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Turbeville v. Financial Industry Regulatory Authority, Case No. 16-11083 (11th Cir. 2017).
No private right of action exists under the Exchange Act of 1934 for FINRA members and associated persons to sue FINRA for violating its own internal rules.

Wells Fargo Delaware Trust Company, N.A. v. Petrov, Case No. 2D16-1536 (Fla. 2d DCA 2017).
Upon rehearing, the Second District re-affirms that servicing agents may verify foreclosure complaints and testify at trials on behalf of a foreclosing plaintiff, and a servicer doing so does not constitute prosecuting a case on behalf of the plaintiff lender. The revised opinion deletes a reference to a "tax deed" in the third paragraph of the original opinion and replaces it with "certificate of title."

Ricketts v. Village of Miami Shores, Case No. 3D16-2212 (Fla. 3d DCA 2017).
An "as-applied" constitutional challenge to a zoning ordinance must demonstrate that there are no set of circumstances under which the ordinance would be constitutional.

Lucky Star Horses, Inc. v. Diamond State Insurance Company, Case No. 3D17-725 (Fla. 3d DCA 2017).
Arbitration is not waived, despite the passage of time and the filing of numerous pleadings, until the party to the arbitration clause is brought into the case.

Corrections Corporation of America v. City of Pembroke Pines, Case No. 4D14-4815 (Fla. 4th DCA 2017).
On rehearing, the Fourth District re-affirms that a municipality has no obligation to provide utility services outside its boundaries unless it has contracted to do so or has otherwise assumed the duty to so by holding itself out as the public utility for the affected area.

BK Marine Construction, Inc. v. Skyline Steel, LLC, And Great American Insurance Company, Case No. 4D16-1241 (Fla. 4th DCA 2017).
A party seeking judgment for invoiced construction materials delivered to and incorporated into a job site must correspond the invoices to the allegations of the complaint, and if there are multiple portions of a job site, must demonstrate as to which portion of the job site the materials were incorporated into.

The Waterview Towers Condominium Association, Inc. v. City of West Palm Beach, Case No. 4D16-2858 (Fla. 4th DCA 2017).

A party, including a lessee, who joins in or consents to a declaration of condominium subjects their property to the declaration and all of its provisions. Additionally, restrictive covenants may be enforced by grantees among or between themselves where the grantees obtained their property from a common grantor and the restrictive covenants were part of "a general plan of development or improvement" or a "general building scheme."

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BK MARINE CONSTRUCTION, INC.,
Appellant,

v.

SKYLINE STEEL, LLC, and **GREAT AMERICAN INSURANCE COMPANY,**
Appellees.

No. 4D16-1241

[November 1, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates, Judge; L.T. Case No. CACE12030715.

Robert A. Sweetapple and Berkley S. Vitale of Sweetapple, Broeker & Varkas, PL, Boca Raton, for appellant.

Patrick G. Brugger and Michael Jay Rune II of Shutts & Bowen, LLP, Miami, for appellee Skyline Steel, LLC.

FORST, J.

Appellant BK Marine Construction, Inc. ("BKM") appeals the trial court's final summary judgment order in favor of appellee Skyline Steel, LLC ("SKY"). The trial court found that under the Rental Contract for Steel Sheet Piling ("Rental Contract"), BKM owed SKY a total sum of $776,853.27 including accrued interest. On appeal, BKM argues the trial court improperly granted summary judgment because the court granted relief greater than that pled in the amended complaint, and because genuine issues of material fact remained as to the amount of damages awarded. Finding the second argument meritorious, we reverse and remand for further proceedings consistent with this opinion.

Background

BKM is a Florida construction company that regularly used steel sheet pilings for its construction projects, including a large endeavor called the Interstate 595 Project ("I-595 Project"). To complete the I-595 Project, BKM acquired steel sheet pilings from SKY, with which BKM had a business

relationship spanning over twenty-five years. In April 2011, BKM began receiving invoices from SKY pertaining to the I-595 Project.[1] Two months later, on June 2, 2011, BKM and SKY formally entered into the Rental Contract in which SKY agreed to rent steel sheet pilings to BKM in exchange for payments upon receipt of periodic invoices. The Rental Contract specifically referred to project "I-595, 3rd Section" and stated the agreement would become binding upon acceptance and execution of the contract or when shipments began. The Rental Contract also listed the monthly prices and specifications for steel sheet pilings, but it did not state a specific amount that would be owed by BKM to SKY. BKM continued placing orders and receiving invoices from SKY through July 2012.

One year after the creation of the Rental Contract, BKM notified SKY that it was behind on paying several invoices and outlined a plan to pay the outstanding balance of "$500,000 (+ or −)." Nearly one year later, SKY filed a complaint against BKM, alleging, in pertinent part, breach of contract and unjust enrichment. In response, BKM moved to dismiss the complaint on the grounds that "without copies of the exhibits being attached to the pleading," BKM was unable to respond to the complaint, and SKY failed to appropriately state a cause of action. SKY then amended its complaint and attached the Rental Contract, but did not attach any other contracts nor any invoices. BKM subsequently filed its answer asserting three affirmative defenses: (1) SKY's complaint failed to state a cause of action; (2) BKM had already paid the outstanding balance owed under the contract; and (3) SKY could not pursue a claim in equity (unjust enrichment), as there was an enforceable contract.

SKY ultimately moved for summary judgment. It explained that no issues of material fact remained because BKM signed the Rental Contract, SKY delivered the ordered materials, and BKM failed to pay the full amount owed under the invoices; therefore, SKY argued, it met all of the requisite elements of the breach of contract claim. SKY attached several documents to its motion. First, it attached an affidavit of indebtedness by its Chief Financial Officer, who explained that, "[b]eginning on May 10, 2011, Skyline delivered invoices to BKM under the Agreement totaling $669,583.93," and that BKM admitted in a letter that it owed "$500,000 (+ or −)." The CFO attached the letter to her affidavit. Second, SKY attached a multitude of invoices dating from April 2011 through July 2012 detailing the monthly rental agreements.

In response, BKM argued there remained genuine issues of material

[1] There is some evidence in the record that BKM began receiving invoices before April 2011.

fact, and filed a deposition transcript of one of SKY's corporate representatives, who appeared to be the employee at SKY most familiar with the present lawsuit. The representative testified that he knew the I-595 Project had multiple sections,[2] but he did not know which invoices pertained to which section. To figure that out, he mentioned he would have to see the installation records from the general contractors. He also explained how he did not know whether SKY was owed more than $15,000 under the Rental Contract (for "I-595, 3rd Section") attached to the amended complaint.

The trial court granted SKY's motion for summary judgment, awarding what it deemed to be the unpaid principal and interest due on the Rental Contract, a total of $776,853.27. BKM timely appealed this final summary judgment order.

Analysis

"The standard of review for an order granting summary judgment is de novo." *Int'l Christian Fellowship, Inc. v. Vinh on Prop., Inc.*, 954 So. 2d 1214, 1215 (Fla. 4th DCA 2007) (quoting *5th Ave. Real Estate Dev., Inc. v. Aeacus Real Estate Ltd. P'ship*, 876 So. 2d 1220, 1221 (Fla. 4th DCA 2004)). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Id.* (quoting *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). On this first requirement, "[i]f the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *see also Dellatorre v. Buca, Inc.*, 211 So. 3d 272, 273 (Fla. 4th DCA 2017) (similar).

BKM raises two issues on appeal. First, it argues that the trial court erred in its final summary judgment order by granting more damages than what SKY sought in its amended complaint. Next, it argues that myriad genuine issues of material fact remained as to the amount of damages owed under the contract sued upon. SKY disagrees. It contends that there were no genuine issues of fact regarding the amount of damages awarded, per the invoices attached to its summary judgment motion, and that it did not seek greater damages than it pled in its complaint. On this last point, SKY contends that even if there was error, that error was harmless because BKM was in possession of the invoices almost two years before

[2] The representative testified that he did not know if there were written contracts for the other four sections of the I-595 Project.

the filing of the motion for summary judgment, and SKY alleged an alternative unjust enrichment claim.

We find merit in BKM's second argument on appeal, and hold that the trial court erred in granting summary judgment in favor of SKY.[3] Multiple genuine issues of material fact remained below as to which of the invoices attached to the motion for summary judgment correspond to the Rental Contract attached to SKY's amended complaint. Several characteristics of the invoices suggest to us that they relate to the *whole* I-595 Project, and not merely "the 3rd Section." First, none of the invoices specify whether they relate to a designated section of the I-595 Project. Second, many of the invoices predate June 2, 2011, the date the Rental Contract was signed. As BKM rightfully notes, the first invoice was dated April 7, 2011, fifty-six days before the parties signed the Rental Contract. Further, SKY's CFO stated in an affidavit that "*[b]eginning on May 10, 2011*, Skyline delivered invoices to BKM under the Agreement totaling $669,583.93." Third, SKY's corporate representative testified during a deposition that he knew there were five sections of the I-595 Project, but he did not know if the invoices at issue pertained solely to the third section or the entire I-595 Project. Instead, he testified that the installment records, which were not used as evidence by either party, could further clarify the issue.

This uncertainty regarding which invoices correspond to which section of the I-595 Project is inextricably tied to the amount of damages SKY could seek under the Rental Contract—another material issue of fact. The SKY corporate representative admitted he did not know if more than $15,000 was due on the Rental Contract attached to the amended complaint. Due to this uncertainty in the amount of damages owed *under the Rental Contract*, we must reverse the summary judgment.

We also note SKY's alternative argument that, even if it loses on the breach of contract issue, the invoices still support its unjust enrichment claim and, therefore, the final summary judgment award. However, SKY only proceeded under the complaint for damages arising under the *third section* of the I-595 Project, whereas the unjust enrichment claim references invoices for work that predated that rental contract. "A court may not go beyond the four corners of the complaint." *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 494 (Fla 4th DCA 2001) (citing *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)). SKY made clear in its general allegations that the Rental Contract, which applied only to the third section of the I-595 Project, was the operative contract at hand. The existence of this express contract

[3] By way of our disposition, we need not address BKM's first argument on appeal.

necessarily defeated SKY's unjust enrichment claim. *See Real Estate Value Co. v. Carnival Corp.*, 92 So. 3d 255, 263 n.2 (Fla. 3d DCA 2012) ("We acknowledge the well settled principle that 'the law will not imply a contract where an express contract exists concerning the same subject matter.'" (emphasis omitted) (quoting *Kovtan v. Frederiksen*, 449 So. 2d 1, 1 (Fla. 2d DCA 1984))).

Conclusion

Because genuine issues of material fact remain, we reverse the trial court's entry of final summary judgment. There remains uncertainty regarding which invoices pertained to which section of the I-595 Project, and by way of such uncertainty, the amount of damages SKY could obtain under the Rental Contract.

Reversed.

CONNER and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Third District Court of Appeal

State of Florida

Opinion filed November 1, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-725
Lower Tribunal No. 15-14380

Lucky Star Horses, Inc., et al.,
Appellants,

vs.

Diamond State Insurance Company,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Lopez & Best, and Virginia M. Best, for appellants.

Cole Scott & Kissane, and Scott A. Cole and Lissette Gonzalez, for appellee.

Before ROTHENBERG, C.J., and SALTER and LINDSEY, JJ.

SALTER, J.

This is an appeal from a non-final order granting the appellee/insurer's motion to stay a circuit court case and to compel arbitration. The two appellants/insureds, Lucky Star Horses, Inc. ("Lucky Star"), and Marlen Fundora,[1] claimed coverage and insurance benefits under an "Equine Mortality Policy" following the death of a Paso Fino horse owned by Ms. Fundora. Although the appellants have identified a succession of pleadings filed in the case before the insurer, Diamond State Insurance Company ("Diamond State"), invoked the limited right to arbitration in the insurance policy, the trial court found the appellants' claim of waiver unpersuasive and granted Diamond State's motion to stay the lawsuit pending arbitration. On the unusual facts presented by the record in this case, we affirm.

