, this appeal must be dismissed sua sponte for lack of jurisdiction.").

The Third District Court addressed this precise issue in Bryant v. Wells Fargo Bank, N.A., 182 So. 3d 927, 928 (Fla. 3d DCA 2016). Like in this case, the borrowers in Bryant appealed both a final judgment of foreclosure and an order denying their rule 1.540(b) motion to quash the writ of possession in favor of the bank. Id. The appellate court found that the borrowers inappropriately utilized rule 1.540(b), explaining that "a motion to vacate pursuant to Rule 1.540(b) cannot be directed towards non-final orders such as the writ of possession." Id. at 930. The court further determined that "even if the motion to vacate had been the proper procedural vehicle below," it nonetheless lacked "jurisdiction to review the trial court's denial of that motion because it does not fall within the purview of appealable, non-final orders set forth in [Florida Rule of Appellate Procedure] 9.130(a)(3)." Id.; accord Nacius v. One W. Bank, FSB, 211 So. 3d 152, 153 (Fla. 4th DCA 2017) (sua sponte dismissing appeal challenging trial court's denial of motion to vacate writ of possession based on Bryant).

Based on the foregoing, we lack jurisdiction to consider the Garcias' appeal of their denied rule 1.540(b) motion directed towards the non-final order granting a writ of possession to the Trust. Accordingly, we affirm the final judgment of foreclosure and sua sponte dismiss the portion of the appeal concerning the writ of possession.

AFFIRMED in part; DISMISSED in part.

COHEN, C.J., SAWAYA and WALLIS, JJ., concur.

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

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

WILLIAM E. PACE, TRUSTEE
OF THE EARL H. PACE
IRREVOCABLE TRUST,

Appellant,

v. Case No. 5D16-748

BANK OF NEW YORK MELLON TRUST
COMPANY NATIONAL ASSOCIATION
F/K/A BANK OF NEW YORK TRUST
COMPANY, N.A AS SUCCESSOR TO
JPMORGAN CHASE BANK, N.A.,
AS TRUSTEE FOR RESIDENTIAL ASSET
MORTGAGE PRODUCTS, ETC.,

Appellee.
_____/

Opinion filed August 11, 2017

Appeal from the Circuit Court
for Brevard County,
Lisa Davidson, Judge.

Dennis E. Winesett, of Law Office of Dennis E. Winesett, Orlando, for Appellant.

Diana B. Matson and Joshua R. Levine, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, and Michael W. Smith, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, for Appellee.

BERGER, J.

William E. Pace (Trustee), trustee of the Earl H. Pace Irrevocable Trust (Trust), appeals the trial court's order granting summary judgment on Trustee's three-count counterclaim in favor of Bank of New York Mellon Trust Co., N.A. (Bank), acting as trustee for Residential Asset Mortgage Products. The order granting summary judgment dismissed the entire counterclaim with prejudice and without leave to amend. We affirm the dismissal of counts two[1] and three.[2] However, because the trial court erred in finding that Trustee's counterclaim, alleging tortious interference, with a business relationship was barred by the litigation privilege based on Bank's claim of absolute immunity, we reverse the order granting summary judgment on count one.

In December 2007, Bank filed a foreclosure complaint against property owned by the Trust in Cocoa Beach, Florida. As the Trust had leased the property to multiple tenants, Bank named these tenants as defendants and served them with process along with Trustee and the other parties.

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[1] See Perl v. Omni Int'l of Miami, Ltd., 439 So. 2d 316, 317 (Fla. 3d DCA 1983) (concluding that fraud count in complaint based on earlier unemployment compensation case was barred by litigation privilege (citing Robertson v. Indus. Ins. Co., 75 So. 2d 198, 199 (Fla. 1954))).

[2] See LatAm Invs., LLC v. Holland & Knight, LLP, 88 So. 3d 240, 242-43 (Fla. 3d DCA 2011) (holding litigation privilege applied to action for abuse of process (citing Am. Nat'l Title & Escrow of Fla. v. Guar. Title & Tr. Co., 748 So. 2d 1054, 1055 (Fla. 4th DCA 2000))). Although count three is actually a claim for malicious prosecution rather than abuse of process, see Yoder v. Adriatico, 459 So. 2d 449, 450 (Fla. 5th DCA 1984), count three remains subject to dismissal despite the Florida Supreme Court's determination in Debrincat v. Fischer, 217 So. 3d 68, 70-71 (Fla. 2017), that such claims are not barred by the litigation privilege. An element of malicious prosecution is the termination of the original proceeding in favor of the party asserting that it was malicious. See Debrincat, 217 So. 3d at 70 (quoting Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994)); Yoder, 459 So. 2d at 450-51. Consequently, malicious prosecution claims cannot be brought in a counterclaim in the original proceeding. See Yoder, 459 So. 2d at 451.

Eventually, Trustee filed an answer along with affirmative defenses and the three-count counterclaim. Count one alleged tortious interference with the Trust's business relationships with its tenants on the property. Specifically, Trustee alleged that when Bank served process on the tenants, Bank's process server demanded to inspect the property, told the tenants they would soon need a new place to live, and encouraged the tenants to withhold paying rent to the Trust. Trustee further alleged that the Trust's tenants ceased paying rent to the Trust and refused to vacate the property. Count two alleged fraud and asserted that Bank was aware it did not have standing to file the foreclosure complaint and that it filed false affidavits, indorsements, and assignments with the trial court in support of its claim. Count three was titled abuse of process. In count three, Trustee alleged that Bank's filing of the foreclosure complaint was a malicious and frivolous abuse of process because Bank was aware that it did not have standing to foreclose.

Bank asserted absolute immunity under the litigation privilege as an affirmative defense to all three counts in Trustee's counterclaim and filed a motion for summary judgment primarily on that basis. The trial court granted the motion for summary judgment and dismissed the counterclaim with prejudice. Trustee asserts that this was error, arguing that the litigation privilege does not apply to his counterclaim.

Statements or acts are covered by absolute immunity under the litigation privilege if they are (1) made or committed in the course of judicial or quasi-judicial proceedings and (2) are "connected with, or relevant or material to, the cause in hand or subject of inquiry." DelMonico v. Traynor, 116 So. 3d 1205, 1212 (Fla. 2013) (quoting Myers v. Hodges, 44 So. 357, 361 (Fla. 1907)); accord Echevarria, McCalla, Raymer, Barrett &

Frappier v. Cole, 950 So. 2d 380, 383-84 (Fla. 2007); Kidwell v. Gen. Motors Corp., 975 So. 2d 503, 505 (Fla. 2d DCA 2007). Absolute immunity shields statements by judges, counsel, parties, and witnesses during the proceedings. See Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) (citing Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992)); Myers, 44 So. at 360-61. Absolute immunity covers ongoing litigation and "conduct that is 'necessarily preliminary' to judicial proceedings." AGM Invs., LLC v. Bus. Law Grp., P.A., 219 So. 3d 920, 924 (Fla. 2d DCA 2017) (quoting Fridovich, 598 So. 2d at 66).

In count one, the tortious interference with business relationships claim alleges two acts of interference. The first act was filing the foreclosure complaint. The second act involved the process server's alleged comments to Trust's tenants. In the context of a tortious interference with business relationships claim, the act of filing the complaint is subject to absolute immunity under the litigation privilege. See Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., 639 So. 2d at 608 (finding that litigation privilege accords absolute immunity in regards to filing complaint for tortious interference with business relationship). However, Bank's process server's alleged comments to the tenants are not covered by absolute immunity under the litigation privilege because they were unnecessary to effectuate service of process. See § 48.031(1)(a), Fla. Stat. (2008); Matthews v. U.S. Bank, Nat'l Ass'n, 197 So. 3d 1140, 1145-46 (Fla. 4th DCA 2016) (noting that even when process server leaves papers with another resident at party's residence and is required to provide information about the contents of the papers, process server need only inform recipient that the papers contain a lawsuit (citing Mauro v. Wells Fargo Bank, N.A., 180 So. 3d 1083, 1085 (Fla. 4th DCA 2015))).

Although statements and acts that are not covered by absolute immunity under the litigation privilege may still be protected by qualified immunity under the litigation privilege if they are pertinent to the judicial proceeding, see DelMonico, 116 So. 3d at 1213-14, 1217-20, we decline to reach the qualified immunity issue because it was not raised below. See AGM Invs., LLC, 219 So. 3d at 927 n.5.

Accordingly, we reverse the trial court's order granting summary judgment on count one and remand for further proceedings.[3] In all other respects, we affirm.

AFFIRMED, in part; REVERSED, in part; and REMANDED.

ORFINGER and WALLIS, JJ., concur.

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[3] Bank's argument that the grant of summary judgment should be affirmed based on the affidavit of its process server is without merit as the affidavit is limited to the process server's general practices, does not explicitly state that the affiant was the one who actually served process on the tenants, and it contains no claims about what actually happened when the tenants were served, which in the summary judgment context amounts to nothing more than factual conclusions. See Johns v. Dannels, 186 So. 3d 620, 622 (Fla. 5th DCA 2016) ("An affidavit in support of summary judgment may not be based on mere conclusions of fact or law." (citing Dep't of Fin. Servs. v. Associated Indus. Ins. Co., 868 So. 2d 600, 602 (Fla. 1st DCA 2004))); TSI Se., Inc. v. Royals, 588 So. 2d 309, 310 (Fla. 1st DCA 1991).

