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Manuel Farach

Al-Rayes v. Willingham, Case Nos. 18-11059, 18-11539 (11th Cir. 2019).
A judgment debtor husband and his non-debtor wife can form an "association in fact" under Boyle v. United States, 556 U.S. 938, 944 (2009) (individuals in an association-in-fact enterprise are "associated together for a common purpose of engaging in a course of conduct") for R.I.C.O. liability purposes.

Verizon Wireless Personal Communications, LP v. Bateman, Case No. 2D18-161 (Fla. 2d DCA 2019).
An arbitration agreement survives a bankruptcy discharge because the arbitration provision is not a "debt" or "claim" as defined under the Bankruptcy Code.

Zurich American Insurance Company v. Puccini, LLC, Case No. 3D17-0690 (Fla. 3d DCA 2019).
The Third District employs the "case by case" approach in determining whether a tenant is a co-insured under an insurance policy covering a landlord, and as a result, whether the tenant is immune from insurer subrogation actions by the insurer.

Yost-Rudge v. A to Z Properties, Inc., Case No. 4D17-3204 (Fla. 4th DCA 2019).
A homestead is not "abandoned" (thus permitting one spouse to sell without the signature of both spouses) when the non-consenting spouse is involuntarily forced off the property.

Chaudhry v. Pedersen, Case No. 5D18-709 (Fla. 5th DCA 2019).
All parties having an interest in a disputed property are required to be joined to determine the true ownership of the property. In other words, when a plaintiff alleges he entered into an agreement to purchase property in name of one spouse to then be transferred to plaintiff, but instead that husband transferred property to himself and his wife, the other spouse (wife) who owns disputed property with her spouse is required to be joined.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 18-11059, 18-11539
Non-Argument Calendar

D.C. Docket No. 3:15-cv-107-J-34JBT

ABDULLAH M. AL-RAYES, et al.,

Plaintiffs-Appellants,

versus

ERIKA M. WILLINGHAM,
individually and as Trustee of the
ERIKA M. WILLINGHAM TRUST,

Defendant-Appellee.

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

(February 5, 2019)

Before JILL PRYOR, BRANCH, and GRANT, Circuit Judges.

GRANT, Circuit Judge:

The creditors in this case claim that a husband and wife worked together to commit multiple acts of mail and wire fraud over several years for the purpose of

hiding the husband's assets—acts which, in the creditors' telling, violated RICO. The creditors sued the wife. While the district court agreed that the couple may have committed the alleged acts of fraud, it nonetheless granted the wife's motion for summary judgment. According to the court, because the couple's marriage predated the alleged RICO acts, and the couple had created no sort of structure external to their marital relationship, no reasonable juror could conclude that they "formed an organization with some sort of framework, formal or informal, for the purpose of engaging in racketeering activity." In other words, to put it in RICO terms, the court found no evidence of an "association-in-fact" enterprise. We are convinced otherwise; after a thorough review of the record, we conclude that a genuine factual dispute exists about whether this couple formed an association-in-fact enterprise separate and apart from their marital relationship. We therefore reverse the district court's order granting summary judgment and remand for further proceedings. We also vacate the district court's order awarding the wife costs.

I.

Abdullah Al-Rayes and various corporate entities under his control (collectively "Al-Rayes") sued Ben Willingham and several of his businesses, asserting that Ben defrauded Al-Rayes over the course of many real-estate transactions. Roughly a year after that 2006 lawsuit, Al-Rayes received a $25.7 million consent judgment against Ben. But after more than a decade, he has been able to collect only $39,943.81. Al-Rayes now argues that Ben's wife, Erika Willingham, has stymied his efforts to collect the judgment by working with Ben

to execute an intricate asset-concealment scheme. Viewed in the light most favorable to Al-Rayes as the nonmovant, the record reflects the following facts.

According to Al-Rayes, Erika and Ben's scheme to hide Ben's assets involved secretly transferring funds to offshore bank accounts. Their efforts to conceal those accounts began shortly after Al-Rayes secured the consent judgment against Ben. Less than a year after that judgment was entered, Al-Rayes's counsel deposed Ben as part of an attempt to collect the judgment. Ben testified that he did not have any accounts or assets in Switzerland, where Erika was from and where he and Erika had previously lived. Ben also swore that Erika did have a single Swiss bank account in her name, but that she had sole control over it. According to Ben, Erika made wire transfers from her Swiss account to the couple's joint account in the United States, and then used that money to pay for living expenses. Erika, on the other hand, testified that she had no Swiss bank accounts in her name, and that her husband controlled all of her financial matters.

Additional facts emerged a few years later when Ben filed for bankruptcy and Al-Rayes renewed his attempt to collect the consent judgment. During the proceedings, Erika stood by her earlier testimony that she did not have any bank accounts in Switzerland. But the bankruptcy court concluded otherwise, finding that approximately 68 wire transfers were made from a Swiss bank account held only in Erika's name to the couple's joint account in the United States. Those transfers, totaling $255,740, were all made within approximately three years of the consent judgment.

Bank records subsequently turned over to the bankruptcy court revealed that over an eleven-year span Erika and Ben (individually or together) made at least 240 wire transfers of Ben's salary and benefits to Erika's known Swiss account and to other (previously undisclosed) Swiss accounts held in Erika's name. When confronted with these records, Ben admitted that—despite his prior testimony that he had no control over his wife's (purportedly) single Swiss bank account—he actually had signatory authority over four Swiss bank accounts held in Erika's name. He also conceded that—contrary to his prior testimony that he had no assets in Switzerland—he had made numerous transfers of his salary, benefits, and tax refunds to Erika's Swiss accounts. Following these admissions, he acknowledged that he and Erika had used Swiss funds to pay their living expenses.

Still, the parties dispute the extent of Erika's involvement in these transfers. For his part, Al-Rayes cites Ben's testimony that his wife was aware that he was making the transfers, consented to the transfers, and even initiated some of the transfers herself. Erika, on the other hand, consistently testified that her husband had sole control over her finances and that she did not know about the Swiss accounts or any transfers involving those accounts.

Al-Rayes's allegations do not end there; he argues that Erika and Ben misrepresented not only the location of Ben's assets, but also their extent. For example, Al-Rayes points to Ben's declaration to the bankruptcy court that he and Erika had no significant assets and a combined monthly income of $4,062. Only a week after that declaration, however, the couple applied to a retirement community and represented that they owned $750,000 in real estate, $395,000 in investments,

and $40,000 in cash. And subsequent events showed that the couple did have available assets; a few months later, they paid the retirement community a $254,962.50 entrance fee.

The couple also failed to notify the bankruptcy court of two important real-estate transactions made while the bankruptcy action was pending. First, they sold their house and received $334,295.53 in net proceeds, but failed to notify either the bankruptcy court or Al-Rayes. Moreover, both Erika and Ben paid for the house and signed the mortgage, but the title was in Erika's name only, shielding Ben's funds from creditors who were seeking his assets. And a few months later, the couple purchased a condo for $120,000 and again failed to notify the bankruptcy court or Al-Rayes. Like the house, the condo was purchased using funds from a joint account, but title was placed in Erika's name alone—again, Al-Rayes contends, in an attempt to hide Ben's assets.

These were not the only transactions that went unreported. The couple also failed to notify the bankruptcy court or Al-Rayes when they received a partial refund of their retirement-home entrance fee after moving out early. And they failed to notify the bankruptcy court or Al-Rayes when Erika created a trust, named herself as trustee, and executed a quitclaim deed transferring the condo title to herself as trustee, while reserving a life estate in the condo for herself—and for her husband.

Their alleged scheme did not end there. A few months before the bankruptcy action closed, Erika and Ben formed a corporation—Osborn of Jacksonville, Inc.—purportedly to market a book that Ben had written. In the four

months between Osborn's creation and the close of the bankruptcy action, Ben made several transfers totaling $176,630 from the couple's joint bank account to the corporation's bank account. He did not notify the bankruptcy court or Al-Rayes of those transfers, and later admitted to using funds from the corporation's account to pay the couple's personal expenses.