Facts and Procedural History

In April 2014, Ms. Fundora bought the four year-old, registered, Paso Fino stallion, "Secreto del Rosario," for $180,000.00, payable $40,000.00 at the time of the sale and delivery and in monthly instalments payable thereafter for a period of 19 months. The Equine Mortality Policy at issue here insured the life of the stallion for a policy period April 28, 2014, to April 28, 2015. No formal documentation is in the record transferring ownership of the horse to Lucky Star,

[1] The notice of appeal only designated one of the two plaintiffs (Lucky Star) as appellant, but the initial brief filed contemporaneously with the notice included the second plaintiff, Ms. Fundora, as an appellant as well. The non-final order under review also reflects that it applies to both appellants.

but both Lucky Star and Ms. Fundora are identified in the policy as the "named insured" at the same address in Hialeah, Florida. Lucky Star is a Florida corporation wholly owned and controlled by Ms. Fundora. Ms. Fundora testified that she intended to convey the stallion to Lucky Star when the horse was older and would become a breeder.

Before any such transfer of ownership, however, the horse died—on January 17, 2015—while in a stall awaiting a competitive Paso Fino show at Tropical Park. Ms. Fundora promptly notified the insurer by telephone, and worked with the insurer to arrange a necropsy. In compliance with the policy, Ms. Fundora submitted a single, sworn proof of loss on behalf of both Lucky Star and herself, and Diamond State investigated (including an examination under oath of Ms. Fundora). In June 2015, having received no payment for her claim of loss under the policy, Ms. Fundora retained counsel and filed a circuit court lawsuit with Lucky Star as the sole plaintiff and Diamond State as the defendant.

Diamond State filed an answer and numerous affirmative defenses, and the parties exchanged pretrial discovery requests. To that point, Diamond State did not move to compel arbitration or assert that right as an affirmative defense. Diamond State did, however, contend that Ms. Fundora was the only owner of the horse, such that Lucky Star had no standing to make a claim for benefits under the policy. In November 2016, Diamond State moved for final summary judgment on

this issue, contending that there was no genuine issue of material fact that Lucky Star had no ownership interest in the insured stallion.

Two weeks later, Lucky Star (then the only plaintiff) moved to amend the complaint to add Ms. Fundora as an individual plaintiff and claimant under the policy, attaching a proposed amended complaint. Diamond State opposed the motion, but the motion to amend was granted and the amended complaint was deemed filed in December 2016.

In January 2017, and before filing any other pleading or paper in response to the amended complaint, Diamond State filed its motion to compel arbitration and stay the circuit court proceedings. Diamond State invoked the limited arbitration provision in Part V. of the Equine Mortality Policy:

> Should there arise a difference of opinion solely concerning the value of a deceased horse which cannot be amicably settled between the Company [Diamond State] and the Insured, it is understood and agreed that such difference of opinion shall, by agreement of the Company and the Insured, be submitted for arbitration to three (3) disinterested parties, one to be selected by the Company, one to be selected by the Insured, and one to be selected by the two so selected. A decision of the majority of the three shall be final in each case. Each party shall pay for the expense of its own arbitrator and a pro rata portion of the expenses of the third arbitrator.

Diamond State conceded in its motion to compel arbitration that it "is no longer contesting liability in any way relative to this matter due to Plaintiffs' recent pleading amendment, and the dispute solely concerns the value of a deceased horse, which falls well within the province of the Arbitration Clause." Lucky Star

and Ms. Fundora opposed the motion to compel arbitration, asserting waiver.[2] Diamond State asserted that its initial defense had been directed against Lucky Star only (on the basis that Lucky Star had no ownership interest in the horse), involving no issue as to the horse's value. Diamond State contended that once Ms. Fundora was added as a plaintiff in the amended complaint, it dropped any defense relating to standing, liability, or coverage, and immediately invoked its right to arbitration. The value of the deceased horse, Diamond State argued, was never an issue until that point in the proceedings.

The trial court agreed and granted the motion. This appeal followed.

Analysis

In the absence of any argument that the law of any state other than Florida applies to the subject policy, we are guided by the seminal case of Seifert v. United States Home Corp., 750 So. 2d 633 (Fla. 1999). The trial court correctly analyzed the three required elements of a motion to compel arbitration under Seifert. First, in this case the parties do not deny that the policy contains an arbitration provision. Second, the trial court correctly determined that value is an arbitrable issue. The applicable policy provision provides that Diamond State is to "indemnify the Insured for the actual cash value of such horse at the time of the accident."[3] The

[2] Lucky Star and Ms. Fundora also argued that the arbitration provision is ambiguous, amounting to an "agreement to agree" and requiring consent by the parties. The trial court rejected this argument, and we do so as well without further discussion.

actual cash value of the stallion at the time of its death is a matter that became a disputed issue once Ms. Fundora, the owner of the horse, joined the lawsuit as a party plaintiff. And as a result of the concessions by Diamond State, that value is the only issue in contention.

The third element of Seifert requires a determination of whether the party invoking arbitration has waived that right by virtue of its pleadings and conduct in the lawsuit. The unique feature of the present case is that the case proceeded for over a year, and numerous pleadings were filed (and depositions were taken), before the motion to compel arbitration was filed. The distinguishing feature of the present case is that all of those actions occurred in a case in which the only plaintiff at the time had no right to compensation under the policy because it did not own the deceased horse. It was not until this defect was cured, through the filing of the amended complaint adding Ms. Fundora as plaintiff, that liability was appropriately conceded by Diamond State, and the limited arbitration clause—confined to the issue of actual cash value—became pertinent.

"Waiver," for purposes of rights to arbitration and other important rights, means "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right."

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[3] The provision limits the benefit payable to an amount "specified in the Schedule applicable to such horse, less any Deductible." The subject policy had a zero deductible amount, and the Schedule J limit of liability was shown to be $180,000.00.

Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005). The record in this case discloses that the "known right" to be considered is Diamond State's right to invoke arbitration to determine actual cash value if disputed by the insured owner of the horse at the time of its death, i.e., Ms. Fundora. Diamond State could not, and did not, waive its right to arbitrate value in defending the initial phase of the case against Lucky Star.

Finally, "All questions about waivers of arbitration should be construed in favor of arbitration rather than against it." Doctors Assocs., Inc. v. Thomas, 898 So. 2d 159, 162 (Fla. 4th DCA 2005).

For all these reasons, we affirm the non-final order staying the circuit court lawsuit[4] and directing the parties to submit to arbitration in accordance with the terms of the policy.

[4] In the order under review, the trial court also directed that a status report be filed in six months. This salutary ruling recognizes that the arbitration is quite limited—"actual cash value" of the insured horse at death—and allows the circuit court to monitor and prod, as necessary, to assure progress in the case.

Third District Court of Appeal

State of Florida

Opinion filed November 1, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2212
Lower Tribunal No. 13-36012

Hermine Ricketts and Laurence Carroll,
Appellants,

vs.

Village of Miami Shores, Florida, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Monica Gordo, Judge.

Institute for Justice and Ari Bargil and Allison Daniel and Michael Bindas (Bellevue, WA), for appellants.

Genovese Joblove & Battista and Richard Sarafan and Nina Greene, for appellees.

Before ROTHENBERG, C.J., and SALTER and LUCK, JJ.

SALTER, J.

As the initial brief in this appeal frames the issue:

Miami Shores homeowners may have virtually anything in their front yard. They may decorate with garden gnomes, pink flamingos and trolls. They may park their boats and jet skis. And they are free to grow whatever trees, flowers, shrubs, grasses, fruits and berries they desire. There is, however, one thing forbidden:

Vegetables.

In Miami Shores, maintaining a vegetable garden in your own front yard is illegal and punishable by fines of $50 per day. But Americans have been growing vegetables on their property since precolonial times. This appeal seeks to vindicate the constitutional rights of Floridians to continue to do so today.

Appellants, Hermine Ricketts and Tom Carroll ("Hermine and Tom"), a married Miami Shores couple in their 60s, designed and maintained a vegetable garden, peacefully and without incident, in the front yard of their modest Miami Shores home for over 17 years. After nearly two decades without a complaint (but quite a few compliments), they were abruptly ordered to stop. Facing the threat of fines of $50 per day, Hermine and Tom destroyed their beloved garden and, along with it, uprooted a significant source of both material sustenance and personal joy. Today, where flowers and colorful plants once abounded, there sits a decidedly less vibrant (but fully compliant) patch of land. All of this, according to Miami Shores, in the name of aesthetics.

Hermine and Tom desire to once again grow vegetables for their own consumption, methodically and attractively as before, in their own front yard. But the ordinance at issue in this case prohibits this historically recognized, productive use of property. And despite Miami Shores' purported interest in promoting aesthetics, the ordinance bans only vegetable gardens—thus allowing virtually any other type of landscape, regardless of how it looks. As a result, Hermine and Tom filed this lawsuit, challenging the ban on front-yard vegetable gardens as a violation of the Florida Constitution's Due Process and Equal Protection Clauses.

* * * *

> Hermine and Tom also challenged the ban on front-yard vegetable gardens as a violation of two of their fundamental rights under the Florida Constitution—the right to acquire, possess and protect property and the right of privacy.[1]

Though these claims seem compelling, the trial court's well-reasoned, ten-page final order rejecting the appellants' claims correctly acknowledged the difficult procedural posture confronting the appellants and dutifully applied controlling precedent. We affirm that final order in all respects.[2]

Procedural Posture—Facial vs. "As-Applied" Constitutional Claims

The appellants' circuit court lawsuit attacking the constitutionality of the applicable zoning ordinance followed an earlier, unsuccessful administrative proceeding in which the appellants contested a notice of violation pertaining to their front-yard vegetable garden. That notice (which followed a written courtesy notice issued four weeks earlier requesting removal of the vegetable garden from

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[1] The appellants have been ably represented in the trial court and here by the Miami and Bellevue, Washington, offices of the Institute for Justice, a national non-profit which "litigates to limit the size and scope of government power and to ensure that all Americans have the right to control their own destinies as free and responsible members of society." http://ij.org/about-us/ (site last visited October 3, 2017).

[2] The appellants also challenge the trial court's order sustaining the Village's objections to certain pretrial discovery requests (including, for example, requests for information and documents regarding the Village Council's reasons for, and any investigation of, the ordinance amendment in question). We reject the appellants' arguments on this point. Rainbow Lighting, Inc. v. Chiles, 707 So. 2d 939 (Fla. 3d DCA 1998) (City commissioners' motives in adopting ordinances are not subject to judicial scrutiny).

the front yard) was issued by a code inspector with the Village's code enforcement department.

The appellants ultimately appeared at two hearings before the code enforcement board, presenting testimony and evidence regarding their objections. The objections did not include constitutional challenges. The Village code enforcement board issued a written notice of disposition sustaining the violation, authorizing a fine of $50.00 per day for non-compliance, allowing another month within which the appellants could comply, and notifying them of their rights to appeal the ruling to the circuit court.

The appellants then appealed to the appellate division of the circuit court. Subsequently, the appellants removed the vegetable garden and voluntarily dismissed their appeal. The Village did not impose any fines regarding the violation.

Less than a month after the circuit court's dismissal of that case, however, the appellants (then represented by their current counsel rather than pro se) filed a new circuit court lawsuit seeking declaratory and injunctive relief challenging the constitutionality of the design standard in section 536(e) of the Village's zoning code, "Vegetable gardens are permitted in rear yards only."[3]

[3] Before an amendment in 2013, the design standard stated "Vegetable gardens are permitted in rear yards." The amendment added the word "only."

The significance of the earlier proceeding is that, for purposes of judicial review by this Court in the present case, that first proceeding conclusively determined that a violation occurred based on the evidentiary record presented to the Village's code enforcement board. Any attempt to present an "as-applied" constitutional challenge to the statute, as opposed to a "facial" constitutional challenge, is barred as a matter of res judicata and waiver. Kirby v. City of Archer, 790 So. 2d 1214 (Fla. 1st DCA 2001); Charles v. Citizens Prop. Ins. Corp., 199 So. 3d 495 (Fla. 3d DCA 2016) (res judicata applies even to those matters which were not, but could properly have been, raised in a prior action between the parties); Holiday Isle Resort &Marina Ass'n v. Monroe County, 582 So. 2d 721 (Fla. 3d DCA 1991) (constitutional claims may be raised in an appeal to a circuit court from a final order of a code enforcement board).[4]

A facial challenge to legislation, as in the case of the ordinance and this second proceeding, "is more difficult than an 'as applied' challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid." Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004); Ogborn v. Zingale, 988 So. 2d 56 (Fla. 3d DCA 2008).