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STELLA PARTRIDGE a/k/a STELLA GOMEZ SEITZ a/k/a M. STELLA GOMEZ SEITZ, Appellant, v. NATIONSTAR MORTGAGE, LLC; RICARDO PARTRIDGE; and THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as trustee for the certificateholders of CWHEQ, Inc., Home Equity Loan Asset Backed Certificates, Series 2006-S6; Appellees.	)	Case No. 2D16-3081

Opinion filed August 11, 2017.

Appeal from the Circuit Court for Pinellas County; Cynthia J. Newton, Judge.

Nicholas Taldone, New Port Richey, for Appellant.

Nancy M. Wallace of Akerman LLP, Tallahassee; William P. Heller of Akerman LLP, Fort Lauderdale; and Celia C. Falzone of Akerman LLP, Jacksonville, for Appellee Nationstar Mortgage, LLC.

No appearance for remaining Appellees.

LaROSE, Chief Judge.

Stella Partridge, also known as Stella Gomez Seitz ("Ms. Seitz"), appeals a final judgment of foreclosure. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). Ms. Seitz, who unsuccessfully moved for involuntary dismissal at trial, argues that the trial court erred in admitting the payment history into evidence. She also contends that Nationstar Mortgage, LLC ("Nationstar"), lacked standing to foreclose. Because Nationstar failed to prove standing, we reverse and remand for further proceedings.

Standard of Review

We review an order denying a motion for involuntary dismissal de novo. See Deutsche Bank Nat'l Tr. Co. v. Kummer, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016); Deutsche Bank Nat'l Tr. Co. v. Huber, 137 So. 3d 562, 563 (Fla. 4th DCA 2014).

Background

Ms. Seitz' ex-husband, Ricardo Partridge, executed a promissory note in favor of United Capital Mortgage Corporation in 2002. A mortgage executed by Ms. Seitz and Mr. Partridge secured the debt. After they failed to make payments on the note, Bank of America, N.A., the then-noteholder sued to foreclose in 2011. Bank of America filed the original note and mortgage with the trial court. The case was dismissed in 2012.

In 2013, Nationstar began servicing the loan. A year later, Nationstar filed a foreclosure action. With its complaint, Nationstar filed a certification stating that the original note and mortgage remained with the trial court. Nationstar asked the trial court to take judicial notice of the originals and transfer them to the Nationstar foreclosure case. The trial court granted the motion.

At trial, Nationstar introduced a welcome letter advising Mr. Partridge that Nationstar was the assignee of the mortgage. An assignment of the mortgage was also part of the evidence before the trial court. The evidence at trial also included a letter from Bank of America to Mr. Partridge advising him that Nationstar would now be servicing the loan.

At trial, Cris Thomas, a Nationstar senior default case specialist, testified about Nationstar's business records. She worked for Nationstar and was familiar with its business practices. She testified that Nationstar's practice was to leave the original note with the clerk of court so as to avoid loss. She also stated that the payment history reflecting the debt owed was in Nationstar's file and was maintained in accordance with its normal business procedures.

Analysis

Issue 1: Admission of Payment History

Ms. Seitz argues that the trial court erred in allowing the payment history into evidence. We disagree. The payment history reflected transactions made in the ordinary course of business. Ms. Thomas testified adequately about her knowledge of Nationstar's business records. See Cayea v. CitiMortgage, Inc., 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014) (noting that the authenticating witness to the business record "just need be well enough acquainted with the activity to provide testimony" (citing Cooper v. State, 45 So. 3d 490, 493 (Fla. 4th DCA 2010))). The trial court did not err in admitting the payment history into evidence.

Issue 2: Standing

"The party seeking foreclosure must present evidence that it owns and holds the note and mortgage to establish standing to proceed with a foreclosure action."

Stone v. BankUnited, 115 So. 3d 411, 413 (Fla. 2d DCA 2013) (quoting Mazine v. M & I Bank, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011)). "A plaintiff may prove that it has standing to foreclose 'through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer.' " Id. (quoting BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 939 (Fla. 2d DCA 2010)).

In Geweye v. Ventures Trust 2013-I-H-R, 189 So. 3d 231, 232 (Fla. 2d DCA 2016), we held that Venture failed to prove standing to foreclose. JP Morgan Chase Bank, N.A. ("Chase"), filed a foreclosure suit alleging that it held the note. Id. Chase filed the original note with the trial court. Id. A year later, Chase successfully moved to substitute Ventures as the party plaintiff, alleging that it had transferred the mortgage to Ventures. Id. Although Ventures introduced an assignment of mortgage at trial, "[t]he assignment . . . did not purport to assign any interest in the note." Id. Indeed "the parties d[id] not dispute that there was no assignment of the note." Id. We concluded that Chase had standing when it filed its foreclosure complaint. Id. at 232-33. However, the order of substitution, by itself, did not extend that standing to Ventures. Id. at 233.

Nationstar urges us to disregard Geweye. Nationstar contends that "the undisputed evidence was that, rather than risk losing the note through multiple transfers, Nationstar was using the clerk [of the court] as a bailee to continue possessing the note on its behalf until it could complete the foreclosure." We are not persuaded.

This case is remarkably similar to Geweye. Although Bank of America assigned the mortgage to Nationstar, it does not appear that Nationstar acquired an interest in the note. Further, Nationstar's unilateral decision to leave the original note

and mortgage with the trial court does not establish possession of the note. "A plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special endorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note." Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308, 310 (Fla. 2d DCA 2013).

Here, the original note was filed with the trial court long before Nationstar commenced its foreclosure action. An assignment of the note from Bank of America may have gone a long way to establish Nationstar's standing. Unfortunately for Nationstar, it has not established "that it was the holder or nonholder in possession for purposes of standing." Geweye, 189 So. 3d at 233 (citing Creadon v. U.S. Bank N.A., 166 So. 3d 952, 954 (Fla. 2d DCA 2015)).

Conclusion

We reverse the final judgment and direct the trial court to grant Ms. Seitz' motion for involuntary dismissal because Nationstar failed to prove standing.

Reversed with instructions.

WALLACE and LUCAS, JJ., Concur.

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

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

DR. AMANDA SAUNDERS,

Appellant,

v. Case No. 5D17-45

ST. CLOUD 192 PET DOC HOSPITAL, LLC,

Appellee.

_____/

Opinion filed August 11, 2017

Non-Final Appeal from the Circuit Court
for Osceola County,
Scott Polodna, Judge.

Travis Hollifield, of Hollifield Legal Centre,
and Margaret E. Kozan, of Margaret E.
Kozan, P.A., Winter Park, for Appellant.

John Finnigan, of Finnigan Law Firm, P.A.,
Maitland, for Appellee.

WALLIS, J.

Dr. Amanda Saunders appeals the trial court's order granting a motion to compel arbitration filed by appellee, St. Cloud 192 Pet Doc Hospital, LLC ("Pet Doc"). Because

the trial court improperly granted Pet Doc's motion to compel arbitration, we reverse and remand for further proceedings.[1]

In September 2015, Pet Doc hired Saunders (then, Dalton) as its managing doctor of veterinary medicine. The parties executed an employment agreement containing the following arbitration provision: "Any claim or controversy that arises out of or relates to this agreement, or the breach of it, shall be settled by arbitration in accordance with the rules of the American Arbitration Association." (emphasis added). In June 2016, Saunders filed a four-count complaint against Pet Doc, alleging: (I) sex discrimination in violation of Osceola County Ordinance Section 27, (II) negligent hiring, (III) negligent training, and (IV) negligent supervision. The allegations stemmed from various incidents involving one of Saunders's co-workers, which she alleges resulted in her constructive termination due to a hostile work environment. In its answer, Pet Doc generally denied Saunders's allegations and repeatedly asserted the following: "[Pet Doc] denies that jurisdiction and venue are proper in this Court due to an arbitration provision in an Employment Agreement that [Saunders] entered into with [Pet Doc] and [Pet Doc] denies liability as to all of [Saunders's] claims in her Complaint."

In October 2016, Pet Doc moved to compel arbitration and stay the proceedings, citing the employment agreement's arbitration clause. Pet Doc argued Saunders's claims arose "from the parties' employment relationship that only existed as a result of the parties' execution of their Employment Agreement" and, thus, fell well within the scope of

[1] Because we find that Saunders's complaint did not raise arbitrable claims, we do not address the additional issue of waiver.

the broad arbitration clause. Pet Doc also cited the employment agreement's clause concerning harassment and discrimination, which states:

> It is the policy of Company to maintain a model workplace free from harassment and other forms of discrimination based on race, color, religion, sex, national origin, age, disability, and sexual orientation. Accordingly, Company has zero tolerance for harassment or any other form of unlawful discrimination. Company will not tolerate retaliation against any employee for reporting matters under this policy or procedure, or for assisting in any inquiry about such a report. Employee agrees to strictly comply with Company policy.