In light of these acts, Al-Rayes sued Erika[1] in the United States District Court for the Middle District of Florida, alleging that she violated RICO, 18 U.S.C. § 1962(c); conspired to violate RICO, 18 U.S.C. § 1962(d); and violated several Florida laws. To support the RICO claims, Al-Rayes alleged that Erika and Ben formed an association-in-fact enterprise by working together to conceal Ben's assets. After thorough discovery, the district court granted Erika's summary judgment motion, holding that both RICO claims failed because no reasonable juror could find that Erika and Ben together constituted an association-in-fact enterprise. Specifically, the court determined that the facts here could not satisfy the Supreme Court's requirement that individuals in an association-in-fact enterprise were "associated together for a common purpose of engaging in a course of conduct." *Boyle v. United States*, 556 U.S. 938, 944 (2009) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

In evaluating whether Erika and Ben could be considered an association-in-fact enterprise under RICO, the court acknowledged that the two "are associated in

[1] For whatever reason, Ben Willingham is not a party to this action. The Complaint states that Al-Rayes sued Erika Willingham because she "orchestrated and carried out a convoluted fraudulent scheme to conceal [Ben's] assets in order to hinder, delay, and impede" Al-Rayes's ability to collect the consent judgment. Also, Erika is the sole trustee of the Erika Willingham Trust.

marriage, and in the course of that marriage engaged in acts which may constitute mail or wire fraud." Still, the court determined, the couple could not constitute an association-in-fact enterprise because "there is no evidence to suggest that they associated together *for that purpose*." The court indicated that Al-Rayes nevertheless could have shown an association-in-fact enterprise if he had alleged that the enterprise was—or at least included—a business or other separate entity run by Erika and Ben. But because the alleged enterprise lacked a non-marital component, the court concluded that Al-Rayes had failed to present sufficient evidence of a RICO enterprise.

Having disposed of both federal RICO claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. The court later deemed Erika a prevailing party and awarded her $2,661.72 in costs under Federal Rule of Civil Procedure 54(d)(1). Al-Rayes now appeals, challenging both the order granting summary judgment and the order awarding costs.

II.

On appeal from a grant of summary judgment, this Court reviews legal questions *de novo*. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918–19 (11th Cir. 1993). We also conduct a *de novo* review of the evidence, viewing all evidence in the light most favorable to the nonmoving party and resolving all reasonable inferences in favor of the nonmoving party. *Id.* As for the award of costs, whether "the facts as found suffice to render the plaintiff a 'prevailing party' is a legal question reviewed *de novo*." *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1321 (11th Cir. 2001) (citation omitted).

III.

RICO is widely regarded as a broad statute; indeed, the RICO text itself "provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'" *Boyle*, 556 U.S. at 944 (quoting Pub. L. No. § 904(a), 84 Stat. 922, 947 (1970)); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985) ("RICO is to be read broadly."); *Russello v. United States*, 464 U.S. 16, 21 (1983) (recognizing "the pattern of the RICO statute in utilizing terms and concepts of breadth"); *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1227 (11th Cir. 2014) (observing that "civil RICO targets a broad category of criminally fraudulent acts"). This breadth of language (and, we will see, of construction) is evident in the provision of RICO at issue in this case: RICO makes it "unlawful for any person employed by or associated with *any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (emphasis added).[2]

"Enterprise," in turn, is defined to encompass "any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity*." 18 U.S.C. § 1961(4) (emphasis added). As the Supreme Court has emphasized, the "term 'any' ensures that the definition has a wide reach, and the very concept of an association in fact

[2] "A violation of § 1962(c)" requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496.

is expansive." *Boyle*, 556 U.S. at 944 (citation omitted). Along those lines, the Supreme Court has "succinctly" defined an association-in-fact enterprise as any "group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 946 (quoting *Turkette*, 452 U.S. at 583). In keeping with that general definition, an association-in-fact enterprise may be "formal or informal," and requires only "three 'structural features': (1) a 'purpose,' (2) 'relationships among those associated with the enterprise,' and (3) 'longevity sufficient to permit these associates to pursue the enterprise's purpose.'" *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1067 (11th Cir. 2017) (first quoting *Turkette*, 452 U.S. at 583; and then quoting *Boyle*, 556 U.S. at 946).

Here, the district court granted summary judgment because it determined that the evidence was insufficient to satisfy *Boyle's* "purpose" requirement. The district court's order acknowledges the rather obvious point that as a married couple Erika and Ben have a relationship, and goes on to conclude that "in the course of that marriage [the couple] engaged in acts which may constitute mail or wire fraud." Still, the district court declined to recognize Erika and Ben as an association-in-fact enterprise because the record lacked evidence that they originally married *for the purpose* of engaging in mail or wire fraud. The district court was careful to note that it was not ruling out the possibility that a married couple could form an enterprise. But the court also indicated that, so long as a couple does not "get married for the purpose of engaging in racketeering activity," some additional structure or vehicle must be alleged for the pair to qualify as an association-in-fact enterprise; this requirement seemed to reflect a view that the

formation of a new entity would somehow demonstrate a new shared purpose between the couple that eclipsed their prior marital intentions.

We disagree. As an initial matter, to satisfy the purpose requirement, neither the text of RICO nor any relevant precedent requires an association-in-fact enterprise to consist of strangers who originally met for the purpose of engaging in illegal activity. "That an 'enterprise' must have a purpose is apparent from the meaning of the term in ordinary usage, *i.e.*, a 'venture,' 'undertaking,' or 'project.'" *Boyle*, 556 U.S. at 946 (quoting Webster's Third New International Dictionary 757 (1976)). Thus, the "concept of 'associat[ion]' requires both interpersonal relationships and a common interest." *Id.* (alteration in original). Nothing in that description prevents individuals with preexisting relationships—say, family members or business partners—from later joining together for the common purpose of engaging in illegal activity. So, unsurprisingly, federal courts have routinely recognized association-in-fact enterprises made up of individuals who had relationships that predated their schemes. *See, e.g.*, *Crowe v. Henry*, 43 F.3d 198, 201, 205 (5th Cir. 1995) (plaintiff adequately pleaded an association-in-fact enterprise consisting of two people who originally met as "friends and business associates"); *United States v. Torres Lopez*, 851 F.2d 520, 528 (1st Cir. 1988) (evidence was sufficient for a rational trier of fact to find that a RICO enterprise consisted of a group of police officers who met as members of the Puerto Rico Police Department and then joined together to engage in criminal conduct for pay); *Nesbitt v. Regas*, No. 13 C 8245, 2015 WL 1331291, at *7 (N.D. Ill. Mar. 20, 2015) (plaintiff adequately pleaded that people with longtime "family

and business relationships" formed an association-in-fact enterprise). We can see, then, that the relevant "purpose" in an association-in-fact enterprise is the members' shared purpose of engaging in illegal activity—not the purpose for which they initially became acquainted.

Moreover, neither the text of RICO nor any relevant precedent imposes a heightened "structure" requirement for married couples. But the district court appears to have done just that. While it may not have described it as mandatory, the district court's explanation of how a married couple could form an association-in-fact enterprise under RICO is telling. The court emphasized that an enterprise must be a "vehicle" and that "some discernable structure is still required." The court then went on to deem it "[s]ignificant[]" that the RICO enterprise here "does not encompass the actions of Ben Willingham's business entities."[3] The court also concluded that the couple's actions to hide Ben's assets were those of a "husband and wife, conducting the personal affairs of Erika and Ben Willingham, not the affairs of a separate 'enterprise.'"