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[4] A facial challenge to the ordinance is not barred by the prior issues and determinations in the parties' code enforcement case because the requisite identity of causes of action necessary to invoke res judicata is absent. Wilson v. County of Orange, 881 So. 2d 625 (Fla. 5th DCA 2004); see also City of Ft. Lauderdale v. Scott, 773 F. Supp. 2d 1355 (S.D. Fla. 2011).

Recognizing that more difficult hurdle facing the appellants in this second proceeding—attacking the statute on the grounds that it cannot be validly enforced under any set of circumstances—we turn next to the level of constitutional scrutiny. The appellants claim that the ordinance must survive the more stringent test, "strict scrutiny," rather than the less stringent "rational basis" level of scrutiny.

Rational Basis versus Strict Scrutiny

The trial court correctly determined that the ordinance did not infringe upon the appellants' fundamental rights and that strict scrutiny is not required. The appellants first posit a fundamental right to use their front yard to grow food for their own consumption, based on article I, section 2 of the Florida Constitution's Declaration of Rights (the right "to acquire, possess and protect property"), based on such cases as Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64, 67 (Fla. 1990) (right to devise one's own property is a right protected by article I, section 2).

The Florida Supreme Court said more in Zrillic, however—"even constitutionally protected property rights are not absolute, and 'are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are necessary to secure the health, safety, good order, [and] general welfare.'" Id. at 68 (quoting Golden v. McCarty, 337

So. 2d 388, 390 (Fla. 1976)). And the ordinance challenged below and here only prohibits vegetable gardens in a front yard, not anywhere or everywhere on a residential lot.[5]

The appellants' second claim that the ordinance violates a fundamental right and should thus be subjected to strict scrutiny also fails. Article I, section 23, of the Florida Constitution provides a right of privacy ("to be let alone and free from governmental intrusion into the person's private life"), and it was relied upon by the Florida Supreme Court in one case involving a "choice concerning food," as the appellants suggest. In that case, In re Browning, 568 So. 2d 4 (Fla. 1990), the issue presented was the withdrawal of nutrition from an 86-year-old, incompetent, incurably ill person in accordance with a previously-signed living will.

The patient's right of self-determination under consideration in In re Browning is not akin to the "choices concerning food" sought to be invoked as a fundamental right by the appellants in this case. It takes a leap of the imagination to suggest that the right of privacy applies to all choices concerning food. Zoning and design ordinances prohibiting chicken coops or turkeys in the front yard may

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[5] The appellants complain that they cannot cultivate a vegetable garden in their backyard because of the shade from overhanging trees and because of their backyard swimming pool. These are particular circumstances that may reflect personal choices, vary from resident to resident, and are inappropriate considerations when the facial challenge claims invalidity as to all residents and all residential lots.

relate to sustenance and food choices, but no Florida case suggests that such a prohibition runs afoul of the right of privacy.

Rational Basis

Having correctly determined that strict scrutiny was not warranted, the trial court considered the constitutionality of the ordinance under the rational basis level of scrutiny. The trial court correctly applied this Court's decisions in Membreno & Florida Ass'n of Vendors, Inc. v. City of Hialeah, 188 So. 3d 13 (Fla. 3d DCA 2016), and Kuvin v. City of Coral Gables, 62 So. 3d 625 (Fla. 3d DCA 2010).

In Membreno, we detailed the heavy burden borne by a party challenging the constitutionality of a legislative enactment under the rational basis test:

- "[T]he burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it." Id. at 20 (quoting Haire v. Fla. Dept. of Agric. & Consumer Servs., 870 So. 2d 774, 782 (Fla. 2004)).
- The "deferential standard" applicable to rational basis scrutiny requires the reviewing court to uphold the enactment if it is "fairly debatable" whether the purpose of the law is legitimate and whether the methods adopted in the law serve that legitimate purpose. Id. at 25.
- Under this test, a legislative choice is not subject to courtroom fact-finding, because such laws "'may be based on rational speculation unsupported by

evidence or empirical data.'" Id. at 26 (quoting City of Fort Lauderdale v. Gonzalez, 134 So. 3d 1119, 1121 (Fla. 4th DCA 2014)).

- A legislative enactment can pass the rational basis test even if purely experimental. Id. at 28.
- The Constitution does not prohibit a legislature from passing a law striking a judge as unwise or unfair. Id. at 29.

Applying these principles, grounded in the core concept of separation of powers between the judicial branch and the political branches, to the present case, the ordinance is rationally related to the Village code's design standards and landscaping regulations. The preamble to the pertinent section of the code states that the purposes of the design and landscaping provisions include the "protection and promotion of the . . . appearance . . . of the village," the protection of "the distinctive character of Miami Shores Village that has resulted from . . . [t]he application and careful administration of protective regulations," and the protection of "property values and the enjoyment of property rights by minimizing and reducing conflicts among various land uses . . . ." Village of Miami Shores, Fla., Code of Ordinances § 100.

It is at least fairly debatable that a vegetable garden occupying most of the appellants' front yard and including, according to the appellants' complaint, some 75 different varieties of vegetables, could signify a conflict between the Village's

decorative standards for front yards (green space planted with grass, sod, low growing plants, and a minimum of two trees) and an agricultural use based on the cultivation of vegetables for consumption. The appellants assert, however, that the Village's ban on front yard vegetable gardens is based on ambiguous and undefined "aesthetic" requirements, "inviting arbitrary and subjective enforcement."

This Court addressed the relevance and validity of zoning regulations based on aesthetics in Kuvin, 62 So. 3d at 634-35. We cited with approval numerous Florida cases in which zoning regulations based on aesthetics have been upheld as preserving the residential look and feel of a community.

Finally, the trial court conscientiously surveyed four dictionary definitions of each of the terms "vegetable" and "garden," concluding that the plain meaning of these words when used together connotes the cultivation of plants to be eaten as part of a meal, as opposed to the cultivation of plants for ornamental reasons, i.e., aesthetics. We agree.

Conclusion

Following the ineluctable conclusion that the Village ordinance does not restrict a fundamental right or suspect class, Membreno and Kuvin control the analysis in this case. The ordinance is constitutional. We agree with the trial court's parting observation that the appellants "still have a remedy. They can

petition the Village Council to change the ordinance. They can also support candidates for Council who agree with their view that the ordinance should be repealed."[6]

Affirmed.

[6] Such a result actually occurred in the aftermath of Kuvin. Coral Gables' ban on private (non-commercial) pickup trucks in front of a home was liberally amended by City voters following a November 2012 referendum on the issue. http://www.coralgables.com/index.aspx?recordid=672&page=30 (City Code Enforcement Release posted November 6, 2012; site last visited October 3, 2017).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11083

D.C. Docket No. 8:15-cv-02920-JSM-EAJ

ANTONY LEE TURBEVILLE,

Plaintiff-Appellant,

versus

FINANCIAL INDUSTRY REGULATORY AUTHORITY,
JOHN DOES,
JOHN WILLIAM MCCALL,

Defendants-Appellees.

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

(November 1, 2017)

Before TJOFLAT and ROSENBAUM, Circuit Judges, and REEVES,[*] District Judge.

TJOFLAT, Circuit Judge:

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[*] The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Before us is the District Court's dismissal of Antony Turbeville's complaint against the Financial Industry Regulatory Authority ("FINRA") and its denial of Turbeville's motion to remand the case to Florida state court. We affirm both.

I.

A.

The Securities Exchange Act of 1934 ("Exchange Act") provides that persons who wish to use any instrumentality of interstate commerce to transact in securities must join an association of brokers and dealers registered as a national securities association. 15 U.S.C. § 78o(a)(1), (b)(1).[1] In turn, the Exchange Act requires registered national securities associations to establish membership and conduct rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest . . . ." *Id.* § 78o-3(b)(6).

When member brokers or dealers violate the rules of a national securities association or any provision of the Exchange Act, the association can—indeed, must—levy sanctions that carry the force of federal law. *Id.* § 78o-3(b)(7) (requiring national securities associations to "appropriately discipline[]" members

[1] Alternatively, a person may transact in securities if he joins a national securities exchange, but he must transact exclusively on that exchange. 15 U.S.C. § 78o(b)(1)(B).

for violating "the rules of the association" or "any provision of" the Exchange Act "by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction"). In this way, the Exchange Act vests registered national securities associations with a prominent role in the administration and enforcement of federal securities law. Fittingly, the Exchange Act refers to these associations as "self-regulatory organizations" ("SROs"). *Id.* § 78s. Before taking effect, all rules proposed by national securities associations must be reviewed by the Securities and Exchange Commission ("SEC") to ensure they are "consistent with the requirements of" the Exchange Act and may be approved by the SEC only after public notice and comment. *Id.* § 78s(b)(1).

FINRA, a private, non-profit Delaware corporation, is one of those national securities associations and a registered SRO.[2] FINRA oversees and regulates securities firms who join its membership, individuals who work for those firms, and individuals associated with those firms. Securities brokers who wish to join a FINRA-affiliated firm must pass FINRA-administered examinations and comport their professional conduct with the rules, regulations, and standards FINRA

[2] FINRA, previously known as the National Association of Securities Dealers, has since 1939 been the only registered national securities association in the United States. Exemption for Certain Exchange Members, Exchange Act Release No. 74,581, 111 SEC Docket 680 (Mar. 25, 2015).

promulgates. When its member brokers or associated persons violate FINRA's rules, FINRA disciplines them pursuant to the Exchange Act's requirements.

B.

FINRA's disciplinary process is governed by the FINRA Code of Procedure, a series of internal rules that set forth the disciplinary procedures that apply—and the due-process protections afforded—to members charged with breaking the rules. In satisfaction of the Exchange Act's requirement, the SEC approved the FINRA Code of Procedure. *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 571–72 (2d Cir. 2011).

The FINRA Code of Procedure sets forth a multi-layered hearing and appeals process that governs disciplinary actions against FINRA-affiliated brokers and dealers.[3] Once FINRA formally charges a broker with a violation by filing a complaint, a FINRA hearing panel conducts a full hearing to determine whether the individual violated FINRA regulations, and, if so, imposes sanctions. *See* FINRA Rule 9200 (setting forth FINRA's disciplinary procedures). The individual may then appeal the hearing panel's finding and punishment to FINRA's appeals

[3] These procedures are designed to conform to the Exchange Act's requirement that SROs' disciplinary procedures

> provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

15 U.S.C. § 78o-3(b)(8).

board, the National Adjudicatory Council ("NAC"). FINRA Rule 9311(a). After that, a broker may, as of right, seek *de novo* review of the NAC's decisions in the SEC. 15 U.S.C. § 78s(d)(2). Finally, the broker may appeal the SEC's decision to a federal court of appeals—again, as of right. *Id.* § 78y(a)(1).

Prior to formally charging a broker with a violation and instituting formal disciplinary proceedings, FINRA retains discretion to issue to the broker a "Wells notice," a communication informing the individual that FINRA believes it has grounds to institute a disciplinary action and inviting him to respond and try to convince FINRA not to institute formal proceedings. *See* FINRA Rule 8210(a)(1); FINRA Regulatory Notice 09-17 at 3 (Mar. 2009). These notices become a part of the public record: FINRA's SEC-approved rules require it to disclose communications like Wells notices in response to public inquiries about FINRA-affiliated brokers or firms. *See* FINRA Rule 8312(a), (b)(2)(A) (requiring FINRA, "[i]n response to a written inquiry, electronic inquiry, or telephonic inquiry via a toll-free telephone listing," to release "information regarding a current or former FINRA member," including Wells notices, which are required by the "U5" and "U6" forms listed in the Rule). Those rules are designed to satisfy the Exchange Act's requirement that SROs "establish and maintain a . . . readily accessible electronic or other process, to receive and promptly respond to inquiries regarding . . . registration information on its members and their associated persons." 15

U.S.C. § 78o-3(i)(1). FINRA makes these disclosures through its "BrokerCheck" program, an online database that contains a report on each currently and formerly registered broker. BrokerCheck reports are available to the public.