After a hearing, the trial court compelled arbitration.

"Under both federal statutory provisions and Florida's arbitration code, there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). According to Seifert, "the phrase 'arising out of or relating to' the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims." 750 So. 2d at 637. However, the Florida Supreme Court also qualified this otherwise broad scope:

> [E]ven in contracts containing broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause.
>
> [T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one "arising out of or relating to" the agreement. . . . [F]or a tort claim to be considered "arising out of or relating to" an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself.

Id. at 638.

Pet Doc specifically argues a significant relationship existed between the agreement and the claims because, "[w]ithout the Employment Agreement, Dr. Saunders would not have been an employee at Pet Doc, and Pet Doc would not have had any statutory or common law duties regarding the claims Dr. Saunders alleged." For several reasons, this argument fails. Seifert rejected such logic, holding, "While it is certainly true that this dispute would not have arisen but for the sales agreement between U.S. Home and the Seiferts, we conclude that the mere existence of such contract is not sufficient to compel that this dispute be arbitrated." Id. at 642. The court noted that the complaint's allegations neither asserted duties arising from the subject sales contract nor even referred to or mentioned the agreement, and thus concluded that the tort action dispute in the case did not bear "a significant relationship to the contract or that the parties in contracting necessarily contemplated the existence and arbitration of future tort claims for personal injuries based on a party's common law negligence." Id.

Although the employment agreement created the legal relationship between Pet Doc and Saunders, her claims did not relate directly to the contract itself. Cf. Sears Authorized Termite & Pest Control, Inc. v. Sullivan, 816 So. 2d 603, 606 (Fla. 2002) ("Sullivan's cause of action rests upon the failure to perform the agreement."); Terminix Int'l Co. v. Ponzio, 693 So. 2d 104, 108 (Fla. 5th DCA 1997) (finding that "[t]he controversy or claims here clearly arise out of or derive from Terminix's contractual undertaking" because "[t]he allegations of the complaint assert that Terminix had a duty, deriving from its contractual agreement, to eradicate certain pests and that it failed to do so resulting in bodily injury, etc. to the plaintiffs"). Instead, Saunders's complaint addressed Pet Doc's

duties under an Osceola County Ordinance (employer sex discrimination) and common law (negligence), not any particular duties created by the contract. Importantly, an employer-employee relationship may exist even without the execution of an employment agreement. Even without entering this agreement, Saunders could have raised the identical claims. Cf. Beazer Homes Corp. v. Bailey, 940 So. 2d 453, 460 (Fla. 5th DCA 2006) ("[I]n this case, the duties and relationships of the parties were created only by the sales contract. No third persons could have sued Beazer under these circumstances, although indeed, there is a general common law duty not to lie or misrepresent facts in connection with selling real estate."); Five Points Health Care Ltd. v. Alberts, 867 So. 2d 520, 521 (Fla. 1st DCA 2004) (finding arbitrability where the statutory rights raised in the complaint "arise only as a result of an admission and, hence, an admission agreement, with a nursing home facility"). Thus, the claims' general relation to her employment does not demand consideration of the underlying employment agreement.

Pet Doc argues the agreement's reference to a zero tolerance policy regarding workplace harassment and discrimination requires the arbitration of Saunders's sexual discrimination and negligence claims. However, the language of this provision addresses only Pet Doc's duty to terminate anyone who harasses or discriminates and Saunders's duty to comply with this policy, presumably by not harassing or discriminating against any of her co-workers. Saunders did not allege that Pet Doc breached the employment agreement by failing to comply with its zero tolerance policy. This provision, combined with the arbitration clause, does not necessarily communicate that the parties "contemplated the existence and arbitration of" claims like those raised by Saunders.

Seifert, 750 So. 2d at 642. Therefore, the trial court erred by compelling the arbitration of Saunders's claims.

REVERSED and REMANDED.

PALMER and EDWARDS, JJ., concur.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10498

D.C. Docket No. 9:15-cv-80665-DMM

EMILY SCHWEITZER,

Plaintiff - Appellant,

versus

COMENITY BANK,

Defendant - Appellee.

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

(August 10, 2017)

Before JORDAN and JILL PRYOR, Circuit Judges, and COOGLER,* District Judge.

JORDAN, Circuit Judge:

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* The Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama, sitting by designation.

In law, as in life, consent need not be an all-or-nothing proposition. Having already concluded that the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., allows for the oral revocation of consent, *see Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014), we now hold that the Act permits a consumer to partially revoke her consent to be called by means of an automatic telephone dialing system.

I

As relevant here, the TCPA makes it unlawful for "any person," absent the "prior express consent of the called party," to make any non-emergency call "using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service[.]" 47 U.S.C. § 227(b)(1)(A)(iii). Anyone who violates the TCPA may be sued in federal court for "actual monetary loss" or $500 in damages for each violation, "whichever is greater." § 227(b)(3)(B). Treble damages are also available for knowing or willful violations. § 227(b)(3) (concluding language).

One of the key concepts in § 227(b)(1)(A)(iii) is consent. In *Osorio*, we applied common-law consent principles and held that, absent a contractual restriction to the contrary, the TCPA allows a consumer to orally revoke her consent to receive automated calls. *See Osorio*, 746 F.3d at 1255 ("We . . . conclude that Betancourt and Osorio, in the absence of any contractual restriction

to the contrary, were free to orally revoke any consent previously given to State Farm to call No. 8626 in connection with Betancourt's credit-card debt.").

A

Emily Schweitzer applied for, and was issued, a credit card by Comenity Bank in 2012. In her application, she provided her cellular phone number to Comenity, and the district court concluded that she had initially consented to allow Comenity to call her on this number. *See* D.E. 82 at 5. Because no one challenges that conclusion on appeal, we assume without deciding that it is correct. *Cf. In the Matter of Rules & Regulations Implementing the TCPA*, 7 F.C.C. Rcd. 8752, 8769, 1992 WL 690928 (1992) ("[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.").

In 2013, when Ms. Schweitzer failed to make required payments on her credit-card account, Comenity placed calls to her cellular phone concerning the delinquency. Comenity used an automated telephone dialing system falling within the purview of the TCPA to make hundreds of such calls.

On October 13, 2014, a Comenity employee called Ms. Schweitzer, told her that she was two payments behind on her account, and asked if she could make a $35 payment. In response, Ms. Schweitzer said the following:

> Unfortunately I can't afford to pay [my past due payment] right now. And if you guys cannot call me, like, in the morning and during the work day, because I'm working, and I can't really be talking about these things while I'm at work. My phone's ringing off the hook with you guys calling me.

D.E. 24-2 at 18. The employee replied that "[i]t's a phone system. When it's reporting two payments past due, it's a computer that dials. We can't stop the phone calls like that." *Id.* at 18–19.

Five months later, on March 19, 2015, a different Comenity employee called Ms. Schweitzer about her past-due account. During that conversation, Ms. Schweitzer twice told the employee to please stop calling her. *See, e.g.*, D.E. 24-2 at 21 ("Can you just please stop calling? I'd appreciate it, thank you very much."). Comenity did not place any more automated calls to Ms. Schweitzer's cellular phone after this conversation.

B

Ms. Schweitzer sued Comenity for violating the TCPA. She alleged that during the October 13 conversation she had revoked her consent to have Comenity make calls to her cellular phone using an automatic telephone dialing system. And she claimed that Comenity violated the TCPA by making over 200 automated calls to that phone between October of 2014 and March of 2015.

The district court, "applying the common-law concept of revocation," granted summary judgment in favor of Comenity on Ms. Schweitzer's TCPA

claim. First, Comenity "did not know and should not have had reason to know that [Ms. Schweitzer] wanted no further calls." D.E. 82 at 7. Second, Ms. Schweitzer did not "define or specify the parameters of the times she did not want to be called," and as a result "no reasonable jury could find that [she] revoked consent to be called[.]" *Id.* at 7–8.

Ms. Schweitzer now appeals. Exercising plenary review, *see, e.g.*, *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1242–43 (11th Cir. 2001), and with the benefit of oral argument, we reverse the district court's grant of summary judgment. The TCPA allows a consumer to partially revoke her consent to receive automated calls, and there is an issue of material fact as to whether Ms. Schweitzer's statements during the October 13 conversation constituted a revocation of consent to be called in the morning and during the work day.

II

In defending the district court's summary judgment order, Comenity makes two arguments, one legal and one factual. The legal argument is that the TCPA does not permit partial revocations of consent. As Comenity puts it, the only effective revocations are unequivocal requests for no further communications whatsoever. *See* Appellee's Br. at 17–21. The factual argument is that, even if partial revocation of consent is possible, no reasonable jury could find that Ms. Schweitzer's statements on October 13 constituted a revocation of her consent

to be called in the morning or during work hours. *See id.* at 22–29. We address each argument below.