In so reasoning, the court imposed a requirement that the Supreme Court has already expressly rejected in *Boyle*. When presented with the assertion that "the

[3] The corporation formed by the couple deserves a brief discussion. The district court stated that while "Ben Willingham did incorporate Osborn, allegedly as part of his concealment efforts, Creditors do not allege that Osborn is the RICO enterprise, or even a part of the enterprise, at issue here." A more generous reading of the Complaint could indicate that Al-Rayes *did* allege that Osborn was part of the enterprise; that document contends that Erika and Ben "formed a scheme or artifice to defraud" Al-Rayes that included, among other things, "creating" Osborn "and using Osborn's bank accounts to further launder funds that were subsequently used to pay for personal expenses." But whether Osborn is viewed as a part of the alleged RICO enterprise is not dispositive because an association-in-fact enterprise need not include a corporation or other formal structure in any event.

definition of a RICO enterprise is limited to 'businesslike entities,'" the Supreme Court stated that it saw "no basis to impose such an extratextual requirement." *Boyle*, 556 U.S. at 945. Not only has the Supreme Court rejected the assertion that an association-in-fact enterprise must be "businesslike," it has also instructed lower courts not to require that association-in-fact enterprises have the formal characteristics often associated with businesses or other legal entities. For example, the Supreme Court has stated that the group comprising the association-in-fact enterprise "need not have a hierarchical structure or a 'chain of command,'" and the "group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." *Id.* at 948. In light of *Boyle's* express rejection of the assertion that association-in-fact enterprises must be "businesslike," we cannot agree with the district court's conclusion that, as a matter of law, an association-in-fact enterprise cannot exist here simply because the couple's alleged bad acts were confined to the management of their personal funds.[4]

We note that the district court cited several cases to back up its suggestion that, absent a business or other distinct operation, Erika and Ben could not constitute an association-in-fact enterprise. But none of those cases actually supports that conclusion. In fact, one case shows that an association-in-fact enterprise *can* consist solely of two people who are married to each other. *See*,

[4] The Supreme Court has repeatedly rejected the notion that RICO only targets organized crime in the traditional sense. *See, e.g.*, *Sedima*, 473 U.S. at 499 (RICO is not limited to "being used against mobsters and organized criminals."); *Turkette*, 452 U.S. at 580 (RICO encompasses "both legitimate and illegitimate enterprises.").

e.g., *Absolute Activist Value Master Fund Ltd. v. Devine*, No. 2:15-cv-328-FtM-29DNF, 2015 WL 12838168, at *19 (M.D. Fla. July 1, 2015) (plaintiff was substantially likely to establish an association-in-fact enterprise consisting of a husband and wife working together for the common purpose of concealing the proceeds of a fraudulent scheme). And in another, the court—having already found the enterprise element satisfied by the presence of a "business entity"—summarily declined to recognize the marriage itself as a RICO enterprise simply because "the plaintiff cite[d] no case law" on point. *Edvisors Network, Inc. v. Husser*, No. 14-062-JJB-RLB, 2014 WL 3853457, at *3 (M.D. La. Aug. 5, 2014). Moreover, the cases concluding that the requirements for an association-in-fact enterprise were *not* met all turn on infirmities not present here. *See Danny Lynn Elec. & Plumbing, LLC v. Veolia ES Solid Waste Se., Inc.*, No. 2:09cv192-MHT, 2011 WL 2893629, at *4 (M.D. Ala. July 19, 2011) (complaint did not allege that members of the alleged enterprise actually carried out the illegal acts); *Paradise Nw. Inc. v. Randhawa*, No. 2:09-cv-02027-MCE-KJN, 2011 WL 1459206, at *2 (E.D. Cal. April 15, 2011) (no shared purpose because complaint did not allege that wife played a meaningful role in her husband's fraudulent business). So what these cases actually affirm is that a married couple can constitute an association-in-fact enterprise under RICO—or not—depending on the facts of the case.

That brings us back around to the facts of this case. Under a purpose analysis consistent with *Boyle*, the record contains sufficient evidence for a reasonable juror to find that—although Erika and Ben originally joined together for the purpose of marriage—the couple came together shortly after the consent

judgment was entered against Ben for a new purpose, to hinder Al-Rayes's efforts to collect the consent judgment by committing mail and wire fraud. That evidence, viewed in the light most favorable to Al-Rayes, reflects that the couple deposited Ben's income into offshore bank accounts held in Erika's name only, and then transferred some of those offshore funds to their joint U.S. bank account to pay for living expenses. All the while, both Erika and Ben denied the existence of the offshore accounts under oath and made numerous misrepresentations regarding the extent of their financial assets. The record also reflects that the couple purchased real estate jointly, but put the titles to the properties in Erika's name only; eventually, the couple created a trust in Erika's name only, to which they transferred the condo title. Finally, the record contains evidence that the couple formed a corporation, set themselves up as its sole shareholders, and then used its bank account as both a haven for personal funds and a source for personal expenditures. These actions may or may not constitute RICO violations. But they certainly could lead a reasonable juror to conclude that Erika and Ben came together shortly after the consent judgment was entered and orchestrated an asset-concealment scheme for the common purpose of hiding Ben's assets from Al-Rayes. A marriage certificate does not transform alleged mail and wire fraud into ordinary household management.

In sum, to survive summary judgment, Al-Rayes did not need to bolster Erika and Ben's marital relationship with evidence that the alleged association-in-fact enterprise included a business or other separate entity formed by the couple. Nor did he need to provide evidence that Erika and Ben originally married for the

purpose of engaging in mail or wire fraud. Under RICO, the same rules apply to married people as to everyone else. Because the district court applied a heightened standard for association-in-fact enterprises consisting of married couples when it granted summary judgment in Erika's favor, we must reverse that order.

This opinion addresses only the "enterprise" element of the RICO claims because the district court's order addressed only that element. Accordingly, nothing in this decision prevents the district court from entering judgment as a matter of law in Erika's favor on some other basis, should that be appropriate. And because we reverse the order granting summary judgment in Erika's favor, Erika no longer qualifies as a prevailing party under Federal Rule of Civil Procedure 54(d)(1). We therefore also vacate the district court's order awarding her costs.

REVERSED, VACATED, AND REMANDED.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

VERIZON WIRELESS PERSONAL COMMUNICATIONS, LP,	)	
Appellant,	)	
v.	)	Case No. 2D18-161
CHRISTOPHER BATEMAN,	)	
Appellee.	)	

Opinion filed February 8, 2019.

Appeal pursuant to Fla. R. App. P. 9.130
from the Circuit Court for Pinellas County;
Thomas H. Minkoff, Judge.

R. Eric Bilik, Emily Y. Rottmann, and Daniel
Mahfood of McGuire Woods LLP,
Jacksonville, for Appellant.

Katherine Earle Yanes and Brandon K.
Breslow of Kynes, Markman & Felman,
P.A., Tampa; and Brian L. Shrader and
Gus M. Centrone of Dunlap Bennett &
Ludwig, PLLC, Tampa, for Appellee.

LaROSE, Chief Judge.

Verizon Wireless Personal Communications, LP, challenges the trial court's nonfinal order denying its motion to compel arbitration. We have jurisdiction.