FINRA's rules set forth an administrative-review proceeding through which a broker may "dispute the accuracy of" information disclosed in his BrokerCheck report by filing written notice stating the grounds for his dispute and submitting supporting documentation "identifying the alleged inaccurate factual information and explaining the reason that such information is allegedly inaccurate." *See* FINRA Rule 8312(e)(1)(B). Once the broker has done so and if FINRA determines that the "dispute of factual information is eligible for investigation," FINRA will "add a general notation to the eligible party's BrokerCheck report stating that the eligible party has disputed certain information included in the report." *Id.* § (e)(2)(B). Once it completes its investigation, FINRA will then issue a written finding setting forth its determination as to the accuracy of the information contested, and it will update the broker's BrokerCheck report accordingly. *Id.* § (e)(3)(A)–(B). Unlike the hearing panel determination in the formal disciplinary process, this initial finding is the end of the road: "A determination by FINRA, including a determination to leave unchanged or to modify or delete disputed information, is not subject to appeal." *Id.* § (e)(3)(C).

C.

In 2009, FINRA filed a complaint against Antony Turbeville, a registered representative of a FINRA-affiliated broker firm. The complaint alleged that, among other things, Turbeville committed securities fraud by recommending certain types of collaterized mortgage obligations to elderly buyers who lacked the sophistication and risk tolerance necessary to make them suitable purchasers. A FINRA hearing panel found that Turbeville's conduct violated FINRA's rules, barred him from associating with any FINRA-affiliated firm, and assessed restitution and adjudication costs against him. Turbeville appealed the hearing panel's decision to the NAC, which affirmed. Turbeville then appealed to the SEC. Before the SEC reviewed his case, Turbeville withdrew his appeal, thereby letting the hearing panel's findings and punishments stand.

While Turbeville's appeal to the NAC was still pending, FINRA learned that Turbeville filed a defamation suit in Florida state court against the elderly investors who testified against him in the course of the FINRA hearing panel's proceedings.[4] Upon learning of this suit, FINRA investigated Turbeville again—this time, to determine whether he violated FINRA rules by filing a retaliatory action against his former customers in an attempt to influence ongoing FINRA disciplinary

[4] Turbeville voluntarily dismissed his first Florida lawsuit when the Florida court ordered him to arbitrate his claims.

proceedings. FINRA's investigators determined that they had cause to institute another disciplinary proceeding on the basis of Turbeville's conduct and issued Turbeville a Wells notice. The Wells notice said,

> ON JULY 3, 2013, FINRA MADE A PRELIMINARY DETERMINATION TO RECOMMEND THAT DISCIPLINARY ACTION BE BROUGHT AGAINST ANTONY TURBEVILLE ALLEGING HE FILED A FALSE COMPLAINT AGAINST AND ATTEMPTED TO INTIMIDATE WITNESSES IN A FINRA DISCIPLINARY ACTION, IN VIOLATION OF FINRA RULE 2010.

At the time FINRA issued the Wells notice, Turbeville no longer worked in the securities industry and was not a member of a FINRA-affiliated broker firm. The Wells notice was included in Turbeville's BrokerCheck report, which was still available to the public. Turbeville responded to the Wells notice and disputed the investigators' findings. Subsequently, FINRA removed the Wells notice from Turbeville's BrokerCheck report.

Then, Turbeville returned to the Florida state courts—this time suing FINRA, unnamed FINRA employees, and another individual.[5] He sued for defamation, abuse of process, intentional interference with a prospective advantage, and conspiracy, all Florida tort actions. Turbeville alleged that each of his claims arose from FINRA's second investigation of his suit against his former

[5] This individual, John William McCall, was later identified as the son of one of Turbeville's former clients. The District Court observed that it appeared Turbeville never served process to McCall or the individual FINRA employees.

clients, which he claimed exceeded FINRA's authority and jurisdiction under its own internal rules.

FINRA timely removed the case to federal district court and shortly thereafter filed a motion to dismiss Turbeville's claims. Turbeville filed a motion to remand the case to the Florida state court, arguing that all of his claims were, on their face, based in Florida tort law. Contemporaneously, he opposed FINRA's motion to dismiss. The District Court construed Turbeville's suit as a challenge to FINRA's application of its own internal rules, which FINRA promulgated pursuant to its grant of regulatory authority under the federal Exchange Act. Thus, the Court concluded that a substantial federal question existed and denied Turbeville's motion to remand. In the same order, the District Court granted FINRA's motion to dismiss Turbeville's claims, concluding that FINRA had absolute immunity from liability in the exercise of its regulatory functions, and that no private right of action for damages against FINRA exists. Turbeville timely appealed.

II.

We affirm both the District Court's denial of Turbeville's motion to remand and its decision to grant FINRA's motion to dismiss. As to the first issue, we hold that suits against SROs like FINRA for violating their internal rules "arise under" the Exchange Act of 1934 and therefore fall under the Act's grant of exclusive jurisdiction to the federal district courts. Thus, removal was proper in this case.

As to the second issue, we hold that no private right of action exists for SRO members and associated persons to sue SROs for violating their own internal rules. Accordingly, the District Court correctly dismissed Turbeville's claim.

A.

The jurisdictional question turns on whether the suit "arose under" Section 27(a) of the Exchange Act, 15 U.S.C. § 78aa(a).[6] Section 27(a) grants the federal district courts exclusive jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." *Id.* In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, the Supreme Court held that § 27(a) "confer[s] exclusive federal jurisdiction of the same suits as 'aris[e] under' the Exchange Act pursuant to the general federal question statute." 578 U.S. —, —, 136 S. Ct. 1562, 1567 (2016) (second alteration in original) (quoting 28 U.S.C. § 1331).

Hence, we apply the same test to determine whether federal courts have exclusive jurisdiction over matters arising under the Exchange Act as we do to determine whether the district courts have original jurisdiction over suits under the general federal-question statute, 28 U.S.C. § 1331. That test is the familiar

[6] If the action did not "arise under" § 27(a) of the Exchange Act, we would use an identical "arising under" test to determine whether the case presented a substantial federal question sufficient to warrant federal jurisdiction under the general federal-question statute, 28 U.S.C. § 1331(a). Indeed, the District Court denied Turbeville's motion to remand under § 1331 and did not discuss § 27(a). This analysis was not erroneous, as the outcome would be the same under either jurisdictional provision.

"arising under" test, which allows for federal jurisdiction in two circumstances: first, where "federal law creates the cause of action asserted"; and second, where a complaint invoking only state-law claims "'necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance' of federal and state power." *Manning*, 136 S. Ct. at 1570 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 2368 (2005)).

We begin our analysis by examining Turbeville's complaint to ascertain the nature of his challenge. Although it invokes state tort law as the basis for relief, the complaint is on its face a challenge to FINRA's application of its internal rules in exercising its regulatory authority under the Exchange Act. Three of Turbeville's four causes of action—defamation, abuse of process, and intentional interference with a prospective advantage—rest expressly on allegations that FINRA violated its own rules and exceeded its jurisdictional grant. For example, regarding defamation, Paragraph 48 of the complaint says, "FINRA's rules and regulations precluded publication of a formal charge . . . when FINRA had only a Wells notice and a response to that Wells notice." Later in the same paragraph, Turbeville says "FINRA . . . published [the Wells notice] far earlier than would normally have been the case had customary protocols been followed." The same

paragraph concludes, "FINRA had no jurisdiction to issue a Wells notice, investigate, or conduct any disciplinary action for the conduct."

Regarding abuse of process, Paragraph 59 alleges, "[t]he activities of FINRA and of the Does in connection with the Florida Action were outside the scope of their regulatory authority, and outside the scope of their corporate authority." Regarding intentional interference with a prospective advantage, Paragraph 69 says,

> The publication of [the Wells notice] in this context was not only done in a manner which failed to provide a forum for Turbeville to respond, the publication was done in a manner and at a time when, under FINRA's own internal rules and regulations, no inquiry, investigation, or action could have been conducted at all and no publication should have been made public even if such actions should have been conducted. By publishing those accusations as set forth in [the Wells notice], Turbeville's due process right to defend himself against FINRA's charges was denied even though no defense should have been necessary because FINRA was outside its authority.

Finally, while Turbeville's fourth cause of action, conspiracy, does not expressly reference FINRA's rules, the allegation incorporated all of the preceding allegations in the complaint, including the allegation that Turbeville was not "subject to the disciplinary and/or regulatory jurisdiction of FINRA for the actions alleged in [the Wells notice]."[7]

[7] We add that, even if Turbeville's conspiracy claim does not turn on the scope of FINRA's regulatory authority under federal law, the District Court still had authority to assert jurisdiction over that claim. Turbeville's complaint is a classic example of shotgun pleading: each claim for relief incorporates indiscriminately all of the factual allegations set forth in the

Thus, Turbeville's complaint is fundamentally a challenge to an SRO's compliance with its internal rules while carrying out its regulatory and enforcement functions. Turbeville's claims cannot be decided without adjudging FINRA's adherence to its internal rules in investigating Turbeville and publishing the Wells notice in his BrokerCheck report. And this challenge appears on the face of the complaint: while Turbeville invokes only Florida tort law, to sustain each of his theories of recovery, he returns necessarily to his contention that FINRA violated its own internal rules and exceeded its regulatory jurisdiction.

To even begin to resolve Turbeville's claims, then, the District Court would have to interpret FINRA's internal rules to determine whether FINRA's conduct in investigating Turbeville complied with those rules. And notwithstanding those internal rules, FINRA issued the Wells notice at the heart of Turbeville's suit pursuant to its regulatory directive under the Exchange Act, which mandates that SROs publish certain information about their members. *See* 15 U.S.C. § 78o-3(i)(1)(B), (5) (requiring SROs to establish a process "to receive and promptly respond to inquiries regarding . . . registration information on its members and

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prior claims for relief, including allegations that FINRA violated its internal rules. This is tantamount to a one-count complaint. Turbeville thus presents multiple theories of recovery—all of which hinge necessarily on the conduct of FINRA's regulators during the course of their investigation of him. Thus, each of Turbeville's claims for relief involves a "common nucleus of operative fact." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138 (1966). Hence, to the extent that any of his claims do not turn on resolution of a federal question—here, FINRA's regulatory conduct under federal securities law—the District Court still had supplemental jurisdiction over those claims under 28 U.S.C. § 1367(a).

their associated persons" and defining "registration information" as "disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law, or exchange or association rule"). The District Court would have to therefore decide whether Wells notices fall within the category of information the Exchange Act requires SROs to make available to the public.

So, as the District Court observed, "[i]n order to determine Turbeville's claims that FINRA's regulatory investigation and disclosure of that investigation on a regulatory database were outside its authority and in violation of FINRA rules and regulations, the Court must necessarily interpret FINRA's rules and regulations." And because those rules and regulations are promulgated according to the Exchange Act's mandates, their interpretation unavoidably involves answering federal questions.

More importantly, Turbeville's suit does not just raise a federal question; it turns on the existence of a federally supplied right of action. Turbeville uses state-law claims to launch a collateral attack on FINRA's conduct in carrying out its disciplinary and disclosure functions under its SEC-approved rules. Were such a right of action to exist, it must have been supplied by federal law, because federal law—namely, the Exchange Act—creates SROs, vests them with a first-line role in the enforcement of federal securities law, and mandates creation of internal rules to govern their disciplinary and disclosure actions.

When exercising these functions, SROs act under color of federal law as deputies of the federal government. To sue these actors, a litigant must obtain permission from the federal sovereign; otherwise, any state-law claims asserted against them for carrying out their federally mandated duties crash headlong into the shoals of preemption. *McCulloch v. Maryland*, 4 Wheat. 316, 317 (1819) ("The states have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government."). Thus, because Turbeville's complaint depends on a right of action supplied by federal law, the District Court concluded correctly that removal was proper. *See Manning*, 136 S. Ct. at 1569 ("Most directly, and most often, federal jurisdiction attaches when federal law creates the cause of action asserted.").

B.

We conclude further that the District Court properly dismissed Turbeville's claim. The District Court rightly found that Congress did not intend to create a private right of action for plaintiffs seeking to sue SROs for violations of their own internal rules.[8] We find no support in the Exchange Act for the proposition that Congress intended to create such a right. The Act's silence regarding the existence

[8] Because we hold that no private right of action exists to sue SROs for violating their internal rules, we do not address the District Court's alternative conclusion that SROs and their employees are absolutely immune from suit while exercising their regulatory functions.

of a private right of action speaks volumes, because Congress can simply say it is creating a private right of action if it wants to do so. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 572, 99 S. Ct. 2479, 2487 (1979) ("Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."); *see also MM&S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 910–11 (8th Cir. 2004) (quoting the Supreme Court's decision in *Touche Ross* in finding no private right of action against FINRA's predecessor for violation of its internal rules).