A

The TCPA was enacted to address certain invasive practices related to "unrestricted telemarketing," and is designed to protect consumers from receiving unwanted and intrusive telephone calls. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). Although the TCPA is silent on the issue of revocation, our decision in *Osorio* holds that a consumer may orally revoke her consent to receive automated phone calls. *See Osorio*, 746 F.3d at 1255.

We reasoned in *Osorio* that, based upon statutory silence regarding the means for providing or revoking consent, we could infer that Congress intended for the TCPA to incorporate the common-law understanding of consent, which generally allows for oral revocation. *See id.* Moreover, we explained that "allowing consent to be revoked orally is consistent with the government interest articulated in the legislative history" of the TCPA—namely, enabling the recipient of incessant and unwanted calls to "tell[ ] the autodialers to simply stop calling." *Id.* at 1255–56 (internal quotation marks and citation omitted). Because the TCPA is silent as to the partial revocation of consent, our analysis is again informed by common-law principles.

At common law, consent is a willingness for certain conduct to occur. *See* Restatement (Second) of Torts § 892A(1) (1979); William Prosser, Law of Torts § 18, at 101 (4th ed. 1971). Such willingness can be limited, i.e., restricted. *See* Restatement (Second) of Torts § 892A(3) & cmt. g. As one treatise has put it, a person "may limit her consent as she likes, consenting to one act but not another, or to acts at one time but not another, or to acts under some conditions but not others." Dan Dobbs et al., 1 The Law of Torts § 108, at 328 (2d ed. 2011). So, if an actor exceeds the consent provided, the permission granted does not protect him from liability for conduct beyond that which is allowed. *See* Restatement (Second) of Torts § 892A(4) & cmt. h. *Cf. McCabe v. Vill. Voice, Inc.*, 550 F. Supp. 525, 529 (E.D. Pa. 1982) (addressing consent for photograph to appear in a certain publication).

The notion of limited consent finds support in other areas of federal law. For example, the Fourth Amendment allows a person to provide limited consent to a search. *See, e.g.*, *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). And under the consent provision of the federal wiretapping statute, 18 U.S.C. § 2511(2)(d), a person can agree to only certain calls being recorded. *See, e.g.*, *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983) ("We can think of no reason why consent . . . cannot be limited. We therefore hold that consent

within the meaning of [§] 2511(2)(d) is not necessarily an all or nothing proposition; it can be limited.”).

We therefore conclude that the TCPA allows a consumer to provide limited, i.e., restricted, consent for the receipt of automated calls. It follows that unlimited consent, once given, can also be partially revoked as to future automated calls under the TCPA. “The consent principle . . . makes [a person’s] right of self-determination or autonomy the centerpiece of the law on intentional torts.” Dobbs, The Law of Torts § 105, at 319.

Our conclusion is supported by the maxim that the greater power normally includes the lesser. We think it logical that a consumer’s power under the TCPA to completely withdraw consent and thereby stop all future automated calls, *see Osorio*, 746 F.3d at 1255, encompasses the power to partially withdraw consent and stop calls during certain times. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345–46 (1986) (concluding that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling”); *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43, 48 (1897) (“The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”).

Comenity argues, however, that a recent declaratory ruling by the FCC precludes partial revocation of consent under the TCPA. *See In the Matter of Rules & Regulations Implementing the TCPA*, 30 F.C.C. Rcd. 7961, 2015 WL 4387780 (2015). For a number of reasons, we disagree. For starters, the FCC concluded that "[n]othing in the language of the TCPA or its legislative history supports the notion that Congress intended to override a consumer's common law right to revoke consent." *Id.* at 7994. The ruling therefore does not cast doubt on our reliance on common-law principles. Moreover, the issue of partial revocation was not before the FCC in 2015. The language Comenity relies on—that "consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages," *id.* at 7996—was used by the FCC in rejecting a creditor's claim that express consent, once given, cannot be revoked at all under the TCPA. This language cannot be read out of context to forbid the partial revocation of consent. Indeed, other language in the FCC's ruling, although admittedly not conclusive, cuts against Comenity's all-or-nothing view of consent. *See id.* (concluding that "callers may not control consumers' ability to revoke consent").[1]

[1] "Congress has conferred upon the FCC general authority to make rules and regulations necessary to carry out the provisions of the TCPA." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1117 (11th Cir. 2014). Although the FCC issued its 2015 ruling after the events in this case, we agree with the parties that we should treat it as persuasive because it is clarifying in nature as to the matter of consent. *See Osorio*, 746 F.3d at 1256 (according persuasive effect to FCC ruling issued after events in the case had taken place). "[C]oncerns about retroactive

The district court was concerned that partial revocation of consent might present "logistical and technical challenges to callers and present evidentiary difficulties for those attempting to recover under the TCPA." *See* D.E. 82 at 8 n.8. The potential for such complications, however, is not enough to limit a consumer's powers under the TCPA. In any event, as Comenity's own representatives recognized, *see* D.E. 35-7 at 39–40, it is technologically feasible (though maybe more expensive) to program the industry's sophisticated software to place calls to a consumer only during certain times. And a creditor can always decide that, if a consumer opts for partial revocation, it makes more practical and business sense to just not place any more automated calls to her.

B

We now turn to whether Ms. Schweitzer's statements on October 13 constituted a partial revocation of consent under the TCPA, and precluded Comenity from placing subsequent automated calls to her in the morning and during work hours. This issue is close, but we conclude that on this record the matter of partial revocation is for the jury.

Osorio quoted with approval the Third Circuit's opinion in *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270–71 (3d Cir. 2013), which in turn

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application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law." *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999).

quoted the Restatement (Second) of Torts. *See Osorio*, 746 F.3d at 1253. The Restatement explains that "consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct." Restatement (Second) of Torts § 892A(5), cmt. i. We apply this common-law standard here, as it generally dovetails with the FCC's view that "consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages." *In the Matter of Rules*, 30 F.C.C. Rcd. at 7996. *See also Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1048 (9th Cir. 2017) (concluding that "[i]t is reasonable for the FCC to interpret the TCPA to permit revocation of consent," and applying the FCC's "clearly expresses" standard).

On October 13, Ms. Schweitzer said the following to the Comenity employee: "[I]f you guys cannot call me, like, in the morning and during the work day, because I'm working, and I can't really be talking about these things while I'm at work. My phone is ringing off the hook with you guys calling me." Although this statement is undisputed, that does not necessarily mean that summary judgment in anyone's favor is appropriate. As we have said on more than one occasion, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the district court should deny summary judgment." *St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co.*, 198 F.3d 815, 819 (11th Cir. 1999). *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (reversing order

granting summary judgment: "Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding.").

According to the district court, no reasonable jury could find that Ms. Schweitzer partially revoked her consent to receive automated calls on October 13 because she did not specify what "the morning" and "during the work day" meant. A jury could certainly find that Ms. Schweitzer—like the protagonist of a recent hit song—was too equivocal, *cf.* Carly Rae Jepsen, *Call Me Maybe*, on Curiosity (Universal Music Canada 2012), but we do not think that the lack of specificity is fatal to her claim of partial revocation.

The district court correctly explained, *see* D.E. 82 at 8 n.8, that the word "morning" can mean the "first or early part of the day, lasting from midnight to noon or from sunrise to noon," or it can mean sunrise or dawn. *See* 1 Shorter Oxford English Dictionary 1833 (5th ed. 2002); The American Heritage Dictionary of the English Language 1144 (4th ed. 2009). And the "work day" is defined as the "part of the day in which one works," American Heritage Dictionary at 1982, a definition which is itself vague and tautological.

Yet "the morning" and "the work day" cannot be viewed, defined, or analyzed abstractly or in isolation. They should (or at least can be) understood in the context of a customer trying to get a creditor not to call her at certain times of

the day. The "meaning of language is inherently contextual," *Moskal v. United States*, 498 U.S. 103, 108 (1990), and "the scope of consent, like its existence, depends heavily upon implications and the interpretation of circumstances." Dobbs, The Law of Torts § 108, at 328–29.

As we have noted, under the common law consent ends when the actor knows or has reason to know that the person is no longer willing to allow certain conduct. Notably, Comenity's personnel testified that they understood what Ms. Schweitzer meant. The Comenity employee who spoke to Ms. Schweitzer on October 13 acknowledged that she "was specific" and wanted the company to "make appointed phone calls." The employee therefore did not need to ask Ms. Schweitzer what she wanted. *See* D.E. 35-5 at 29, 56. A Comenity corporate representative similarly said that there was nothing unclear about Ms. Schweitzer's request. *See* D.E. 35-1 at 20, 25. Although the subjective understanding of these Comenity employees may not be determinative concerning the effect of Ms. Schweitzer's October 13 statements, it is certainly relevant to what was reasonably communicated and understood, and precludes summary judgment.