See Fla. R. App. P. 9.030(b)(1)(B); 9.130(a)(3)(C)(iv). Because Christopher Bateman's statutory claims are not arbitrable, we affirm.[1]

I. Procedural and Factual Background

In 2011, Mr. Bateman obtained cell phone service from Verizon. Mr. Bateman agreed to the terms of Verizon's Customer Agreement. The Customer Agreement included an arbitration provision and stated that Verizon could unilaterally change the Customer Agreement at any time. Verizon revised the arbitration provision in 2012. The revised provision states, in relevant part, as follows:

> **YOU AND VERIZON WIRELESS BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT. . . . WE ALSO BOTH AGREE THAT:**
>
> (1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. EXCEPT FOR SMALL CLAIMS COURT CASES THAT QUALIFY, ANY DISPUTE THAT IN ANY WAY RELATES TO OR ARISES OUT OF THIS AGREEMENT OR FROM ANY EQUIPMENT, PRODUCTS AND SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY SUCH PRODUCTS OR SERVICES) WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB"). YOU CAN ALSO BRING ANY ISSUES YOU MAY HAVE TO THE ATTENTION OF FEDERAL, STATE, OR LOCAL GOVERNMENT AGENCIES, AND IF THE LAW ALLOWS, THEY CAN SEEK RELIEF AGAINST US FOR YOU.
>
> . . . .
>
> **(3) THIS AGREEMENT DOESN'T ALLOW CLASS OR COLLECTIVE ARBITRATIONS EVEN IF THE AAA OR BBB PROCEDURES OR RULES WOULD. NOTWITHSTANDING ANY OTHER PROVISION OF THIS**

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[1]We will not address whether Verizon waived its right to arbitrate because Mr. Bateman does not rely on waiver on appeal. See Kenyon v. Kenyon, 496 So. 2d 839, 840 (Fla. 2d DCA 1986) (holding an issue waived when the parties failed to brief the issue).

> **AGREEMENT, THE ARBITRATOR MAY AWARD MONEY OR INJUNCTIVE RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL CLAIM. NO CLASS OR REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL THEORIES OF LIABILITY OR PRAYERS FOR RELIEF MAY BE MAINTAINED IN ANY ARBITRATION HELD UNDER THIS AGREEMENT.**

Mr. Bateman cancelled his Verizon service in March 2013. A little more than a year later, Mr. Bateman filed a chapter 7 bankruptcy petition. He identified Verizon as a general unsecured creditor for $481. In August 2014, the bankruptcy court discharged Mr. Bateman's debts, including the Verizon debt, under 11 U.S.C. § 727 (2012). As a result, Verizon was prohibited from trying to collect the discharged debt from Mr. Bateman. See 11 U.S.C. § 524(a).

After the bankruptcy discharge, Verizon allegedly hired a debt collector, Convergent Outsourcing, Inc., to send Mr. Bateman a debt collection notice. In mid-January 2015, Convergent sent a notice telling Mr. Bateman that he owed Verizon $568.02 but that Convergent would settle the claim for about $200.

Mr. Bateman sued Verizon and Convergent in federal district court, alleging that Verizon violated the Florida Consumer Collection Practices Act (FCCPA), and that Convergent violated the FCCPA and the Federal Debt Collection Practices Act (FDCPA). See Bateman v. Verizon Wireless Pers. Commc'ns LP, No. 8:15-cv-02096–JDW–AEP (M.D. Fla. 2015). After Mr. Bateman voluntarily dismissed his federal claim, the district court dismissed the action for lack of subject matter jurisdiction.

Mr. Bateman then sued Verizon in state court. He alleged that Verizon attempted to collect a debt previously discharged in the bankruptcy court, in violation of

the FCCPA, section 559.72(7), (9), and (18), Florida Statutes (2014).[2] Mr. Bateman sought to proceed on a class-action basis. Verizon moved to compel arbitration. See 9 U.S.C. § 2 (2012); Fla. R. Civ. P. 1.140(b)(1). The trial court denied Verizon's motion, citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 639 (Fla. 1999), and Harrier v. Verizon Wireless Pers. Communications LP (Harrier I), No. 8:12-CV-1588-T-30AEP, 2012 WL 3655355 (M.D. Fla.), reconsideration denied, Harrier v. Verizon Wireless Pers. Commc'ns LP (Harrier II), 903 F. Supp. 2d 1281 (M.D. Fla. 2012). The trial court found that Harrier I was "analogous to this action and particularity persuasive."

Mr. Bateman also filed class claims in the bankruptcy court, seeking to hold Verizon in contempt for allegedly violating the discharge order. Verizon unsuccessfully tried to stay the bankruptcy claims and compel arbitration. In re Bateman, 585 B.R. 618, 630 (Bankr. M.D. Fla. 2018).

II. Analysis

We review the trial court's order de novo. See Sherwood v. Slazinski, 162 So. 3d 229, 231 (Fla. 2d DCA 2015).

A. Whether the Customer Agreement Survived the Bankruptcy Discharge

Verizon argues that the trial court erroneously relied on Harrier I because its reasoning that a bankruptcy discharge renders the Customer Agreement—and related arbitration provision—unenforceable "in the absence of a reaffirmation

[2]Subsection (7) prohibits a debt collector from willfully communicating or engaging in conduct that "can reasonably be expected to abuse or harass the debtor." Subsection (9) prohibits a debt collector from "[c]laim[ing], attempt[ing], or threaten[ing] "to enforce a debt when such person knows that the debt is not legitimate, or assert[ing] the existence of some other legal right when such person knows that the right does not exist." Subsection (18) prohibits a debt collector from knowingly communicating with a debtor that "is represented by an attorney with respect to such debt."

agreement" is inconsistent with bankruptcy law. See 2012 WL 3655355, at *1. More specifically, Verizon asserts that, "[c]ontrary to Harrier I's erroneous reasoning, it is axiomatic that bankruptcy discharges only . . . the debtor's personal liability on a claim for payment . . . , not underlying contracts." Verizon further argues that the trial court erred by failing to "address the settled concept of severability, under which [Mr.] Bateman's agreement to arbitrate would survive even if his bankruptcy discharge somehow invalidated the Customer Agreement as a whole."

Mr. Bateman maintains that the trial court properly relied on Harrier I because the "better-reasoned and more persuasive weight of authority" holds that "a contractual arbitration provision is enforceable after a bankruptcy only if the contract was reaffirmed in the bankruptcy" pursuant to § 524(c).[3] Mr. Bateman contends that the concept of severability is not applicable here because "the issue is neither the validity of the underlying contract nor the validity of the arbitration clause it contains."

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[3]In his brief, Mr. Bateman mentions in passing that several cases have stated that the central purpose of a bankruptcy discharge is to give a debtor a fresh start when holding arbitration agreements unenforceable under the circumstances of the respective cases. See, e.g., Anderson v. Credit One Bank, N.A., 884 F.3d 382, 390 (2d Cir. 2018) (holding that enforcing an arbitration agreement for claims based "on alleged violations of a discharge injunction . . . would interfere with the fresh start bankruptcy promises debtors, which would create an inherent conflict with the Code"). However, Mr. Bateman has failed to develop an argument as to how the "fresh start" principle would make the arbitration provision unenforceable under the facts of this case. He has mentioned a principle and case law but has failed to apply them. Additionally, Mr. Bateman did not mention the "fresh start" principle to the trial court. We need not address it in this opinion. See Manatee Cty. Sch. Bd. v. NationsRent, Inc., 989 So. 2d 23, 25 (Fla. 2d DCA 2008) ("[I]t would be inappropriate . . . . to depart from our role as a neutral tribunal and to become an advocate by developing arguments that the [party]—for whatever reason—has chosen not to make. We work within the framework of the briefs, and it is not our function to rebrief an appeal." (citation omitted)).

Recently, the United States Bankruptcy Court for the Middle District of Florida disagreed with the reasoning in Harrier I, holding that the arbitration provision survived Mr. Bateman's chapter 7 discharge, even though he did not reaffirm his debt with Verizon. In re Bateman, 585 B.R. at 625 n.24.[4] We find In re Bateman highly persuasive.

As the bankruptcy court explained, "the effect of a chapter 7 discharge is simply to relieve the debtor of personal liability" for a debt. Id. at 625 (citing Johnson v. Home State Bank, 501 U.S. 78, 83-84 (1991) (explaining that a chapter 7 discharge "extinguishes only 'the personal liability of the debtor' " and holding that the underlying lien does not disappear with a discharge)); see also 11 U.S.C. § 727(b) (providing that chapter 7 discharge relieves "the debtor from all debts that arose before" the discharge order and "any liability on a claim" that arose before the commencement of the bankruptcy). The court further explained that, contrary to Harrier I's reading of § 524(c), the statute "instructs how to create a valid and enforceable reaffirmation agreement," and "does not speak to the original contract between the debtor and the creditor." In re Bateman, 585 B.R. at 625. "[N]othing in [§] 524 expands the discharge granted under [§] 727" to discharge the entire contract. In re Bateman, 585 B.R. at 625. The single case cited in Harrier I recognized that § 524 applied to the reaffirmation agreement, not the underlying contract. See Jones v. Springfield City Sch. Credit Union, 6 B.R. 336, 338 (Bankr. S.D. Ohio 1980) ("[Section] 524 now establishes parameters for reaffirmation agreements by court approval under very limited circumstances.").