In fact, the internal appeals and administrative-review processes created by the Exchange Act confirm that no private right exists. Those avenues of relief satisfy the Exchange Act's requirement that SROs "provide a fair procedure for the disciplining of members and persons associated with members," and that they "adopt rules establishing an administrative process for disputing the accuracy of information provided in response to inquiries" about affiliated persons. *See* 15 U.S.C. § 78o-3(b)(8), (i)(3).

To survive, Turbeville's collateral attack on FINRA's regulatory conduct requires picking up far more than the Exchange Act's expressly provided remedies put down. It implies necessarily the existence of a private right of action against FINRA that operates parallel to the administrative-review processes the Act prescribes. And it implies a second set of remedies—the remedies supplied by

state tort law. FINRA's appeals process carries its own set of remedies—to wit, reversal of the FINRA hearing board's disciplinary actions. In similar fashion, FINRA's administrative-review process for disputing information disclosed in a BrokerCheck report carries with it the remedy of removing information shown to be inaccurate. Yet despite the existence of these Exchange-Act-mandated remedies, Turbeville seeks a separate, distinct set of rights and remedies: the right to sue FINRA in state court under state tort law and recover damages as allowed therein. At the same time, he argues that no federal question exists, meaning the federal courts lack jurisdiction to adjudicate these claims. Thus, Turbeville would have us hold that a private right of action to challenge SROs—which are authorized and closely directed by federal law and federal agencies—exists under federal law, while also holding that only state courts have authority to enforce that right of action.

We are not persuaded that Congress contemplated such a result when it granted SROs regulatory authority under the Exchange Act. Recognizing the second set of rights and remedies under state law Turbeville seeks would undercut the distinctly federal nature of the Exchange Act. If actions like Turbeville's are permitted, fifty state courts would be authorized to supervise FINRA's regulatory conduct and its application of its internal, SEC-approved rules through the vehicle of state tort law. And given SROs' front-line role in enforcing federal securities

laws, such review would in turn lead to state-court supervision of the Exchange Act's securities-regulation regime writ large. We find nothing in the Exchange Act that suggests Congress intended to create a private right of action overlaying the relief avenue it set forth in the Act's text and thereby disrupt the uniform federal character of the securities-regulation scheme Congress created.

That these remedies leave something to be desired does not change the analysis. The Supreme Court long ago observed, "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross*, 442 U.S. at 568, 99 S. Ct. at 2485 (internal quotation marks omitted) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688, 99 S. Ct. 1946, 1953 (1979)). Although a person regulated by an SRO might find the prescribed remedies incapable of fully assuaging the reputational harm he suffered as a result of the SRO's regulatory and disciplinary conduct, he chose to accept those limitations on recovery by affiliating himself with an SRO-governed firm.

Thus, in the absence of express statutory language creating an additional right of action with additional remedies, we conclude that Congress intended these processes to be the sole venues through which FINRA-affiliated parties can challenge SROs' regulatory and enforcement conduct for compliance with their own internal rules. As a result, the District Court did not err when it found that it

had jurisdiction to deny remand to state court but not jurisdiction to afford relief under a federal cause of action that does not exist.

III.

For the above reasons, the District Court's decision is AFFIRMED.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

THE WATERVIEW TOWERS CONDOMINIUM ASSOCIATION, INC., a Florida corporation not-for-profit, **LAURA BENNETT, HELEN BOSSMAN,** and **THOMAS J. O'NEILL,** individually,
Appellants,

v.

CITY OF WEST PALM BEACH, a Florida Municipal Corporation, and **PALM HARBOR HOTEL, LLC,** a foreign limited liability company,
Appellees.

No. 4D16-2858

[November 1, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Acting Circuit Judge; L.T. Case No. 50-2014-CA-005009-XXXX-MB.

Robert J. Hauser of Pankauski Hauser PLLC, West Palm Beach, Robert Sweetapple of Sweetapple, Broeker & Varkas, PL, Boca Raton, and John R. Eubanks, Jr. of Breton, Lynch, Eubanks & Suarez-Murias, P.A., West Palm Beach, for appellants.

K. Denise Haire and Douglas N. Yeargin, Office of the City Attorney, West Palm Beach, for appellee, City of West Palm Beach.

Bruce S. Rogow and Tara A. Campion of Bruce S. Rogow, P.A., Fort Lauderdale, and Joseph Ianno, Jr. and Henry S. Wulf of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellee, Palm Harbor Hotel, LLC.

GROSS, J.

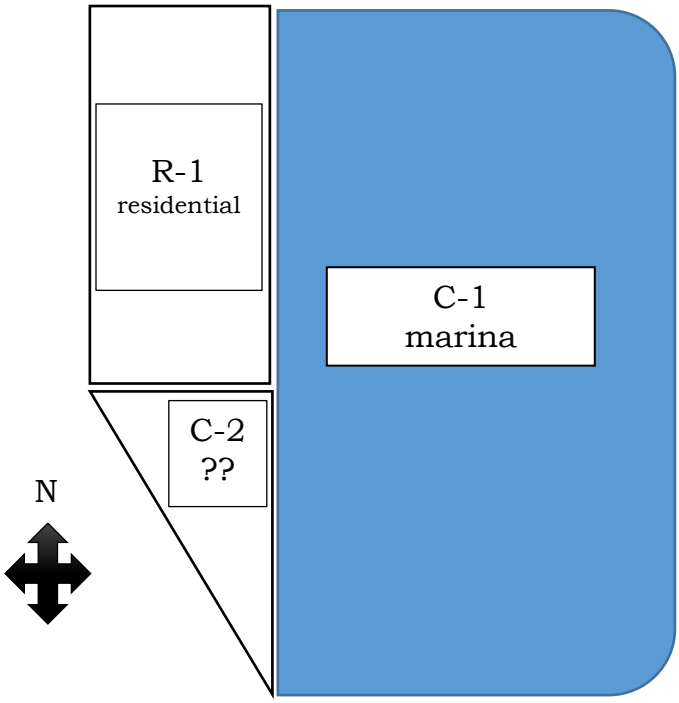
We hold that unit owners and a condominium association have standing to enforce certain development restrictions contained in condominium documents, as defined in the declaration of condominium.

Overview

The property central to this litigation is owned by the City of West Palm Beach. It is bordered on the west side by Flagler Drive, on the east side

by Lake Worth, on the north side by 5th Street, and on the south side by 1st Street.

It is a single piece of property, divided into three parcels: R-1, C-1, and C-2. The parcels are aligned like this:



Palm Harbor Hotel, LLC (the "Hotel") wants to build a hotel and parking garage on parcel C-2. The neighbors living in the condominium tower located on parcel R-1 oppose the Hotel's plans.

This action was brought by The Waterview Towers Condominium Association, Inc. and three individuals who own residential units in the condominium (collectively, the "Plaintiffs") against the City and the Hotel. The Plaintiffs asked the circuit court to declare that the Hotel's plans violated development restrictions found in various documents.

Historical Background

In 1968, the City leased the parcel to the West Palm Beach Marina, Inc. for 99 years. In 1979, the City Commission passed Ordinance 1455-79 which permitted the City to amend the lease. The City, as lessor, and the Marina, as lessee, executed the "Consolidated and Amended Lease" (the "Lease"). Both parties to the Lease anticipated future development of the property. While a portion of the property was to be maintained as a

marina,[1] the remainder of the property could be used in almost any manner.

Article XXX, section 5 of the Lease is important because it contains two development restrictions the Plaintiffs seek to enforce in this action, the "View Restriction," and the "Unanimity Provision." The relevant language reads:

Art. XXX – Miscellaneous Provisions

> It is further mutually covenanted and agreed by and between both of the parties hereto as follows:
>
> * * *
>
> Section 5. Lessee agrees that it will use good site planning and architectural design so that the buildings will fit into the character of the downtown area of West Palm Beach or enhance the same, and retain the waterfront characteristics of the area. *There are 1,573.35 feet of waterfront view, measured on a north-south line, presently existing, of which Lessee agrees to retain open and free from building obstructions as viewed from Flagler Drive [62.82%].* All development of the Leasehold Premises herein shall be pursuant to *a site plan to be approved by resolution or motion of the City Commission unanimously passed, and any modification, change or amendment thereto shall require a unanimous vote of approval of same* by the City Commission of the City of West Palm.[2]

Under Article XXXVI of the Lease, entitled "Condominium Provisions," the parties agreed that the entire property would be submitted to condominium ownership in accordance with the Condominium Act. The plan for the "leasehold condominium" was to divide the property into a residential and a commercial portion. The residential portion would be further divided into 132 units, and the commercial portion would be

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[1] The marina, parcel C-1, was the subject of *City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund*, 714 So. 2d 1060 (Fla. 4th DCA 1998), *approved*, 746 So. 2d 1085 (Fla. 1999). That case held that the City's ownership interest in parcel C-1 extended only to the "land immediately beneath the four piers, referred to by the trial court as the 'footprint' of the piers." *Id.* at 1066.

[2] All emphases supplied unless otherwise noted.

divided into two units. The operation of both the residential and commercial portions would be conducted by the Association.

In addition to the development restrictions set forth above, the Plaintiffs sought a declaration that development of Unit C-2 is limited to a four-story building with surface parking only. The Plaintiffs' argument relies on the following language found under Article XXXVI of the Lease:

> . . . The Commercial Portion will include boat dockage facilities, a marina office with related facilities, and *surface parking*; additionally, a commercial building having approximately one hundred (100') feet of frontage on Flagler Drive and *not exceeding four (4) stories* in height may be constructed on the Commercial Portion.

The following definitions found within the "Condominium Provisions" of the Lease are relevant to this appeal:

> l. "Condominium Documents" means in the aggregate the "Declaration" (as hereinafter defined), Articles, By-Laws, *this Lease* and all of the instruments *and documents referred to therein*.
>
> * * *
>
> q. "Lessee" means in the first instance West Palm Beach Marina, Inc. . . .; and in the second instance upon [the Marina's] assignment of the Lease . . . to LRI, "Lessee" means LRI; and finally, after Submission and upon assignment of the First Unit, *"Lessee" means the Unit Owners*.

One of the documents "referred to" by the Lease is a site plan. In June of 1979, "Site Plan 7" was unanimously approved by the City Commission. The Plaintiffs argue that language in Site Plan 7 imposes the same four-story height restriction as well as a square footage restriction on the future development of Unit C-2. Site Plan 7 contains this "NOTE:"

> THE COMMERCIAL STRUCTURE SHALL NOT EXCEED FOUR STORIES IN HEIGHT AND 20,000 Sq. Ft. IN AREA. THE COMMERCIAL STRUCTURE MAY BE LOCATED ANYWHERE SOUTH OF THIRD STREET, PROVIDED ITS LOCATION IS IN COMPLIANCE WITH THE CITY OF WEST PALM BEACH ZONING ORDINANCES. LESSEE MAY BUT IS NOT REQUIRED TO BUILD THE COMMERCIAL STRUCTURE.

Shortly after the Lease was executed, it was assigned by the Marina to Leisure Resorts, Inc. ("LRI"). In 1981, LRI established a condominium on the entire leased parcel by filing of the "Declaration of Condominium of The Waterview Towers, A Condominium" (the "Declaration"). The condominium, including residential and commercial units, was named "The Waterview Towers, A Condominium."

Although not attached to the Declaration, the Lease is referenced throughout the document and, significantly, the Lease and all documents referenced therein are included in the Declaration's definition of the term "Condominium Documents:"

> l. "Condominium Documents" means in the aggregate this Declaration, the Articles, By-Laws, *the Lease and all of the instruments and documents referred to therein*.

In addition to the development restrictions in the Lease (and its referenced documents), the Plaintiffs sought a declaration that development of Unit C-2 is limited to a single commercial building, not exceeding seventy-five feet in height, with no more than one-hundred feet of frontage along Flagler Drive. The Plaintiffs' argument relies on the following language of the Declaration:

> . . . The Commercial Unit, designated as "C-2" on the Survey shall contain parking facilities which may be used as determined by the C-2 Commercial Unit Owner and the Developer reserves the right for and on behalf of the C-2 Commercial Unit Owner to construct *a commercial building* ("Commercial Structure") within the C-2 Commercial Unit not exceeding *seventy five (75') feet in height* with approximately *one hundred (100') feet of frontage* on Flagler Drive.