"[J]urors are correctly instructed to use their common sense and to evaluate the facts in light of their common knowledge of the natural tendencies and inclinations of human beings." *United States v. Cruz-Valdez*, 773 F.2d 1541, 1546 (11th Cir. 1985) (en banc) (internal quotation marks and citation omitted). We

believe a reasonable jury could conclude that Ms. Schweitzer did not want automated calls in the several hours between the time one wakes up and goes to school or work (say the couple of hours from 6:00 or 7:00 a.m. to 8:00 or 9:00 a.m.), or during a typical work day (say the eight hours from 8:00 or 9:00 a.m. to 4:00 or 5:00 p.m.). *See Watkins*, 704 F.2d at 582 ("It is the task of the trier of fact to determine the scope of consent and to decide whether and to what extent the interception exceeded that consent."). *Cf. Dixon v. Monterey Fin. Servs., Inc.*, 2016 WL 3456680, *3 (N.D. Cal. June 24, 2016) (consumer's statement to creditor –"I asked you guys not to call me and you can contact my attorney"—created an issue of fact as to revocation under the TCPA); *Wright v. Target Corp.*, 2015 WL 8751582, *8 (D. Minn. Dec. 14, 2015) (ruling, in a TCPA case, that revocation of consent presented a disputed issue of fact based on consumer's "cease calling" statement, which was itself conditioned on creditor providing proof of debt).[2]

IV

Under the TCPA, a consumer may partially revoke her consent to receive automated phone calls. The "issue of consent is ordinarily a factual issue," *Thompson v. Louisiana*, 469 U.S. 17, 23 (1984) (analyzing the Fourth Amendment), and here summary judgment here was inappropriate because a

[2] During the call on October 13, Ms. Schweitzer complained about not being able to talk during work and about her phone ringing off the hook. Given that this call was placed at 2:47 p.m., *see* D.E. 24-3 at 5, a reasonable inference is that she was at work during that call, and that, in turn, makes it easier to figure out what she meant by "the morning" and "the work day."

reasonable jury could find that Ms. Schweitzer partially revoked her consent to be called in "the morning" and "during the workday" on the October 13 phone call with a Comenity employee.[3]

REVERSED AND REMANDED.

[3] Because this case is being remanded for trial, and there has been no determination of liability, we decline to address Ms. Schweitzer's argument that Comenity acted knowingly or willfully in violation of the TCPA. *See* 47 U.S.C. § 227(b)(3) ("If the court finds that the defendant willfully or knowingly violated this subsection[,] . . . the court may, in its discretion, increase the amount of the award to an amount equal to not more than [three] times the amount available under [this subsection].").

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STONEPEAK PARTNERS, LP,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D16-4204
	)	
TALL TOWER CAPITAL, LLC,	)	
	)	
Appellee.	)	
	)	

Opinion filed August 11, 2017.

Appeal pursuant to Fla. R. App. P. 9.130
from the Circuit Court for Polk County;
Andrea Teves Smith, Judge.

Christine Marlewski (withdrew after briefing)
and Brian K. Oblow (substituted as counsel
of record) of Gray Robinson, P.A., Tampa,
and Joseph M. McLaughlin of Simpson,
Thacher & Bartlett, LLP, New York, for
Appellant.

Robert L. Rocke and Raul Valles of Rocke,
McLean & Sbar, P.A., Tampa, for Appellee.

SILBERMAN, Judge.

Stonepeak Partners, LP, appeals an order denying its motion to dismiss for lack of personal jurisdiction in this action brought by Tall Tower Capital, LLC, for breach of contract and breach of fiduciary duty. Because the trial court erred in

determining that Tall Tower established jurisdiction based upon the grounds that Stonepeak committed a tortious act in Florida and engaged in a business venture in Florida, we reverse and remand for the trial court to dismiss the action.

Stonepeak is an investment firm incorporated under the laws of Delaware with offices and its principal place of business in New York. Stonepeak has no office, employees, or clients in Florida. Tall Tower is a Florida firm headquartered in Lakeland, Florida, that manages broadcast towers and communications infrastructure throughout the United States. Tall Tower solicited Stonepeak in New York to invest in broadcast towers that were being offered for sale by CC Media Holdings, Inc. (Clear Channel), a Texas company. Clear Channel planned to sell 472 broadcast towers, and 436 of those towers were located outside Florida.

In January 2014, Stonepeak and Tall Tower entered into a confidentiality and noncircumvention agreement (the Confidentiality Agreement) concerning the Clear Channel transaction. The Confidentiality Agreement did not require Stonepeak "to enter into any business relationship or transaction" or "to deal with" Tall Tower. Tall Tower employees regularly made visits to New York to discuss the Clear Channel transaction, and the parties communicated frequently by email. Stonepeak employees or its agents made four visits to Florida regarding the Clear Channel transaction. Tall Tower and Stonepeak negotiated with Clear Channel for almost a year, but their bid was unsuccessful.

During the course of the negotiations, Stonepeak made an equity investment in Vertical Bridge Holding, LLC, a Florida company, and acquired a seventeen percent interest in Vertical Bridge. As a managing director of Stonepeak,

Trent Vichie serves on boards of directors of "portfolio companies" in which Stonepeak has an ownership interest. Vichie served on Vertical Bridge's board of directors as a representative of Stonepeak. Vertical Bridge had the successful bid in the Clear Channel sale.

Tall Tower subsequently filed its complaint, alleging that Stonepeak breached the Confidentiality Agreement and breached its fiduciary duty. Tall Tower alleged that by virtue of the Confidentiality Agreement the parties were "engaged as joint venturers." It further alleged that the fiduciary duty "arose as a result of the [Confidentiality] Agreement and the parties' joint negotiations with Clear Channel."

Stonepeak filed a motion to dismiss for lack of personal jurisdiction and submitted affidavits from Stonepeak's Trent Vichie and Luke Taylor in support. Tall Tower opposed the motion and filed a supporting affidavit from Robert Harper, a managing member of Tall Tower. The trial court determined that the affidavits were in factual conflict and that a limited evidentiary hearing was required. See Canale v. Rubin, 20 So. 3d 463, 469 (Fla. 2d DCA 2009). After an evidentiary hearing, the trial court entered an order denying the motion to dismiss. Stonepeak contends that the trial court erred in determining that Stonepeak is subject to personal jurisdiction in Florida based on section 48.193(1)(a)(2), Florida Statutes (2013), for committing a tortious act in Florida and on section 48.193(1)(a)(1) for engaging in a business venture in Florida.

Section 48.193(1)(a)(2)—Committing a Tortious Act in Florida

Personal jurisdiction under Florida's long-arm statute may be general or specific, depending on the nature of the defendant's contacts with Florida. Wiggins v. Tigrent, Inc., 147 So. 3d 76, 85 (Fla. 2d DCA 2014). Section 48.193(1)(a)(2) of Florida's

long-arm statute applies to a lawsuit "arising from" a person "[c]ommitting a tortious act within this state." Such a lawsuit is based on specific jurisdiction. See Wiggins, 147 So. 3d at 86. Tall Tower alleged that Stonepeak committed a tortious act in Florida by breaching its fiduciary duty to Tall Tower.

At an evidentiary hearing on personal jurisdiction, the evidence must establish jurisdiction by a preponderance of the evidence. See Passy v. Lewis, 553 So. 2d 223, 224 (Fla. 1st DCA 1989). We typically conduct a de novo review of an order on a motion to dismiss for lack of personal jurisdiction. See Rautenberg v. Falz, 193 So. 3d 924, 928 (Fla. 2d DCA 2016); Dev. Corp. of Palm Beach v. WBC Constr., L.L.C., 925 So. 2d 1156, 1160 (Fla. 4th DCA 2006). But when the trial court relies on witness testimony, we defer to the trial court's determination of witness credibility. Dev. Corp., 925 So. 2d at 1160. We then apply the facts to the law based on de novo review. Id.

In Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989), the Florida Supreme Court set forth the two-step analysis necessary to determine whether the trial court has personal jurisdiction over a nonresident defendant. See Rautenberg, 193 So. 3d at 928. The trial court must first determine whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the long-arm statute. Id. If it does, then the trial court must determine whether sufficient minimum contacts are shown to satisfy due process requirements. Id. Tall Tower alleged acts to establish specific jurisdiction under the long-arm statute of committing a tortious act in Florida and engaging in a business venture in Florida. See § 48.193(1)(a)(1), (1)(a)(2). Specific jurisdiction also "requires a causal connection between the defendant's activities in Florida and the plaintiff's cause of action, a requirement known as 'connexity.' " Canale,

20 So. 3d at 466 (quoting Wendt v. Horowitz, 822 So. 2d 1252, 1260 (Fla. 2002)). The long-arm statute is to be strictly construed in favor of the nonresident defendant. Navas v. Brand, 130 So. 3d 766, 770 (Fla. 3d DCA 2014).

Because the tort alleged is breach of a fiduciary duty, Stonepeak must be shown to owe a fiduciary duty to Tall Tower. A fiduciary relationship does not exist in an arms' length transaction. Mac-Gray Servs., Inc. v. DeGeorge, 913 So. 2d 630, 633 (Fla. 4th DCA 2005); Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp., 850 So. 2d 536, 541 (Fla. 5th DCA 2003). But joint venturers owe each other a duty of loyalty, breach of which gives rise to a claim for breach of fiduciary duty. See New Vista Dev. Corp. v. Doral Terrace Assocs., 878 So. 2d 462, 464 (Fla. 3d DCA 2004).