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[4]In re Bateman issued during the pendency of this appeal but before oral argument. Id. at 618.

Thus, the bankruptcy discharge "does not extinguish the underlying debt" itself. In re Scantling, 465 B.R. 671, 678 (Bankr. M.D. Fla. 2012), aff'd, 754 F.3d 1323 (11th Cir. 2014). The debt still exists and can be collected through other modes of enforcing a claim. See Deutsche Bank Tr. Co. Ams. v. Nash, 136 So. 3d 1267, 1269 (Fla. 2d DCA 2014) (holding that the bankruptcy discharge eliminated personal liability, not in rem liability); see also 11 U.S.C. § 524(e) ("Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").

Florida courts are in accord. See, e.g., Can Fin., LLC v. Krazmien, 253 So. 3d 8, 11 (Fla. 4th DCA 2018) ("The terms of the note and mortgage remained intact, as a bankruptcy discharge 'extinguishes only the personal liability of the debtor.' " (quoting Johnson, 501 U.S. at 83)). It follows that the discharge does not extinguish an otherwise binding contract underlying the debt. See In re Bateman, 585 B.R. at 625; Williams v. Navient Sols., LLC, 564 B.R. 770, 775 (Bankr. S.D. Fla. 2017) ("[A] discharge entered under § 727 relieves a debtor only of his or her personal obligations on debts that existed on the petition date. The entry of a chapter 7 discharge does not vitiate the effectiveness of an otherwise binding agreement to arbitrate matters relating to a claim that may or may not be subject to the discharge."); cf. Gadomski v. Wells Fargo Bank N.A., 281 F. Supp. 3d 1015, 1019 (E.D. Cal. 2018) ("The Ninth Circuit has stated that a bankruptcy discharge does not mean the whole contract has been merged into the judgment.").

Furthermore, a bankruptcy discharge does not extinguish the arbitration provision in the Customer Agreement because the obligation to arbitrate is not a "debt"

or "claim" as defined by the Bankruptcy Code. See 11 U.S.C. § 101(5), (12). It is not a right to payment or a right to an equitable remedy for breach of performance. See Mann v. Equifax Info. Servs., LLC, No. 12-CV-14097, 2013 WL 3814257, at *8 n.4 (E.D. Mich. July 22, 2013) ("An arbitration agreement, however, is not a 'claim to payment,' but rather merely defines the venue in which a claim to payment is to be resolved."). An arbitration agreement merely defines the venue where the parties will resolve a claim to payment or equitable remedy. Id. Consequently, Mr. Bateman's reliance on Jernstad v. Green Tree Servicing, LLC, No. 11 C 7974, 2012 WL 8169889, at *2 (N.D. Ill. Aug. 2, 2012), is unpersuasive. See Mann, 2013 WL 3814257, at *8 n.4 (finding Jernstad unpersuasive where the court concluded that the "discharge rendered the parties' Arbitration Agreement unenforceable," and then immediately stated, "What is discharged is a claim to payment" (quoting Jernstad, 2012 WL 8169889, at *6)).

Accordingly, we conclude that the Customer Agreement and its arbitration provision survived Mr. Bateman's bankruptcy discharge. See In re Bateman, 585 B.R. at 625; Williams, 564 B.R. at 775; cf. Can Fin., LLC, 2018 WL 3654832, at *2. The absence of a reaffirmation agreement does not change this conclusion. See In re Bateman, 585 B.R. at 625.

Besides, even if the bankruptcy discharge rendered the Customer Agreement unenforceable, "the arbitration provision [was] severable and survive[d]." See id. ("[A]s a matter of substantive federal arbitration law, . . . an arbitration provision is severable from the remainder of the contract" (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006), for the proposition that "as a matter of

substantive federal arbitration law, . . . an arbitration provision is severable from the remainder of the contract")). We reject Mr. Bateman's argument to the contrary.

B. Whether Mr. Bateman's FCCPA Claims Are Arbitrable

Claiming the strong presumption in favor of arbitration, see Morton v. Polivchak, 931 So. 2d 935, 941 (Fla. 2d DCA 2006), Verizon maintains that Mr. Bateman's claims are within the scope of the broad arbitration provision because the Customer Agreement is the "sole source" of the parties' relationship and "the claims arise directly from Verizon's alleged efforts to enforce its rights under the Customer Agreement." In contrast, Mr. Bateman contends that his claims arise from a state consumer protection statute, the FCCPA. He argues that his claims do not arise from the Customer Agreement because the bankruptcy court discharged the debt; Mr. Bateman owed nothing under the Customer Agreement.

Florida contract law guides our resolution of whether Mr. Bateman must arbitrate.[5] See Parnell v. CashCall, Inc., 804 F.3d 1142, 1147 (11th Cir. 2015) ("When federal courts interpret arbitration agreements, state contract law governs and directs the courts' analyses of whether the parties committed an issue to arbitration."). The Florida Supreme Court explained that even with a general policy favoring arbitration, a dispute is within the scope of a "broad" arbitration provision—a provision demanding arbitration of any claim arising out of or relating to the underlying contract—only if there

[5]Verizon suggested in its motion to compel arbitration that Georgia law applies. However, because neither party argues the applicability of Georgia law and both parties discuss Florida cases, we apply Florida law. See Marine Envtl. Partners, Inc. v. Johnson, 863 So. 2d 423, 426 (Fla. 4th DCA 2003) (applying Florida law where "neither party . . . argued the applicability of Colorado law," and both parties "relied heavily on Florida law as controlling").

is a significant relationship between the dispute and the contract. Seifert, 750 So. 2d at 638. After all, "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." Id. at 636.

A significant relationship does not arise "simply because the dispute would not have arisen absent the existence of a contract between the parties." Id. at 639. Rather, we look for a "contractual nexus" between the dispute and the contract. See id. at 638-39. "A contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013) (citing Seifert, 750 So. 2d at 638).

In Seifert, the court held that a contractual nexus did not exist because the wrongful death claims, there, were founded "upon a tort theory of common law negligence unrelated to" any unique rights and obligations imposed under the contract. 750 So. 2d at 640-42. The court further noted that the factual allegations in the complaint did not rely on the parties' contract, and thus, the "allegations rel[ied] on obligations that would extend to anyone, third parties as well as the Seiferts, who might be injured by U.S. Home's tortious conduct." Id. at 641-42.

Mr. Bateman argues that similar to the tort claims in Seifert, the statutory claims he asserts do not require reference to or construction of the Customer Agreement. He correctly asserts that his statutory claims rely on obligations that arise under the FCCPA and that he "could have brought this action based on [Verizon's] conduct regardless of whether the Customer Agreement ever existed."

Mr. Bateman does not allege that Verizon's conduct violated the Customer Agreement, nor does he base his claims on the terms of the Customer Agreement. Cf. In re Bateman, 585 B.R. at 627-28 (stating that "Verizon misses the mark when describing the nature of the Motion for Contempt" because Mr. Bateman argued that Verizon violated the discharge order, not that "the debt collection letter from Verizon's agent violated the Customer Agreement"). Instead, Mr. Bateman alleges that Verizon violated the FCCPA. This statute imposes legal duties on consumer debt collectors.[6] § 559.72; Morgan v. Wilkins, 74 So. 3d 179, 181 (Fla. 1st DCA 2011). These legal duties arise upon a debt collector's communication to collect debt and do not require a contract. Cf. Desmond v. Accounts Receivable Mgmt., Inc., 72 So. 3d 179, 181 (Fla. 2d

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[6]Section 559.55(6) defines "debt collector" as

> any person who uses any instrumentality of commerce within this state, whether initiated from within or outside this state, in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. The term "debt collector" includes any creditor who, in the process of collecting her or his own debts, uses any name other than her or his own which would indicate that a third person is collecting or attempting to collect such debts.