More than 25 years after establishing the condominium, in 2007, LRI sold parcels C-1 and C-2 to Leisure Resorts, LLC ("Leisure Resorts"). The parties executed a Warranty Leasehold Estate Deed and Partial Assignment of Lease Agreement which transferred all of LRI's interest in parcels C-1 and C-2, including "any and all remaining rights . . . held by Grantor as 'Developer' under the Declaration and/or as the owner of the Units."

Current Dispute

In 2009, the City and Leisure Resorts executed a Development Agreement recognizing Leisure Resorts' intent to develop Unit C-2 to

include a hotel and a parking garage (the "Development Agreement"). A diagram titled "Site Plan No. 8" was attached to the Development Agreement. The conceptual site plan had been approved by Resolution 239-07 in 2007 by the City Commission.

In the Development Agreement, the City gave "conceptual approval" to development of Unit C-2 in accordance with Site Plan No. 8. Both parties agreed to "work cooperatively for a period of up to three (3) years … towards a revised site plan … in lieu of [Site Plan No. 8]."

In the Development Agreement, the City expressly waived any right it may have had as Lessor to enforce the provisions of Article XXX, section 5 of the Lease "with respect to the Approved Site Plan [Site Plan No. 8] or any Revised Site Plan."[3] The City and Leisure Resorts also agreed that the Development Agreement did not "constitute an amendment or modification of any of the terms and provisions of the Consolidated Lease," and none of the Condominium Documents were modified or amended to reflect the new development plan for Unit C-2.

After executing the Development Agreement, Leisure Resorts subleased Unit C-2 to the Hotel. The sublease is subject to the terms and conditions of the Lease, the Declaration, and the Development Agreement.

Sometime in 2013, the Hotel applied to rezone Unit C-2 so it could build an eight-story hotel with an attached three story parking garage. The City approved the rezoning.

Because of their opposition to the proposed development of Unit C-2 (which had been a parking lot since the early 1980's), the Association and two R-1 unit owners filed a petition for writ of certiorari in the circuit court. A three judge panel ruled that the petitioners were denied due process by the City and quashed the 2014 Development Orders. The circuit court appellate panel held that the Association and R-1 Unit Owners had standing to participate in the "quasi-judicial" zoning proceedings due to their special relationship with the land.

In this case, the Plaintiffs sought a declaration that the Association and Unit Owners have the right to enforce the development restrictions found in the referenced documents and that future development of Unit C-2 is limited to the building of:

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[3] We note that Article XXX, section 5 includes both the View Restriction and the Unanimity Provision set forth above.

1. A single commercial office building;
2. Not exceeding four (4) stories;
3. Not exceeding ... [75 feet] in height;
4. Not exceeding ... [100 feet] of total frontage on Flagler Drive;
5. All of which may only utilize surface parking.

The Plaintiffs further sought a declaration that "any proposed construction on the C-2 Upland Parcel ... must be unanimously approved by the City Commission." As an affirmative defense, both the City and the Hotel averred that the Plaintiffs lacked standing to enforce the development restrictions.

After a non-jury trial, the circuit court ultimately issued an amended final judgment, containing the following rulings:

> Plaintiffs lack standing to enforce the subject lease against the Commercial Unit Owner. Only the CITY has standing to enforce, modify or waive provisions of the Lease with respect to the Commercial Portion, including the ability to waive the provisions of Article XXX, Section 5 of the Lease.
>
> Plaintiffs' standing to enforce the Declaration against the Commercial Portion is limited to provisions regarding the height and width of the commercial building which may be located on the C-2 Commercial Unit as set forth in Article V, paragraph D of the Declaration. There are no other restrictive covenants applicable to the Commercial Units, specifically the C-2 Commercial Unit.
>
> Development of the C-2 Commercial Unit is not limited to a single four (4) story office building containing a maximum of 20,000 square feet.
>
> The currently approved development and use of the C-2 Commercial Unit consists of a commercial structure and parking facilities as shown on Site Plan No. 8, the provisions of which are not challengeable because the applicable statute of limitations to challenge Site Plan No. 8 has expired.
>
> The Development Agreement is not a statutory development agreement requiring compliance with Chapter 163 and, further, any challenges to the Development Agreement and Site Plan No. 8 are barred by the applicable Statute of Limitations.

> The Association and the Residential Unit Owners do not have the right under the Lease to consent or approve any development plans for the Commercial Units. While Plaintiffs are permitted to participate as parties in quasi-judicial proceedings before the City Commission, they are not co-lessees of the Commercial Portion. They have a partial assignment of the Lease as to their units and an undivided portion of the common elements. The Commercial Units are not common elements of the Association.

This is the Plaintiffs' appeal from the Amended Final Judgment.

The Plaintiffs Have Standing to Bring an Action Against Any Unit Owner Not Complying with the Condominium Documents, which include the Lease

We find that Article XXII of the Declaration grants standing to the Plaintiffs and that the Hotel and the City are bound by the Declaration.

The City's interest in the property is subject to the provisions of the Declaration because, as a lessor, the City consented to its execution. Both parties to the Lease agreed "that a leasehold condominium shall be created pursuant to the [Condominium] Act …." The parties further agreed that upon the recording of the Declaration, the "Condominium Provisions" found at Article XXXIV "shall supplement the Lease."

By statute,

> [a] person who joins in, or consents to the execution of, a declaration subjects his interest in the condominium property to the provisions of the declaration.

§ 718.104(6), Fla. Stat. (1981). Because the City expressly consented to the execution of the Declaration, the City's interest in the property is subject to the provisions of the Declaration pursuant to section 718.104(6).

The Hotel and the City argue that the residential unit owners lack standing to enforce the Declaration against the commercial unit owners. We disagree and find the Declaration clear and unambiguous on this issue. The drafter of the Declaration was aware of the mixed-use development being created and was meticulous. He knew how to allocate rights and remedies to each category of Unit Owner being created. When

the drafter wanted to distinguish between Commercial and Residential Units and Commercial and Residential Unit Owners, he did so.

For instance, Exhibit C to the Declaration is entitled "Schedule of Shares." It apportions the "percentage share in Common Elements, Common Expenses and Common Surplus." This Exhibit is referenced throughout the Declaration because it allocates to each unit owner their "share" of these items. Exhibit C lists all of the residential units and then lists the two commercial units, assigning shares to every unit. This shows that when he intended to delineate between the residential unit owners and the commercial unit owners, the drafter used precise language.

A second example of the drafter's delineation between the residential and commercial units is found regarding voting rights. Under the Declaration, membership in the Association is divided into three classes – residential, C-1, and C-2. Membership on the Board is divided into the same three classes.

A third example of the drafter distinguishing between the residential and commercial units is found under the section entitled "Description of Improvements." There the drafter refers to the survey, differentiates between the "Residential Portion" and the "Commercial Portion," and explains that "Residential Limited Common Elements are reserved for the exclusive use of the Residential Units."

A fourth example of the drafter's delineation between the residential and commercial units is found under the section entitled "Occupancy and Use Restrictions." There, the drafter carefully spelled out the rules applicable to the "Residential Units" (addressed under subsection A) and the rules applicable to the "Commercial Units" (addressed under subsection B).

When the drafter reached Article XXII of the Declaration, entitled "Remedies for Violation," he *did not delineate* between Residential and Commercial Unit Owners. The Article provides:

> *Each* Unit Owner shall be governed by and shall comply with the Act, all of the Condominium Documents and all amendments to the Condominium Documents. Failure to do so shall entitle the Association, *any* Unit Owner, [or Mortgagee] to bring an action for injunctive relief, damages or both, and such parties shall have all other rights and remedies which may be available at law or in equity.

The Hotel is bound as the "Unit Owner" of Unit C-2.[4] Under the quoted Article, the Hotel "shall comply" with "all of the Condominium Documents." By definition in the Declaration, one of the Condominium Documents is the Lease. The second sentence quoted above gives both the Association and *any Unit Owner* the right to bring an action against a noncomplying unit owner. Again, the language used is clear and unambiguous. This paragraph of the Declaration bestows standing on the Association and each Unit Owner whenever any other Unit Owner fails to comply with the Condominium Documents.[5]

Under the express language of the Declaration, any Unit Owner and the Association, may bring an action when another Unit Owner violates the Lease (a Condominium Document). We find the circuit court erred when it made the blanket declaration that "Plaintiffs lack standing to enforce the subject lease against the Commercial Unit Owner" and that "only the City has standing to enforce, modify or waive provisions of the Lease with respect to the Commercial Portion."

The Unit Owners Have Standing as Co-lessees and Grantees from a Common Grantor to Enforce the Restrictive Covenants Found in the Lease against the Owner of Unit C-2

Under the Lease, the City is the lessor and both the commercial and residential unit owners are lessees. The Lease defines "Lessee" as "the Unit Owners" "upon the assignment of the First Unit."

Each residential unit owner received a "partial assignment" of the Lease. Under the partial assignments, the unit owners were referred to as "Grantees," and each grantee assumed and accepted from the grantor "the leasehold rights and obligations" enumerated in the partial assignment. Each grantee was obligated to pay his portion of the rent and operating expenses due under the Lease and received certain "leasehold rights."

The residential unit owners seek to use their status as "co-lessees" to enforce building restrictions found in the Lease against the owner of Unit C-2, a co-lessee. The provisions the unit owners seek to enforce are:

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[4] The Hotel is bound by the sublease from Leisure Resorts.

[5] This argument also supports the Plaintiffs' standing under Florida Statutes section 718.303(1) (2016) (allowing actions by both "the association or by a unit owner against ... a unit owner" who fails to "comply with [the] documents creating the association.")

1. The View Restriction and the Unanimity Provision contained in Article XXX, Section 5.

2. The Four-Story Height and Surface Parking Restrictions contained in Article XXXVI.

3. The 20,000 Square Footage Restriction found in Site Plan 7 incorporated into the Lease at Article XXX, section 5.

These building restrictions are restrictive covenants, "equitable rights arising out of the contractual relationship between and among the property owners." *Cudjoe Gardens Property Owners Ass'n, Inc. v. Payne*, 779 So. 2d 598, 598-99 (Fla. 3d DCA 2001).

While covenants restraining the free use of realty are not favored, "in order to provide the fullest liberty of contract and the widest latitude possible in disposition of one's property, restrictive covenants are enforced so long as they are not contrary to public policy, do not contravene any statutory or constitutional provisions, and so long as the intention is clear and the restraint is within reasonable bounds." *Hagan v. Sabal Palms*, 186 So. 2d 302, 308-09 (Fla. 2d DCA 1966).

Restrictive covenants may be enforced by grantees among or between themselves where the grantees obtained their property from a common grantor and the restrictive covenants were placed in the transferring instrument as part of "a general plan of development or improvement," or a "general building scheme." *Id.* at 307. "Whether restrictions in deeds are part of a general scheme is to be determined by the intention of the parties, as gathered from the words used, interpreted in the light of all the circumstances and the pertinent facts known to the parties." *Id.*

Where there is no general building scheme, a restrictive covenant can be enforced between grantees *inter sese* where the covenant provides mutual or reciprocal benefits to the grantees. *Rea v. Brandt*, 467 So. 2d 368 (Fla. 2d DCA 1985).

> Basically, the right to enforce a restrictive covenant requires proof that the covenant was made for the benefit of the party seeking to enforce it. *Osius v. Barton*, 147 So. 862 (Fla. 1933). A subsequent grantee who seeks to enforce a restrictive covenant created by a common grantor against another subsequent grantee of a separate parcel of realty must show that the covenant was intended to apply to both parcels. *Osius*.

Id. at 369.

Even where there is no general building scheme and no reciprocal benefit among grantees, a restrictive covenant may be enforced by one neighbor against another where the restriction is found to be a negative easement or equitable servitude on the land. *See Fiore v. Hilliker*, 993 So. 2d 1050 (Fla. 2d DCA 2008) (finding waterfront lot owner could be prevented from blocking view of adjacent owner by a negative easement created by the common grantor).

Here, the restrictive covenants imposed by the Lease on Unit C-2 are enforceable by the unit owners *inter sese* because (1) they were part of a general building scheme; and (2) the restrictions provided mutual and reciprocal benefits to all of the unit owners.