The joint venture relationship must arise from a contract. Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1089 (Fla. 2008). To establish a joint venture, the contract must contain the following five elements: "(1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits and (5) a duty to share in any losses which may be sustained." Id. (quoting Kislak v. Kreedian, 95 So. 2d 510, 515 (Fla. 1957)). If one element is absent it precludes the finding of a joint venture. Id. A party asserting that an unwritten, implied contract is the basis of a joint venture—as Tall Tower appears to argue on appeal—faces a "heavy and difficult" burden as it still must allege and prove that the implied contract contains the same five elements of a joint venture. Kislak, 95 So. 2d at 515. As the Florida Supreme Court noted, "[b]usiness relationships are not customarily entered into in a casual manner[,]" particularly business relationships of significant magnitude. Id.

Tall Tower contends that it is not necessary to prove the elements of a joint venture because "the appropriate inquiry is whether the tort as alleged in the complaint occurred in Florida, and not whether the alleged tort actually occurred." Navas, 130 So. 3d at 770. In Navas, the defendants did not provide affidavits to contest jurisdiction, and the trial court did not conduct an evidentiary hearing. See id. We recognize that "a full-blown trial" to prove that Stonepeak committed the tort is not required. Acquadro v. Bergeron, 851 So. 2d 665, 669 (Fla. 2003). But "[i]n analyzing whether tortious conduct has occurred within Florida, courts have looked to whether the nonresident defendant 'committed a substantial aspect of the alleged tort in Florida.' " NHB Advisors, Inc. v. Czyzyk, 95 So. 3d 444, 448 (Fla. 4th DCA 2012) (quoting Watts v. Haun, 393 So. 2d 54, 56 (Fla. 2d DCA 1981)).

Here, the trial court did not appear to find that a joint venture existed based on any written contract. The trial court noted casual references in emails to a "JV," statements that Stonepeak was acting in partnership with Tall Tower, and that according to Tall Tower the parties discussed creating a partnership. The trial court "conclude[d] that Stonepeak's investment and participation in Vertical Bridge's successful attempt to acquire the Clear Channel assets (some of which are located in Florida) as alleged in the Complaint and as testified to at the evidentiary hearing may constitute the commission of a tortious act in Florida."

It is telling that while the complaint relied upon the Confidentiality Agreement and the parties' joint negotiations with Clear Channel to establish the fiduciary duty, in its appellate brief Tall Tower recognizes that the Confidentiality Agreement is not a source of any fiduciary duty. Instead, it contends that "the duty

arises from the parties' relationship as joint venturers." After thoroughly reviewing the evidence presented at the hearing and on which the trial court relied, we conclude that the evidence does not establish that Stonepeak owed Tall Tower a fiduciary duty pursuant to a joint venture.

The evidence does not show that any written agreement creating a joint venture had been executed by the parties. Robert Harper of Tall Tower testified that his understanding was that the parties were entering into a partnership. Brian Philpot of Tall Tower testified that he understood the proposed LLC as setting up a joint venture partnership and that Tall Tower would be contributing money and investing in the new entity. On cross-examination, Philpot recognized that the LLC agreement that Stonepeak drafted provided in paragraph 2.7, entitled "No State Law Partnership," that except for tax purposes, the agreement would not be construed to create a joint venture or partnership. Philpot also admitted that a draft Master Services Agreement provided that it shall not be construed as creating any joint venture or partnership.

The evidence shows that Stonepeak drafted an LLC agreement and a Master Services Agreement, but the parties never executed either of them. Although the witnesses from Tall Tower believed they were acting as partners or joint venturers with Stonepeak and would enter into such a written agreement in the future, the facts the trial court relied upon are insufficient to show that any implied contract existed that would meet the five Kislak elements. See Kislak, 95 So. 2d at 515. Indeed, the evidence did not address several of the Kislak factors. Without evidence establishing that a joint venture was actually entered into, Stonepeak had no fiduciary duty to Tall Tower and thus could not breach a fiduciary duty in Florida.

Even if the evidence presented at the hearing could be considered sufficient to show that Stonepeak had a fiduciary duty to Tall Tower, the evidence does not show that Stonepeak breached any fiduciary duty in Florida. The trial court found that Stonepeak was subject to "personal jurisdiction based on Tall Towers' claim that Stonepeak committed a tortious act in Florida through its investment in, and actions on behalf of, Vertical Bridge, as well as its alleged disclosure of confidential information to Vertical Bridge."

With respect to the disclosure of confidential information to Vertical Bridge in violation of the Confidentiality Agreement, the testimony from Tall Tower witnesses provided some circumstantial evidence that Vichie disclosed information about the Clear Channel deal to Marc Ganzi of Vertical Bridge. But there was no evidence regarding where this disclosure occurred. This court has recognized "the general rule that the existence of an injury within Florida, standing alone, is insufficient to support jurisdiction over an out-of-state tortfeasor." Kountze v. Kountze, 996 So. 2d 246, 252 (Fla. 2d DCA 2008) (en banc); see also Homeway Furniture Co. of Mount Airy, Inc. v. Horne, 822 So. 2d 533, 538-39 (Fla. 2d DCA 2002). In the present case, the trial court relied upon Wendt v. Horowitz, 822 So. 2d 1252, 1260 (Fla. 2002), for the proposition that a defendant need not be present in Florida for the purpose of committing a tortious act in Florida under the long-arm statute. A nonresident defendant can commit a tortious act in Florida under the long-arm statute by making written, telephonic, or electronic communications into Florida, if the cause of action alleged arises from those communications. Id.

This court has explained that the Wendt rule is applied when the tort "involves some sort of communication directed into Florida for purpose of fraud, slander, or other intentional tort." Wiggins v. Tigrent, Inc., 147 So. 3d 76, 86 (Fla. 2d DCA 2014); see also PK Comput., Inc. v. Indep. Travel Agencies of Am., Inc., 656 So. 2d 254, 255 (Fla. 4th DCA 1995) (stating that the complaint contained insufficient allegations of tortious interference committed in Florida when the complaint alleged that the defendant made oral statements or misstatements but did not allege that the statements were made in Florida or were directed at listeners in Florida). In Wiggins, the plaintiff asserted a cause of action for conversion, claiming injury in Florida when Wiggins withheld and utilized money that should have been transferred into the plaintiff's Florida bank accounts. 147 So. 3d at 78-79. But the alleged tort of conversion did not occur in Florida and there was no connexity with Florida when the defendant gained dominion and control of the funds in Washington State. Id. at 87.

Because there was no allegation or evidence at the hearing that Vichie's alleged disclosure of information occurred in Florida or was directed at a person in Florida, the alleged disclosure of information to Vertical Bridge does not support the finding that Stonepeak committed a tortious act in Florida. See Wendt, 822 So. 2d at 1260; Wiggins, 147 So. 3d at 86. Similarly, the circumstantial evidence adduced at the hearing does not show that Stonepeak did anything in Florida regarding its alleged "participation in Vertical Bridge's successful attempt to acquire the Clear Channel assets." With respect to Stonepeak becoming a minority investor in Vertical Bridge,

nothing indicates that it was a tort for Stonepeak, an investment firm, to purchase a seventeen percent share of Vertical Bridge.[1]

Therefore, the trial court erred in determining that the evidence presented at the hearing establishes that Stonepeak committed a tortious act in Florida under section 48.193(1)(a)(2).

Section 48.193(1)(a)(1)—Engaging in a Business Venture in Florida

Stonepeak contends that the trial court erred in determining that Stonepeak is subject to personal jurisdiction in Florida based on section 48.193(1)(a)(1). Tall Tower alleged in its complaint that Stonepeak was engaged in a business venture in Florida. Section 48.193(1)(a)(1) provides for personal jurisdiction for a cause of action "arising from" the acts of a nonresident in "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." In its findings the trial court stated, "The Court finds that there is competent substantial evidence that Stonepeak engaged in a business venture in Florida. Stonepeak purposefully availed itself of the privilege of conducting activities in Florida, and thus, accordingly invoked the benefits and protections of its laws."

For purposes of section 48.193(1)(a)(1), to demonstrate that a nonresident defendant is "carrying on business" the defendant's activities "must be considered collectively and show a general course of business activity in the state for pecuniary benefit." RMS Titanic, Inc. v. Kingsmen Creatives, Ltd., 579 Fed. App'x 779, 783 (11th Cir. 2014) (quoting Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A., 421 F.3d 1162, 1167 (11th Cir. 2005)). Factors to consider in making this determination "include:

[1]The evidence also does not show that Stonepeak was prohibited by any agreement from investing in another company such as Vertical Bridge.

(1) 'the presence and operation of an office in Florida'; (2) 'the possession and maintenance of a license to do business in Florida'; (3) 'the number of Florida clients served'; and (4) 'the percentage of overall revenue gleaned from Florida clients.' " Id. at 784 (quoting Horizon Aggressive Growth, 421 F.3d at 1167).