Unlike the FDCPA, "the FCCPA applies not only to debt collectors but also to any 'person.' " Gann v. BAC Home Loans Servicing LP, 145 So. 3d 906, 910 (Fla. 2d DCA 2014); see also § 559.72 (providing that "[i]n collecting consumer debts, no person shall . . .") (emphasis added); Morgan v. Wilkins, 74 So. 3d 179, 181 (Fla. 1st DCA 2011) (noting the appellees' concession that the trial court was in error when it ruled that FCCPA pertains only to debt collectors" in a case where a former client allegedly owed a debt to a law firm); Kelliher v. Target Nat'l Bank, 826 F. Supp. 2d 1324, 1327 (M.D. Fla. 2011) ("Although the federal FDCPA does not apply to original creditors, the FCCPA has been interpreted to apply to original creditors as well as debt collection agencies."). The parties have not asked us to weigh in on whether Verizon is a debt collector under the FCCPA.

DCA 2011) (holding that FCCPA applied where ARM attempted to collect debt from the wrong person because FCCPA applies to "not only an actual debtor, but also 'any natural person . . . allegedly obligated to pay any debt.' " (quoting § 559.55(2))); McCaskill v. Navient Sols., Inc., 178 F. Supp. 3d 1281, 1297 (M.D. Fla. 2016) ("[W]hen a creditor calls the wrong number and mistakenly alleges that the plaintiff owes a debt, the plaintiff is a 'debtor' under the FCCPA."). Accordingly, the alleged statutory violations addressed under section 559.72 arose from Verizon's collection efforts and were not unique to the Customer Agreement. Cf. Five Points Health Care Ltd. v. Alberts, 867 So. 2d 520, 521 (Fla. 1st DCA 2004) (reasoning that its conclusion the statutory claims were within the scope of arbitration was consistent with Seifert where "[t]he statutory duties . . . arose because of Mr. Alberts' admission to Park Ridge Nursing Center pursuant to the Agreement for Care").

Further, Mr. Bateman's FCCPA claims do not require reference to or construction of the Customer Agreement. Verizon claims a significant relationship between the Customer Agreement and its alleged conduct because Mr. Bateman alleged in his complaint that the underlying debt arose from a "transaction" for cell phone services.[7] We are not moved. Mr. Bateman's allegations do not explicitly

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[7]At oral argument, Verizon argued for the first time that the Customer Agreement is required to resolve the dispute based on Mr. Bateman's allegations pertaining to class certification and the limitation of liability provision in the Customer Agreement. Because Verizon failed to present these arguments pertaining to these allegations in its briefs, we do not address them. See Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1126 (Fla. 2014) (" 'Basic principles of due process'—to say nothing of professionalism and a long appellate tradition—'suggest that courts should not consider issues raised for the first time at oral argument' and 'ought not consider arguments outside the scope of the briefing process.' " (quoting Powell v. State, 120 So. 3d 577, 591 (Fla. 1st DCA 2013))); cf. Morton, 931 So. 2d at 941 (declining to address other provisions in an arbitration agreement where the parties did

mention the Customer Agreement, and the reference to the transaction simply notes that there was an underlying debt before the bankruptcy discharge. See Mims v. Glob. Credit & Collection Corp., 803 F. Supp. 2d 1349, 1358 (S.D. Fla. 2011) (stating that the claims were not intertwined with the Agreement where "the claims presume[ed] the existence of the Agreement . . . purely for the purpose of noting there [was] an underlying debt").

It may be true that the debt would not have accrued but for the Customer Agreement and that the dispute may not have resulted but for the Customer Agreement, but Seifert rejected such analysis. See 750 So. 2d at 638 ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."); see also Saunders v. St. Cloud 192 Pet Doc Hosp., LLC, 224 So. 3d 336, 338 (Fla. 5th DCA 2017) (rejecting similar logic). Again, to compel arbitration under a broad arbitration provision, the claim "must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself." Seifert, 750 So. 2d at 638. The dispute in this case is whether Verizon violated the FCCPA. Verizon fails to explain adequately how the Customer Agreement is required to resolve this dispute.

Without a disputed issue that requires reference to or construction of the Customer Agreement, the FCCPA claims lack a significant relationship to the Customer Agreement and are not arbitrable. See id. Compare In re Bateman, 585 B.R. at 627-28

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not present any "argument concerning the bearing these provisions might have on the issue of whether the parties" agreed to arbitrate the punitive damages claims).

(holding that "[t]he lack of a nexus [was] apparent" between the Customer Agreement and the issue of contempt where Mr. Bateman did "not argue that the debt collection letter from Verizon's agent violated the Customer Agreement" and the Customer Agreement was not needed to resolve the issue of contempt), with Aztec Med. Servs., Inc. v. Burger, 792 So. 2d 617, 624 (Fla. 4th DCA 2001) (holding that the statutory claims were within the scope of arbitration "where (1) appellees pled identical allegations to support both their breach of contract and statutory claims and (2) reliance on the agreement and its terms [was] necessary to determine whether or not the claims submitted by the physicians to Aztec were paid timely and whether Aztec improperly coded the claims submitted-the factual allegations at the core of the Unfair Trade Practices Act claim").

We are not persuaded by the federal cases upon which Verizon relies. Sherer v. Green Tree Servicing LLC, 548 F.3d 379, 381 (5th Cir. 2008), is inapposite because the parties in Sherer did not challenge "that the claims would otherwise be within the scope of the arbitration clause '[h]ad the defendant signed the contract.' " (Alteration in original.) Instead, the sole issue in Sherer was "whether Sherer ha[d] agreed to arbitration with a nonsignatory, such as Green Tree." Id. Some of the other federal cases relied on by Verizon did not involve claims pertaining to a discharged debt and concluded that the debt collection claims arose under the broad arbitration agreements without delving into whether a significant relationship existed between the agreements and the claims. See Wilder v. Midland Credit Mgmt., No. CIVA109CV2039JOFAJB, 2010 WL 2499701, at *4 (N.D. Ga. May 20, 2010), report and recommendation adopted, No. CIVA109CV02039JOFAJB, 2010 WL 2499659 (N.D. Ga.

June 15, 2010); Miller v. Nw. Tr. Servs., Inc., No. CV-05-5043-RHW, 2005 WL 1711131, at *4 (E.D. Wash. July 20, 2005).

In the federal cases where the courts provided a more in-depth analysis of the scope of the arbitration provision, the plaintiffs in those cases raised issues for which resolution required reference to the contracts. See Koch v. Compucredit Corp., 543 F.3d 460, 466 (8th Cir. 2008); Campbell v. Verizon Wireless, LLC, No. CIV.A. 14-0517-WS-N, 2015 WL 416484, at *5 n.13 (S.D. Ala. Jan. 29, 2015). In Koch, "the heart of the dispute—the occurrence and alleged payment of the debt—[was] one founded in the credit agreement." 543 F.3d at 466. In Campbell, the February 2008 and May 2010 Customer Agreements "included detailed recitations of Verizon's billing practices and obligations," and the dispute "occurred as a fairly direct result of the manner and methods by which Verizon charged [Mr. Campbell] for services and referred his account to collection." 2015 WL 416484, at *5 n.13. Mr. Campbell also disputed that he ever signed the service agreement, under which the debt at issue incurred. Id. at *1. Unlike the parties in Koch and Campbell, Verizon and Mr. Bateman do not dispute whether Mr. Bateman paid the debt or signed the Customer Agreement. If anything, they dispute whether the debt was discharged, which is a dispute founded in the bankruptcy proceedings.