The general building scheme is revealed by the unambiguous language of the Lease. The parties agreed that the property would be developed as a single mixed-use condominium. The entire condominium was to be developed pursuant to a "site plan" that had to be unanimously approved by the City Commission. The developer/lessee agreed to "maintain the character of a marina on a portion of the property" and "use good site planning and architectural design so that the buildings will fit into the character of the downtown area of West Palm Beach or enhance the same, and retain the waterfront characteristics of the area." The developer/lessee further agreed to "retain open and free from building obstructions" sixty-two percent of the "waterfront view."

This general building scheme contemplated a mixed-use development where all unit owners would benefit from the presence of the marina, the view, and the unique waterfront character of the area.

"Building restrictions imposed by a grantor on lots, being evidently for the benefit, not only of the grantor, but also of his grantees and subsequent successors in title, the burden, as well as the benefit, of the restrictions is an incident to ownership of the lots, because in a neighborhood scheme the burden follows the benefit." *Hagan*, 186 So. 2d at 307. The development restrictions found in the Lease, drafted to further the general building scheme, are enforceable by each of the unit owners among or between themselves. *Id.* at 308. Equity does not permit the owner of unit C-2, which has benefitted from the general building scheme, to disregard the restrictions that bind the other unit owners simply because unit C-2 permits a commercial use.

Similarly the restrictive covenants are enforceable by the residential unit owners because they were imposed for the benefit of all the unit owners. Building restrictions have been held to be enforceable by neighbors on the adjacent property. *See Rea*, 467 So. 2d 368; *Palm Point Property Owners' Ass'n of Charlotte Cty., Inc. v. Pisarski*, 626 So. 2d 195 (Fla. 1993).

In *Rea*, the restrictive covenant stated "no water lot shall have a fence." When one property owner sought to enforce the covenant against an adjacent owner, the court found that the restriction was "clearly intended to benefit and burden more than a single water lot. The restriction was in the chain of title or deed of each property. Thus, there was a mutual and reciprocal beneficial interest running to the adjacent parcels held by appellants and appellees." *Rea*, 467 So. 2d at 370 (finding appellants in violation of the restrictive covenant and directing them to remove their fence).

In *Palm Point*, an association sought to enjoin a lot owner from violating deed restrictions (building a pool, stem wall, and dock). While the supreme court found that the association lacked standing because the covenants were not made for its benefit, the court noted that individual property owners "*clearly* have standing to enforce the covenants." *Id.* at 198 (emphasis added) (affirming the Second District's finding that "any one" of the individual property owners "could sue to enforce the restrictions at issue in this case." *Palm Point Property Owners' Ass'n of Charlotte Cty., Inc. v. Pisarski*, 608 So. 2d 537, 538 (Fla. 2d DCA 1992)).

Here, restrictive covenants were imposed on the entire condominium; every unit was burdened by and benefited from the development restrictions. The view restriction enhanced the character of the condominium, inspiring its name: The Waterview Towers, A Condominium. The limit on the number of stories and the square footage restrictions further preserved the view while controlling the number of people and traffic on the parcel. The unanimity provision helped protect the general building scheme from a change in the political winds.

In sum, each of the restrictions which the residential unit owners, as co-lessees, seek to enforce on Unit C-2 benefitted the entire condominium. Under *Osius* and its progeny, the development restrictions are enforceable by each of the grantees (unit owners) from the common grantor (the City).

The Association Has Standing Under The Condominium Act And Florida Rule Of Civil Procedure 1.221

The Condominium Act provides that an association may institute an action "in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners." § 718.111(3), Fla. Stat. (2014). Similarly, Rule 1.221 provides:

> [A] condominium association ... may institute ... actions or hearings in its behalf on behalf of all association members concerning matters of common interest to the members, including, but not limited to: (1) the common property, area, or elements ....

Fla. R. Civ. P. 1.221.

"This court has recognized that an association may sue and be sued as the representative of condominium unit owners in an action to resolve a controversy of common interest to all units." *Four Jay's Const., Inc. v. Marina at Bluffs Condo. Ass'n, Inc.*, 846 So. 2d 555, 557 (Fla. 4th DCA 2003); *see generally Homeowner's Ass'n of Overlook, Inc. v. Seabrooke Homeowners' Ass'n, Inc.*, 62 So. 3d 667 (Fla. 2d DCA 2011).

Under the Declaration, the Association is responsible for the operation of the entire condominium. The commercial parcels are part of the condominium. While the commercial parcels are not "common elements," because they are part of the condominium, they are part of the "common property" and the "common area."

An aerial view of the property reveals that the unit owners share points of ingress and egress off Flagler Drive. In addition, the residents' pool and a portion of the marina directly abut Unit C-2. Any structure on C-2 will affect the use and enjoyment of the entire condominium property (including light, view, and noise). For these reasons, development of Unit C-2 concerns a matter of "common interest" to members of the Association.

Because Unit C-2 is part of the common property, and because development of the common property involves matters of common interest to members of the Association, the Association had standing under the Condominium Act and Florida Rule of Civil Procedure 1.221 to pursue this action.

Development Restrictions Limit the Future Development of Unit C-2

1. Development Restrictions in the Declaration Run With the Land.

By statute, "All provisions of the declaration are enforceable equitable servitudes, run with the land, and are effective until the condominium is terminated." § 718.104(7), Fla. Stat. (1981).

By their Second Amended Complaint, the Plaintiffs sought a declaration that development on Unit C-2 was limited to a single commercial building, not exceeding 75 feet in height, and not exceeding 100 feet of total frontage on Flagler Drive – all development restrictions found in the Declaration. The City and the Hotel concede that they were bound by these restrictive covenants.

The trial court granted the Plaintiffs' prayer for declaratory relief in part, finding there were enforceable restrictive covenants in the Declaration regarding the height and width of the commercial building. However, the order went too far by finding that there are "no other restrictive covenants applicable" to Unit C-2 and that the only restrictive covenants enforceable by any of the Plaintiffs are those regarding "the height and width of the commercial building." This was error.

The trial court was not asked to scour the Declaration for restrictive covenants enforceable by the Plaintiffs. Indeed, there are at least three additional restrictive covenants found in the Declaration that are enforceable by the Plaintiffs:

> 1. The Association would have standing to enforce the requirement that Unit C-2 "contain parking facilities."
>
> 2. The Association would have standing to establish and enforce rules and regulations regarding easements and rights of way crossing Unit C-2.
>
> 3. The Association and Unit Owners would have standing to enforce the requirement that the C-2 Unit Owner conduct a lawful commercial enterprise.

The only restrictive covenants found in the Declaration that the Plaintiffs raised in this case are those with regard to height and width of the commercial building. Thus, we reverse the trial court's order to remove all language that forecloses the Plaintiffs' rights to enforce the restrictive covenants contained in the Declaration though not raised in this litigation.

> *2. The Unit Owners are Entitled to Enforce Restrictive Covenants Contained in the Lease.*

As indicated above, the individual Plaintiffs have standing to enforce the restrictive covenants found in the Lease against the owner of Unit C-2. The following development restrictions are affected by the conclusion reached in this section:

Restriction	**Language**	**Source**
The View Restriction	"Lessee agrees to retain 62.82% of waterfront view (as viewed from Flagler Drive) open and free from building obstructions."	Lease, Art. XXX, § 5
Square Footage	"The commercial structure shall not exceed … 20,000 sq. ft. in area …"	Site Plan 7
Number of Stories	"[A] commercial structure … not exceeding four (4) stories in height may be constructed on the Commercial Portion."	Lease, Art. XXXVI, § 2.b.

The trial court therefore erred when it found that "Development of the C-2 Commercial Unit is not limited to a single four (4) story office building containing a maximum of 20,000 square feet."

3. Because the Lease and Declaration are Ambiguous on the Issue of Two Commercial Buildings on Unit C-2, the Documents Cannot be Read to Preclude a Parking Garage.

The Plaintiffs argue that only one commercial building can be built on Unit C-2 and because of this "one building" restriction, a parking garage cannot be built along with a hotel. The Hotel and the City maintain that *in addition to* a commercial building, a "parking facility" may also be placed on Unit C-2, and that the "parking facility" may be a multi-level garage.

The relevant language reads:

Language	**Source**
"The Commercial Unit, designated as "C-2" on the Survey *shall contain parking facilities* which may be used as determined by the C-2 Commercial Unit Owner *and* the Developer reserves the right for and on behalf of the	Declaration, Art. V-D

C-2 Commercial Unit Owner to construct *a commercial building* ("Commercial Structure") within the C-2 Commercial Unit ..."	
"... [T]he Developer reserves the right for and on behalf of the C-2 Commercial Unit Owner *to construct the Commercial Structure and/or parking facilities* within the C-2 Commercial Unit."	Declaration Art. XXIII-A
"... The Commercial Portion will include boat dockage facilities, a marina office with related facilities, and *surface parking* ..."	Lease, Art. XXXVI-2.-b.

"Restrictive covenants are not favored and are to be strictly construed in favor of the free and unrestricted use of real property." *Wilson v. Rex Quality Corp.*, 839 So. 2d 928, 930 (Fla. 2d DCA 2003). "Any doubt as to the meaning of the words used must be resolved against those seeking enforcement." *Id.*

The documents do not specify a limitation on the nature of the potential parking. A "parking facility" is a broad term that includes structures like a garage. The Lease's reference to "surface parking" does not mean that all parking had to be surface parking. Given the strict construction imposed on restrictive covenants, the ambiguous tension between "parking facilities" and "surface parking" in the Declaration and the Lease supports the position of the Hotel and the City on this issue.

4. The Trial Court Erroneously Found That Site Plan No. 8 Is The "Currently Approved Development."

Plaintiffs argue that the trial court's holdings regarding Site Plan No. 8 were erroneous. The trial court held:

> The currently approved development and use of the C-2 Commercial Unit consists of a commercial structure and parking facilities as shown on Site Plan No. 8, the provisions of which are not challengeable because the applicable statute of limitations to challenge Site Plan No. 8 has expired.

"Site Plan No. 8," however, was merely a "conceptual plan" needing additional governmental approvals to become final.

The "conceptual site plan" was approved by the City Commission "in its capacity as the land owner" — not in its governmental capacity. The Resolution approving the conceptual site plan states that the plan is "*deemed to be 'Site Plan No. 8' under the Marina Lease*." Although the Lease's Unanimity Provision was satisfied as evidenced by Resolution 239-07, the "conceptual site plan" attached to the Resolution still needed governmental and regulatory approvals and permits.

The Ordinances and Resolutions in evidence do not establish that the conceptual site plan ever received the requisite governmental approval. Thus, while Site Plan No. 8 is the currently-approved "site plan" under the Lease, the trial court's holding that it is the "currently approved development and use of the C-2 Commercial Unit" was too broad.

For these reasons, we reverse the Amended Final Judgment and remand to the circuit court for proceedings consistent with this opinion.

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

CIKLIN, J., dissenting.

I respectfully dissent.

The plaintiffs below are not lessees of the commercial portion of the subject plat and do not have standing to take independent legal action to enforce the underlying lease.

The 1981 Declaration of Condominium does not grant or authorize the plaintiffs to enforce any restrictions in the Lease particularly because the Declaration clearly delineates between the "Residential Portion" and "Commercial Portion" of the property and Article XII. B. provides that the commercial lessees "may conduct any commercial enterprises on the Commercial Portion to the extent permitted by law and the Lease" and that "[n]othing contained in this Declaration shall limit the right of the Commercial Unit Owners or their assigns, lessees, or licensees to conduct commercial enterprises on the Commercial Portion."

Clearly, the interplay between Article XIX, section 1, Article XXII, and Article XXX of the lease contemplates multiple uses of the property and even permits commercial lessees to change uses and site plans provided that the City's duly elected policy makers—in a quasi-judicial setting—exercise their discretion to permit such changes. As a historical matter of fact, the 2009 Development Agreement between the City and Leisure

Resorts, LLC (Palm Harbor's sublessor) modified the lease requirements of Article XXX, section 5 to actually require the City Commission's *unanimous consent* of any changes to the site plan—again, after a full quasi-judicial hearing before the West Palm Beach City Commission.