Tall Tower points to the large amount of email exchanges and telephone calls over the negotiation period between Tall Tower and Stonepeak. Harper testified that he exchanged numerous emails with Stonepeak regarding the Clear Channel transaction, and Taylor testified that there had been regular telephone discussions. Electronic communications from out-of-state offices into Florida do not establish conducting business in Florida. See Horizon Aggressive Growth, 421 F.3d at 1167; Bernardele v. Bonorino, 608 F. Supp. 2d 1313, 1322 (S.D. Fla. 2009); see also Jasper v. Zara, 595 So. 2d 1075, 1075 (Fla. 2d DCA 1992) (involving communications by mail and telephone).

But we note that in Canale, 20 So. 3d at 468-69, this court distinguished the Florida Supreme Court's decision in Wendt that electronic communications into Florida could constitute a tort. In doing so, this court recognized that to meet the connexity requirement, the alleged tort must arise from the communications on which the plaintiff seeks to establish long-arm jurisdiction. Id. at 469. This court then stated, "Certainly, telephone calls made to Florida may be relevant to whether an out-of-state resident is doing business in this state. But in order to come to this conclusion, the nature of the calls must be examined." Id. Here, the trial court found only that the communications concerned the Clear Channel transaction, a transaction that was never consummated. There was no evidence that Stonepeak derived pecuniary gain as a

result of the communications, and it did not purchase the Clear Channel assets or even enter into an agreement to purchase them.

The trial court also relied on the fact that Stonepeak made an equity investment in Vertical Bridge for a seventeen percent interest in the Florida company and that Vichie sat on the board of directors of Vertical Bridge. The fact that a New York investment firm owns a minority equity interest in a Florida company as part of its portfolio does not equate with Stonepeak doing business in Florida. See Res. Healthcare of Am., Inc. v. McKinney, 940 So. 2d 1139, 1143 (Fla. 2d DCA 2006) ("Ownership of a resident subsidiary corporation by an out-of-state parent corporation, without more, has been repeatedly deemed insufficient to meet the requirements of section 48.193."); Greystone Tribeca Acquisition L.L.C. v. Ronstrom, 863 So. 2d 473, 476 (Fla. 2d DCA 2004). And the activities of Vertical Bridge and its board of directors cannot be attributed to Stonepeak when Tall Tower has made no effort to pierce the corporate veil or establish jurisdiction under an alter ego theory. See Bellairs v. Mohrmann, 716 So. 2d 320, 323 (Fla. 2d DCA 1998); WH Smith, PLC v. Benages & Assocs., 51 So. 3d 577, 581 (Fla. 3d DCA 2010). To demonstrate jurisdiction under an alter ego theory, the plaintiff must make sufficient jurisdictional allegations to pierce the corporate veil. WH Smith, 51 So. 3d at 581. To pierce the corporate veil the plaintiff must establish "*both* that the corporation is a 'mere instrumentality' or alter ego of the defendant[] *and* that the defendant engaged in 'improper conduct' in the formation or use of the corporation." Bellairs, 716 So. 2d at 323 (quoting Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1120-21 (Fla. 1984)). Tall Tower made no allegation that Vertical Bridge was a mere instrumentality of its minority investor, Stonepeak.

Tall Tower is correct that a single transaction for profit can constitute engaging in a business venture. See Labbee v. Harrington, 913 So. 2d 679, 683 (Fla. 3d DCA 2005). Labbee dealt with another long-arm statute, section 48.181, Florida Statutes (2003), that also applies to "nonresidents who engage in or carry on a business or business venture in the state." Labbee, 913 So. 2d at 682. The Third District determined that the allegation that the defendant had rented out real property in Florida for twenty years and then sold it was sufficient to describe a business venture. Id. at 683; see also Wm. E. Strasser Constr. Corp. v. Linn, 97 So. 2d 458, 460 (Fla. 1957) (determining that by the purchase of real property in Florida and the execution of a contract to construct an apartment building that would be rented to tenants for income for the benefit of the defendants, the defendants "were initiating the first sub[s]tantial steps toward setting themselves up in a business venture in this state"); State ex rel. Weber v. Register, 67 So. 2d 619, 620 (Fla. 1953) (determining that the purchase of a citrus grove in Florida and subsequent listing of grove for sale constituted a business venture). The intent of the long-arm statute is "to regard nonresidents who have availed themselves of the privilege of 'dealing in goods, services, or property, whether in a professional or nonprofessional capacity, within the State in anticipation of economic gain,' as operating a business or business venture." Labbee, 913 So. 2d at 683 (quoting DeVaney v. Rumsch, 228 So. 2d 904, 907 (Fla. 1969)).

Here, in addition to telephone calls and emails, the trial court found that over the course of approximately ten months Stonepeak had the following contacts in Florida: (1) three Stonepeak employees attended an introductory meeting and dinner in Florida with Tall Tower in January 2014; (2) an accountant acting as an agent for

Stonepeak visited Tall Tower sometime not long after the January meeting and in October 2014 to audit Tall Tower's financial records in relation to the potential Clear Channel transaction; and (3) a Stonepeak employee visited a Miami site of a Tall Tower broadcast tower in April 2014 to continue negotiations regarding the Clear Channel transaction.

Stonepeak never consummated a transaction to purchase the Clear Channel assets or even entered into a contract for purchase. Stonepeak did not enter into any LLC or management agreement with Tall Tower. Stonepeak did not deal in any property in Florida but investigated the possibility of entering into such a transaction. Stonepeak owned no real property in Florida. The trial court seemed to rely on the fact that a small percentage of the broadcast towers were located in Florida, but Clear Channel owned these towers, not Stonepeak.

The Confidentiality Agreement that Stonepeak signed in New York did not obligate it to do anything in Florida. And Tall Tower originally solicited Stonepeak in New York regarding the Clear Channel transaction that was for the purchase of 472 broadcast towers across the nation, although only 36 of the towers were located in Florida. Stonepeak has no office in Florida and no license to do business in Florida. Tall Tower failed to show that Stonepeak has any clients in Florida or that any percentage of its revenue is from Florida clients.

In applying the facts that the trial court found to the law, we conclude that the trial court erred in finding that section 48.193(1)(a)(1) was satisfied based on "competent substantial evidence that Stonepeak engaged in a business venture in Florida." The trial court did not find and the evidence does not support that Stonepeak

dealt in any goods, services, or property in Florida or that Stonepeak's activities in Florida showed a general course of business activity for pecuniary gain.

We also note that the trial court found in a conclusory sentence that there was "a sufficient connection between Stonepeak's Florida activities and the causes of action alleged by Tall Tower to satisfy the connexity requirement." But the order does not explain how Stonepeak's conduct, including the meetings or communications with Tall Tower, could be the basis for the claim that Stonepeak disclosed confidential information to a third party and assisted that party in purchasing the Clear Channel assets. See Canale, 20 So. 3d at 466 (stating that for specific jurisdiction there must be "a causal connection between the defendant's activities in Florida and the plaintiff's cause of action" (quoting Wendt, 822 So. 2d at 1260)).

Therefore, the trial court erred in determining that the evidence established that Stonepeak engaged in a business venture in Florida under section 48.193(1)(a)(1).

Conclusion

Because Tall Tower did not establish either ground under section 48.193(1)(a)(1) or (1)(a)(2) asserted for personal jurisdiction, we reverse the order denying the motion to dismiss for lack of personal jurisdiction and remand for the trial court to dismiss the case. Based on our conclusion that Tall Tower did not establish a basis for personal jurisdiction under section 48.193, we do not reach the issue of sufficient minimum contacts with Florida. See Rautenberg, 193 So. 3d at 930; Casita, L.P. v. Maplewood Equity Partners L.P., 960 So. 2d 854, 858 (Fla. 3d DCA 2007).

Reversed and remanded for dismissal.

MORRIS and BLACK, JJ., Concur.

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

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

CASE NO. 1D16-5112

WHITNEY BANK, a Mississippi state chartered bank, formerly known as HANCOCK BANK, a Mississippi state chartered bank, as assignee of the FDIC as receiver for PEOPLES FIRST COMMUNITY BANK, a Florida banking corporation,

Appellant,

v.

VON DANIEL GRANT, JR., and LISA D. GRANT,

Appellees.

_____/

Opinion filed August 7, 2017.

An appeal from the Circuit Court for Bay County.
Hentz McClellan, Judge.

Michael Anthony Shaw and Joseph D. Steadman, Jr., of Jones Walker LLP, Miami, for Appellant.

Jeffrey P. Whitton, Panama City, for Appellees.

PER CURIAM.

Whitney Bank appeals the trial court's order granting summary judgment in favor of Von Daniel Grant, Jr., and Lisa D. Grant, and adjudging that Whitney Bank's cause of action seeking damages from alleged breaches of two promissory notes is barred by the one-year statute of limitations in section 95.11(5)(h), Florida Statutes (2015). Because we conclude that section 95.11(5)(h) does not apply to the current cause of action, we reverse.