Additionally, Verizon does not indicate if the July 2011 or February 2012 Customer Agreements included detailed recitations of Verizon's billing practices and obligations relevant to this dispute, like the agreements in Campbell. Our independent review of the record indicates that the Customer Agreements do not include detailed recitations of Verizon's billing practices or obligations when a debt is discharged in

bankruptcy. The only mention of collections in the Customer Agreements is in the "About My Payments" section and states that Verizon may charge the customer any fees the collection agency charges them if the customer fails to pay and Verizon uses a collection agency and caps the amount of collection fees at 18%. And the only mention of bankruptcy is in the "What Are Verizon Wireless' Rights to Limit or End Service or End This Agreement?" section, which states that Verizon may suspend or terminate the service if the customer goes bankrupt. This statement has no bearing on the allegations in Mr. Bateman's complaint as Mr. Bateman had ended his service with Verizon well before he ever filed for bankruptcy.

We conclude, based on the arguments and record before us, that Mr. Bateman's claims do not have a "significant relationship" to the Customer Agreement. Cf. Bray v. PNC Bank, N.A., 196 F. Supp. 3d 1282, 1287 (M.D. Fla. 2016) ("Plaintiffs' claims in this case arise out of Defendant's attempts to enforce a debt that was discharged in bankruptcy, as opposed to arising directly from the Mortgage. Thus, Plaintiffs' claims do not arise out of and are not sufficiently related to the Mortgage to fall within the jury waiver provision."). We emphasize that the policy favoring arbitration does not change our conclusion because the "significant relationship" requirement laid out in Seifert must be satisfied even in light of the general policy favoring arbitration. See Seifert, 750 So. 2d at 638; see also Wilder, 2010 WL 2499701, at *4 ("Although federal policy favors arbitration, . . . a district court must compel arbitration only if the parties have agreed to arbitrate their dispute; 'parties cannot be forced to submit to arbitration if they have not agreed to do so.' " (quoting Magnolia Capital Advisors, Inc. v. Bear Stearns & Co., 272 F. App'x. 782, 785 (11th Cir. 2008))).

III. Conclusion

The trial court erred in denying the motion to compel arbitration by applying Harrier I's flawed reasoning. As we explained above, the bankruptcy order discharged Mr. Bateman's personal liability as to his debts, not the entire Customer Agreement and arbitration provision therein. See In re Bateman, 585 B.R. at 625; Williams, 564 B.R. at 775. The arbitration provision remained valid even in the absence of a reaffirmation agreement. See In re Bateman, 585 B.R. at 625. Nevertheless, bound as we are by Seifert, we affirm the trial court's denial of Verizon's motion to compel arbitration because Mr. Bateman's FCCPA claims do not have a significant relationship to the Customer Agreement.

Affirmed.

SLEET and SALARIO, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed February 6, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-0690
Lower Tribunal No. 16-6142

Zurich American Insurance Company, a/s/o Lincoln-Drexel Waserstein, Ltd. and Lincoln Drexel, Ltd.,
Appellant,

vs.

Puccini, LLC d/b/a 5 Napkin Burger,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Bronwyn C. Miller, Judge.

Derrevere Stevens Black and Cozad, and Jon D. Derrevere, and Michael B. Stevens, and Shirley Jean McEachern and Mary Grecz (West Palm Beach), for appellant.

Hamilton, Miller & Birthisel, LLP, and Michelle A. Delancy and Melanie Grant, for appellee.

Before EMAS, C.J., and LOGUE and LINDSEY, JJ.

LINDSEY, J.

Appellant Zurich American Insurance Company ("Zurich"), as subrogee of Lincoln-Drexel Waserstein, Ltd. and Lincoln Drexel, Ltd. ("Landlord"), appeals the trial court's final order dismissing, with prejudice, all of its claims against Appellee Puccini, LLC. d/b/a 5 Napkin Burger ("Tenant"). Because we find, based on the written lease agreement as a whole, that Tenant was not an implied co-insured with Landlord for subrogation purposes, we reverse.

BACKGROUND

This subrogation action arises from Zurich's attempt to recover money from Tenant that Zurich paid to Landlord for fire damage sustained to Landlord's building. Tenant leased space from Landlord for a restaurant pursuant to a written lease agreement dated March 1, 2010, for a term of fifteen years and ten months. On February 7, 2015, a fire ignited in Tenant's kitchen followed by another fire on the roof of the building. At the time of the fire, Landlord had a Zurich insurance policy that covered a portion of the damage. Pursuant to the terms of its policy, Zurich alleged that it paid Landlord over $2.1 million dollars and that, as a result, Zurich became subrogated to all of Landlord's claims against Tenant up to that amount.

Tenant moved to dismiss Zurich's subrogation action, asserting that Tenant was an implied co-insured under the policy. The trial court ultimately agreed and entered a written order finding, based on various provisions of the lease, that Tenant

was an implied co-insured and concluding, as a matter of law, that Zurich was barred from proceeding with a subrogation action against Tenant. The trial court then entered a final order dismissing Zurich's claims against Tenant with prejudice and without leave to amend. This timely appeal follows.

I. STANDARD OF REVIEW

We review a trial court's order granting a motion to dismiss *de novo*. Grove Isle Ass'n v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014) (citations omitted). "In determining the merits of a motion to dismiss, the trial court must limit itself to the four corners of the complaint, including any attached or incorporated exhibits, assuming the allegations in the complaint to be true and construing all reasonable inferences therefrom in favor of the non-moving party." Id. (citations omitted).

Moreover, the interpretation of a lease agreement is a question of law, and the applicable standard of review is *de novo*. Leisure Resorts, Inc. v. City of West Palm Beach, 864 So. 2d 1163, 1166 (Fla. 4th DCA 2003) (citation omitted). In undertaking review of a lease, an appellate court is permitted to reassess the contract and reach a different interpretation from that of the trial court. Sugar Cane Growers Coop. of Fla. v. Pinnock, 735 So. 2d 530, 534 (Fla. 4th DCA 1999). The contract should be reviewed as a whole and all language given effect, and where the language is clear and unambiguous, the contract should be enforced as it reads. Id.

II. ANALYSIS

At issue in this case is the concept of insurance by implication as it relates to an insurer's ability to maintain a subrogation action against a tenant who is not named in the insurance policy. "Generally, when an insurer pays the claim of its insured, the insurer stands in the shoes of its insured, and the insurer may bring a subrogation action against the tortfeasor to recover the amounts paid under the insurance policy." State Farm Fla. Ins. Co. v. Loo, 27 So. 3d 747, 748 (Fla. 3d DCA 2010). However, an insurer may not maintain a subrogation action against its own insured, even if the insured's negligence caused the loss. Id. In the landlord/tenant context, when a tenant is found to be an implied co-insured with its landlord, the landlord's insurer is barred from bringing an action against the tenant in subrogation. Here, Zurich seeks to stand in the shoes of its insured, Landlord, to sue Tenant for any damage to the building that may have been caused by Tenant's agents or employees.

In determining whether a landlord's insurer may pursue a subrogation action against a negligent tenant, courts have typically adopted one of three views: (1) the approach set forth in Sutton v. Jondahl, 532 P.2d 478 (Okla. Civ. App. 1975), which establishes that a tenant is a coinsured of the landlord—and therefore subrogation is unavailable—absent an express agreement to the contrary; (2) the "anti-Sutton approach," which provides a presumption in favor of subrogation and permits an

insurer to bring a subrogation action against the tenant absent an express or implied agreement to the contrary; and (3) the "case-by-case approach." Loo, 27 So. 3d at 749; see also Am. Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 757 N.W.2d 584, 589-94 (S.D. 2008).