Nothing in the Declaration of Condominium or the laws of the State of Florida supports the notion that the plaintiffs have standing to enforce, modify, waive or contest provisions of the Lease with respect to the Commercial Portion. Nor do they have standing under the condominium documents to oversee or challenge use of the property approved by the City in its proprietary capacity.

Ultimately, of course, all power rests with the plaintiffs through the power of the ballot box, but until that time, the duly elected members of the West Palm Beach City Commission have the unbridled discretion to make all decisions pertaining to the commercial portion of the subject property.

The plaintiffs assert that the "*Amended Final Judgment* is inconsistent" because it "**provides standing**" . . . to enforce . . . restrictions . . . on the frontage and height of any new structure on the [commercial] parcel," while denying standing "to enforce other more detailed restrictions." In fact, the Lease and Development Agreement addressed frontage and height and once the City Commission approved Site Plan 8 in June 2007, and incorporated it into the 2009 Development Agreement, the issues of height and frontage under the lease were resolved. (The only remaining restriction on the development of the C-2 unit was the 100' width and 75' height size limitation contained in Article V.D. of the Declaration).

In my opinion, the trial court properly found that the 2009 Development Agreement was not governed by Chapter 163 and, notwithstanding that judicial determination, the time to challenge the 2009 Development Agreement, including Site Plan 8, has expired in any case.

I would affirm.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

October 31, 2017

WELLS FARGO DELAWARE TRUST COMPANY, N.A., as trustee for VERICREST OPPORTUNITY LOAN LOAN TRUST 201-NPL1, Appellant, v. ALEXEY PETROV; FIFTH THIRD BANK; AMSOUTH BANK; TOWNHOMES AT TURTLE CREEK ASSOCIATION, INC.; AMERICAN EXPRESS CENTURION BANK; RHONDA PETROV; and FLORIDA LIMITED INVESTMENT PROPERTIES, INC., Appellees.	)	Case No. 2D16-1536

BY ORDER OF THE COURT:

Appellant Wells Fargo's Motion to Correct Opinion is stricken as untimely. On this court's own motion, the prior opinion dated October 6, 2017, is withdrawn and the attached opinion is issued in its place. The substituted opinion deletes a reference to a "tax deed" in the third paragraph of the opinion and replaces it with "certificate of title." No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WELLS FARGO DELAWARE TRUST COMPANY, N.A., as trustee for VERICREST OPPORTUNITY LOAN LOAN TRUST 201-NPL1,	)	
Appellant,	)	
v.	)	Case No. 2D16-1536
ALEXEY PETROV; FIFTH THIRD BANK; AMSOUTH BANK; TOWNHOMES AT TURTLE CREEK ASSOCIATION, INC.; AMERICAN EXPRESS CENTURION BANK; RHONDA PETROV; and FLORIDA LIMITED INVESTMENT PROPERTIES, INC.,	)	
Appellees.	)	

Opinion filed October 31, 2017.

Appeal from the Circuit Court for Hillsborough County; Perry A. Little, Senior Judge.

David W. Rodstein of Rodstein Law Group, P.A., Ft. Lauderdale; and Norman Rodney Holmes and Silver Deutch of Millennium Partners, Aventura, for Appellant.

Uta S. Grove of Grove & Cintron, P.A., Largo; Starlett M. Massey of McCumber Daniels, Tampa; and Karen E. Maller of Powell, Carney, Maller, P.A., St. Petersburg, for Appellee Florida Limited Investment Properties, Inc.

No appearance for remaining
Appellees.

ROTHSTEIN-YOUAKIM, Judge.

Wells Fargo Delaware Trust Company, N.A., as Trustee for Vericrest Opportunity Loan Trust 201-NPL1, appeals from an order involuntarily dismissing its foreclosure complaint after a bench trial.[1] Because the trial court erroneously concluded that Wells Fargo's servicer, Caliber Home Loans, f/k/a Vericrest Financial,[2] and its employee, Scott Logue, had prosecuted this action on Wells Fargo's behalf without proving that they had been authorized to do so, we reverse and remand for reinstatement of Wells Fargo's second amended complaint.

THE PROCEEDINGS BELOW

On June 2, 2004, Alexey Petrov executed the mortgage and note at issue in this case. On December 1, 2010, Petrov stopped making mortgage payments.

In February 2012, Wells Fargo filed a foreclosure complaint. Petrov failed to defend, and the clerk entered a default on May 22, 2012. That same day, Wells Fargo moved for a final summary judgment of foreclosure and filed with the trial court the original mortgage and note. Subsequently, however, Wells Fargo discovered that a certificate of title for the property had been issued to Florida Limited Investment

[1]Although styled as an "Order of Dismissal," the order includes traditional words of finality and refers to itself as a "judgment." Accordingly, we construe it as an entry of judgment that is final and appealable. See HSBC Bank USA, Nat'l Ass'n v. Buset, 216 So. 3d 701, 702-03 (Fla. 3d DCA 2017).

[2]We reject without comment Florida Limited Investment Properties, Inc.'s repeated suggestion that Vericrest and Caliber are separate and distinct entities.

Properties, Inc. (FLIP), before Wells Fargo had initiated the foreclosure action, so Wells Fargo moved to amend the complaint to include FLIP as a defendant. The trial court granted the motion, and Wells Fargo filed an amended complaint and served FLIP. FLIP filed a motion to dismiss the amended complaint, which the court granted for reasons not pertinent to this appeal.

In April 2014, Wells Fargo filed its second amended complaint, which FLIP unsuccessfully moved to dismiss. At the December 2015 trial, Wells Fargo, through Logue, entered into evidence the original note with allonges, the original mortgage, assignments of the mortgage, the notice of default, the loan payment history, and other exhibits. Logue testified as to the servicer's boarding process and its role in maintaining the mortgagee's loan records. In short, this was—or should have been—a run-of-the-mill foreclosure proceeding at which the plaintiff proved standing, its fulfillment of conditions precedent, the facts supporting the default, and the amounts due.

The groundwork for the error requiring reversal, however, was laid when FLIP objected to the admission of the Limited Power of Attorney (LPOA) between Wells Fargo and Vericrest/Caliber. FLIP argued that the LPOA only authorized Vericrest/Caliber to "creat[e] . . . documents" and did not "provide[] for . . . testimony or the filing of foreclosures." The trial court overruled the evidentiary objection but directly questioned Logue on the issue, repeatedly asking whether Logue could point out in the document itself what provision gave Vericrest/Caliber "the authority to prosecute the foreclosure action."

Post-trial, the trial court directed the parties to file written closing arguments. In FLIP's "Motion for Involuntary Dismissal, Closing Argument, and

Memorandum of Law," FLIP argued, in pertinent part, that the LPOA did not give Vericrest "the authority to hold the Note, or to enforce the Note or to foreclose the Mortgage," to verify the complaint on behalf of Wells Fargo, to initiate suit on behalf of Wells Fargo, or to give testimony on behalf of Wells Fargo. Moreover, FLIP argued, Caliber lacked any authority at all under the LPOA because "the power of attorney was only in favor of Vericrest, as Caliber Home Loans didn't exi[s]t."[3]

The trial court granted FLIP's motion for involuntary dismissal, stating:

> A. Plaintiff, WELLS FARGO DELAWARE TRUST COMPANY N.A., AS TRUSTEE FOR VERICREST OPPORTUNITY LOAN TRUST 201-NPL1 [sic], hereinafter referred to as "WELLS FARGO", presented the testimony of a single witness, SCOTT LOGUE, hereinafter referred to as "LOGUE."
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> B. LOGUE testified that he was not an employee of WELLS FARGO but was an employee of CALIBER HOME LOANS, INC. LOGUE further testified that he was authorized, as an employee of CALIBER HOME LOANS, INC., to testify on behalf of WELLS FARGO pursuant to a Limited Power of Attorney, a photocopy of which was admitted into evidence as Plaintiff's Exhibit 2.
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> C. The Limited Power of Attorney executed by WELLS FARGO did not grant to its Attorney-in-Fact, CALIBER HOME LOANS, INC., the authority to prosecute the litigation on behalf of WELLS FARGO. LOGUE, who is not an employee of WELLS FARGO, did not have the authority to prosecute the case on behalf of WELLS FARGO.

[3]We question whether FLIP had standing to raise any of these arguments. Although FLIP acquired its interest in the property before the filing of the lis pendens, there is no evidence that FLIP ever attempted to assume the mortgage or to cure the existing default when it purchased the property. Therefore, it does "not stand in the shoes of the mortgagors and cannot participate in the bank's foreclosure as though [it] were a party to the mortgage." Pealer v. Wilmington Tr. Nat'l Ass'n, 212 So. 3d 1137, 1137-38 (Fla. 2d DCA 2017) (Sleet, J., specially concurring). Wells Fargo, however, did not challenge FLIP's standing to participate in the foreclosure proceeding below and, in any event, does not raise this issue on appeal.

ANALYSIS

Upon our de novo review, see Green Tree Servicing LLC v. Sanker, 204 So. 3d 496, 497 (Fla. 4th DCA 2016), we hold that the trial court erred in granting FLIP's motion for involuntary dismissal. The basis for the court's error was its misapprehension—fostered by FLIP—that Caliber and Logue were "prosecuting the case on Wells Fargo's behalf." Caliber, as Wells Fargo's servicing agent, verified Wells Fargo's foreclosure complaint, and Logue, as Caliber's employee, testified as a witness for Wells Fargo at the foreclosure trial. Neither of these actions constituted "prosecuting the case on Wells Fargo's behalf"—Wells Fargo is and always has been the plaintiff in this case. Servicing agents routinely verify complaints filed by noteholder-plaintiffs. See Deutsche Bank Nat'l Tr. Co. v. Plageman, 133 So. 3d 1199, 1200-01 (Fla. 2d DCA 2014) (explaining difference between servicer that files foreclosure complaint in its own name on behalf of owner and holder of note and servicer that merely verifies complaint filed in name of owner and holder of note); Deutsche Bank Nat'l Tr. Co. v. Huber, 137 So. 3d 562, 564 (Fla. 4th DCA 2014) (finding error with trial court's determination that appellant's servicing agent lacked standing to bring foreclosure action on appellant's behalf when record "clearly reflect[ed]" that appellant filed foreclosure complaint on its own behalf and that servicing agent merely verified complaint); see also US Bank Nat'l Ass'n v. Marion, 122 So. 3d 398, 399 (Fla. 2d DCA 2013) (reversing dismissal on basis that servicer's employee verified bank's foreclosure complaint); Deutsche Bank Nat'l Tr. Co. v. Prevratil, 120 So. 3d 573, 576 (Fla. 2d DCA 2013) (holding that Florida Rule of Civil Procedure 1.110 does not require that verification be based on personal knowledge). Moreover, noteholder-plaintiffs routinely call servicing agents to testify

regarding business records that servicing agents maintain in connection with the mortgage and note to establish the noteholder-plaintiffs' right to pursue foreclosure. See, e.g., Shaffer v. Deutsche Bank Nat'l Tr., 42 Fla. L. Weekly D889, D889 (Fla. 2d DCA Apr. 19, 2017); Rosa v. Deutsche Bank Nat'l Tr. Co., 191 So. 3d 987, 988 (Fla. 2d DCA 2016); Michel v. Bank of N.Y. Mellon, 191 So. 3d 981, 982 (Fla. 2d DCA 2016); Bolous v. U.S. Bank Nat'l Ass'n, 210 So. 3d 691, 692 (Fla. 4th DCA 2016); Deutsche Bank Nat'l Tr. Co. v. Marciano, 190 So. 3d 166, 167 (Fla. 5th DCA 2016); Seidler v. Wells Fargo Bank, N.A., 179 So. 3d 416, 420 (Fla. 1st DCA 2015); Guerrero v. Chase Home Fin., LLC, 83 So. 3d 970, 972 (Fla. 3d DCA 2012). Consequently, we conclude that Caliber's and Logue's asserted need for "authority to prosecute" this action was nothing more than a red herring with which FLIP somehow managed to mislead the trial court.

CONCLUSION

Because the trial court misapprehended Caliber's and Logue's need for authorization to prosecute this foreclosure action, we reverse the judgment and remand for reinstatement of Wells Fargo's second amended complaint and for further proceedings not inconsistent with this opinion.

Reversed and remanded with directions.

WALLACE and MORRIS, JJ., Concur.