The pleadings and summary judgment evidence presented below reveal the following. On June 29, 2005, the Grants borrowed $240,600 from Peoples First Community Bank, verifying the debt with a note and securing the note with a mortgage on the Grants' principal residence. On November 27, 2006, the Grants borrowed an additional $25,000 from Peoples First, executing a credit agreement with the bank that included a balloon payment due on December 15, 2011. The amount borrowed was secured by a second mortgage on the residence.

Three years later, in December 2009, the federal Office of Thrift Supervision closed Peoples First Community Bank and appointed the Federal Deposit Insurance Corporation as the bank's receiver. In turn, the FDIC transferred certain assets belonging to the bank—including each of the Grants' promissory notes—to Hancock Bank by way of an allonge.

On December 1, 2010, the Grants defaulted on the June 2005 promissory note by failing to make the installment payment due on that date and on every subsequent

installment date. Also, they did not make the balloon payment due in December 2011 as required by the 2006 note. In April 2012, Hancock Bank and the Grants executed a "revised short sale approval" agreement, under which Hancock Bank approved the Grants' "request for the Pre-Foreclosure Sale." According to the terms of the agreement, the sales price of the residence was $190,000. After the amounts still owed on the unpaid balances of the 2005 and 2006 debts were deducted from the sales price, along with closing costs and a broker's commission, the agreement reflected an "Estimated Deficiency Balance" of $99,377.70. The agreement also provided that the Grants would "receive no proceeds" from the sale and Hancock Bank "reserve[d] the right to pursue the deficiency balance owed." The closing took place on May 11, 2012.

Two years later, in April 2014, Whitney Bank merged its charter with that of Hancock Bank and, as a result, Hancock Bank changed its name to Whitney Bank. By letter dated November 30, 2015, Whitney Bank notified the Grants that they were in default under the June 2005 promissory note and afforded them the opportunity to cure the default. Whitney Bank also advised that if the default was not cured, it could, at its option, accelerate the indebtedness due under the note. The Grants failed to cure the default.

Thereafter, on January 15, 2015, Whitney Bank filed a Verified Complaint containing two counts. Count I alleges that the Grants breached the 2005 promissory

note and avers that Whitney Bank, as holder of the note, is entitled to enforce it. Count I seeks a judgment for the unpaid balance owed on the note in the principal amount of $45,069.41, plus accrued interest, late fees, costs of collection, and attorneys' fees. In turn, Count II alleges a breach of the 2006 promissory note, and likewise seeks a judgment for the unpaid balance owed on the note in the principal amount of $23,634.67, along with accrued interest, late fees, costs of collection, and attorneys' fees.

After the Grants filed their Answer to the Verified Complaint, the parties filed cross motions for summary judgment. In their motion, the Grants urge that Whitney Bank's cause of action is barred by the one-year statute of limitations in section 95.11(5)(h). That subsection states:

> An action to enforce a claim of a deficiency related to a note secured by a mortgage against a residential property that is a one-family to four-family dwelling unit. The limitations period shall commence on the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure.

§ 95.11(5)(h), Fla. Stat. (2015). The Grants' argument reads the foregoing statute in pari materia with section 702.06, Florida Statutes (2015), which provides that "[i]n all suits for the foreclosure of mortgages," the trial court, in its discretion, may enter a deficiency decree. But, "in the case of an owner-occupied residential property, the amount of the deficiency may not exceed the difference between . . ., [] in the case of a short sale, the outstanding debt, and the fair market value of the property on the

date of sale." Based on the "short sale" language, the Grants maintain that since Whitney Bank's cause of action is for alleged deficiencies due following a short sale of their single-family dwelling, the action must be brought within the one-year limitations period of section 95.11(5)(h), which references deficiencies, or it is barred.

Whitney Bank responds to this argument by emphasizing that the current action is one for a breach of a contract/written instrument; no foreclosure or deed in lieu of foreclosure was ever involved. As a result, it urges the five-year statute of limitations period in section 95.11(2)(b), Florida Statutes (2015), applies.

Section 95.11(2)(b) provides in relevant part that "[a]ctions other than for recovery of real property shall be commenced as follows":

> **(2) Within five years.—**
>
> . . . .
>
> (b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument . . . except for an action for a deficiency judgment governed by paragraph (5)(h).

§ 95.11(2)(b), Fla. Stat. (2015).

The trial court agreed with the Grants and held that the one-year statute of limitations barred Whitney Bank's cause of action. Significantly, it noted the following:

> The parties do not dispute that the present action is one to enforce claims of deficiency related to notes secured by mortgages against a residential one-family dwelling unit. However, [Whitney Bank] argues the language used in section 95.11(5)(h) to describe the commencement

> of the limitations period indicates that this section is applicable only to foreclosures and deeds in lieu of foreclosure.

In evaluating the bank's argument, the trial court acknowledged the fundamental principle of statutory construction that directed it to resort to the "clear and unambiguous" language of section 95.11(5)(h), *see, e.g.*, *State v. Hackley*, 95 So. 3d 92, 93 (Fla. 2012), and precluded it from "look[ing] behind the statute's plain language for legislative intent or resort[ing] to rules of statutory construction to ascertain intent." *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004). Nonetheless, it did just that by analyzing the unambiguous language of section 95.11(5)(h) through the lens of legislative intent and resorting to rules of statutory construction when it stated:

> Although neither of the two events identified in section 95.11(5)(h) would occur in the context of a short sale [i.e., "the day after the certificate (of foreclosure) is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure"], this does not demonstrate a clear intent to exclude actions that would otherwise fall squarely within the plain language of this section. . . . In the case of a short sale, the lender's right to pursue a deficiency judgment accrues once the sale has occurred. *See* § 702.06, Fla. Stat. (the amount of deficiency after a short sale is measured by the difference between the outstanding debt and the fair market value of the property on the date of sale). In the present case, [Whitney Bank's] right to seek a deficiency judgment accrued after the short sale in 2012. Under section 95.11(5)(h), [Whitney Bank's] claims are barred.

"Questions of statutory interpretation are matters of law that are reviewed de novo." *Green v. Cottrell*, 204 So. 3d 22, 26 (Fla. 2016). When construing a statute, the first place a court looks "is to its plain language—if the meaning of the statute is

clear and unambiguous, [a court] look[s] no further." *Hackley*, 95 So. 3d at 93 (citing *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1220 (Fla. 2010)). We are reminded that

> [i]t is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. . . . If the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute.

Overstreet v. State, 629 So. 2d 125, 126 (Fla. 1993) (internal quotation marks and citation omitted). In the present case, the trial court's analysis applies the first sentence of section 95.11(5)(h), but fails to properly consider the plain language of the second sentence.

Our review of section 95.11(5)(h) leads us to an interpretation contrary to the that reached by the trial court. The unambiguous language of section 95.11(5)(h) states that a cause of action accrues under its terms on "the day after the certificate [of foreclosure] is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure." Under the circumstances of the present case, where a short sale was held in lieu of foreclosure, neither of these two predicates occurred: there was no certificate of foreclosure issued by the clerk and there was no deed in lieu of foreclosure. Only by looking beyond the plain language of section 95.11(5)(h) may one arrive at the interpretation advanced by the trial court and the Grants.

In reaching our conclusion, we are also persuaded by the logic applied by the Fifth District in its recent decision in *Bush v. Whitney Bank*, 14 Fla. L. Weekly D1142 (Fla. 5th DCA May 19, 2017)—a case based on facts nearly identical to those in the instant case. In *Bush*, the Fifth District affirmed the trial court's ruling that section 95.11(5)(h) did not apply to bar the bank's cause of action seeking damages for the borrower's breach of a promissory note following an agreed-to short sale. The Fifth District acknowledged—as do we—that if the meaning of a statute is clear and unambiguous, we look no further. *Id.* In applying the statute's unambiguous language, the Fifth District looked to the second sentence of section 95.11(5)(h) to define the meaning of the first sentence, holding that the second sentence

> clarifies the scope of the first sentence by providing: "The limitations period shall commence on the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure." . . . Accordingly, the limitations period is triggered by one of two events: 1) issuance of certificate by clerk or 2) acceptance of deed in lieu of foreclosure by mortgagee. After a short sale, neither of these events occur. Thus, pursuant to the statute's plain terms, section 95.11(5)(h) does not apply to the bank's action.

Id.

Applying this rationale to the current case, under the plain language of the statute the one-year limitations period in section 95.11(5)(h) does not apply to bar Whitney Bank's claims. *Overstreet*, 629 So. 2d at 126; *see also, Thayer v. State.* 335 So. 2d 815, 817 (Fla. 1976) ("The Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in

the statute.”). Reading section 95.11(5)(h) in pari materia with section 702.06 is therefore unwarranted, since this case does not involve a suit in foreclosure.

For these reasons, we hold that the five-year statute of limitations period in section 95.11(2)(b) applies to Whitney Bank’s cause of action. We therefore reverse the trial court’s order entering summary final judgment against Whitney Bank and its holding that the bank’s claims are barred, and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED for further proceedings.

ROBERTS, MAKAR, and JAY, JJ., CONCUR.