In the case-by-case approach, there is no presumption in favor of or against subrogation; rather, "the 'lease as a whole' is examined 'in order to ascertain the intent of the parties as to who should bear the risk of loss for damage to the leased premises caused by the tenant's negligence.'" Loo, 27 So. 3d at 750 (quoting Am. Family, 757 N.W.2d at 592). This Court, along with some of our sister courts, has adopted the case-by-case approach.[1] Id. at 750-51; see also Underwriters of Lloyds of London v. Cape Publ'ns, Inc., 63 So. 3d 892, 895-96 (Fla. 5th DCA 2011) ("Although each approach is supported by persuasive policy rationales, this court

[1] According to the dissent, our case-by-case approach departs from the majority view, which is the anti-subrogation approach from Sutton. But see Rausch v. Allstate Ins. Co., 882 A.2d 801, 814 (Md. 2005) ("The majority of courts, however, have avoided per se rules and taken a more flexible case-by-case approach, holding that a tenant's liability to the landlord's insurer for negligence causing a fire depends on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole." (quoting Union Mut. Fire Ins. Co. v. Joerg, 824 A.2d 586 (Vt. 2003))). We are, however, bound by our prior cases to follow the case-by-case approach. Moreover, as articulated by other courts, "[w]e are not particularly impressed with characterizations of a doctrine as the 'majority' or 'minority'. We will give due consideration to all decisions of other jurisdictions but will be persuaded only by the soundness of their reasoning and their consistency with [our State's] law." Am. Family, 757 N.W.2d at 594 (alterations in original) (quoting Koch v. Spann, 92 P.3d 146, 150 n.2 (Or. Ct. App. 2004)).

concludes that the parties are in the best position to allocate the risk of loss for fire damage and, therefore, adopt the case-by-case approach." (footnote omitted)); Cont'l Ins. Co. v. Kennerson, 661 So. 2d 325, 326-30 (Fla. 1st DCA 1995) (examining several lease provisions to determine the parties' intent as to who should bear the risk of loss for damage caused by tenants' negligence).

In Loo, the landlord maintained an insurance policy on a rental dwelling unit it leased to a tenant. 27 So. 3d at 748. During the rental period, a fire occurred at the premises, and the insurer paid the landlord for the losses. Id. The insurer filed a subrogation action against the tenant to recover the amounts paid to the landlord, alleging that the tenant's negligence caused the fire. Id. The trial court applied the Sutton doctrine, under which a tenant is an implied co-insured under a landlord's policy unless there is an express agreement between the landlord and the tenant to the contrary. Id. at 748, 753. Because there was no such express agreement, the trial court granted summary judgement in favor of the tenant, finding it was an implied co-insured and barring the insurer from suing the tenant in subrogation for damages caused by the tenant's negligence. Id. at 748.

This Court reversed, determining that the trial court applied the incorrect legal standard and instead examined "the terms of the parties' lease to determine if, as a matter of law, the parties intended that the tenant would not be held liable for her negligent acts that damaged the leased premises." Id. at 751. In Loo, the lease

provided that the landlord would repair the premises if damaged by fire "not due to lessee's negligence" and prohibited the tenant from keeping materials on the premises "that might unreasonably increase the danger of fire." Id. at 752. This Court, however, noted that nothing in those provisions prevented the landlord from holding the tenant liable for its negligence, and the landlord never agreed to purchase insurance for the tenant's benefit. Id.

This Court further relied on three additional factors in Loo in determining that the tenant was not an implied co-insured under the lease. Id. Specifically, there was no provision in the parties' lease (1) that exculpated the tenant from liability for her own negligence; (2) required the landlord to maintain insurance for the benefit of the tenant; or (3) shifted to the landlord any loss incurred as a result of the tenant's negligence. Id. Based on our review of "the lease as a whole," this Court allowed the insurer to proceed with its subrogation action against the tenant because the parties did not intend to limit the tenant's liability for her negligent acts. Id. (citations omitted).

We begin our examination of the "lease as a whole" in this case with provisions related to Tenant's liability to Landlord. Paragraph 41 provides that "[r]ent shall not be abated and Tenant shall be fully responsible for all repairs and damages if Premises are partially or totally destroyed by fire or any other casualty caused by Tenant or its agents." Not only does Paragraph 41 not exculpate Tenant

for its own negligence, it expressly holds it liable. Further, Paragraph 33 eliminates Landlord's duty to make repairs to the "structural aspects and elements of the Building" if such repairs were "occasioned by any intentional or negligent act of Tenant, its agents, or its employees."

In addition, the lease contains unilateral provisions that expressly waive Landlord's liability and waive Tenant's right to make a claim against Landlord. See Cape Publ'ns, 63 So. 3d at 896 ("Applying [the case-by-case] approach to the commercial lease in this case, we agree . . . that the general provisions requiring [the tenant] to obtain general liability insurance and indemnify and hold [the landlord] harmless for its negligence are relevant to determining which party bears the risk of loss."). Specifically, Paragraph 9 states: "The Landlord shall not be liable for any loss or damage to any of Tenant's personal property or Premises unless directly caused by the gross negligence or willful misconduct of Landlord . . . nor shall Landlord be liable for . . . damages incurred or suffered by the Tenant . . . or others occasioned by . . . fire . . . ." Thus, by its plain language, Paragraph 9 shifts the risk of loss from Landlord, absent gross negligence or willful misconduct on its part, to Tenant. Moreover, Paragraphs 24 and 31 require Tenant to indemnify Landlord:

> 24. INDEMNITY/LIABILITY: Tenant will indemnify and save Landlord and any mortgagee of the Building harmless of and from any and all . . . damages . . . arising from or out of any occurrence in or upon the Premises . . . ."
> . . .

> 31. TENANT'S RESPONSIBILITIES: . . . Tenant shall be responsible for, and **shall indemnify and hold harmless Landlord** for any and all costs and expenses relating to such damages, actual or consequential . . . resulting from Tenant's failure to properly maintain the Premises and appurtenances thereto.

(Emphasis added).

The above provisions, when examined to ascertain the intent of the parties as to who should bear the risk for damage caused by Tenant's negligence, support allowing Zurich to proceed with its subrogation claim because Tenant clearly agreed to bear that risk. See Loo, 27 So. 3d at 750; cf. Kennerson, 661 So. 2d at 330 (explaining that the modern trend of authority holds that an "insurer cannot obtain subrogation against the lessee in the absence of an express agreement **or lease provision establishing the lessee's liability**" (emphasis added) (quoting 6A John A. Appleman & Jean Appleman, Insurance Law and Practice, § 4055 at 77–78 (Supp. 1994))).

We also consider the lease provisions related to the obligation to purchase insurance. Rather than require Landlord to maintain insurance for the benefit of Tenant, the lease affirmatively places the burden on Tenant to procure and maintain insurance for its own benefit and to name Landlord as an additional insured:

> 25. INSURED LOSS OR DAMAGE: In any event of loss or damage to the Building, the Premises and/or any contents, each party shall first exhaust its own insurance coverage before making any claim against the other party. **As Tenant is obligated to maintain insurance to fully**

> **cover all of its losses,** in the event Tenant sustains a loss not fully covered by its own insurance, Tenant acknowledges that it is self-insured for any uncovered loss; Tenant **expressly waives** the right to make any claim against the Landlord or seek recovery of any damages from the Landlord or its insurance company arising out of any loss or incident for which the Tenant should have maintained its own insurance.
>
> . . .
>
> 26. TENANT INSURANCE: **Tenant shall procure and maintain in force during the term of this Lease . . . , at its expense, (a) Fire/Windstorm/Property Insurance** with extended coverage endorsement on Tenant's fixtures, equipment, furnishings and other contents of the Premises, for the full replacement cost of said items; and (b) Comprehensive Commercial / Public Liability insurance . . . sufficient to protect against liability for damage claims . . . **arising out of accidents occurring in or around the Premises in a minimum of $1,000,000.00 for each person injured; $1,000,000.00 for any one accident and $1,000,000.00 for property damage;** and (c) Plate Glass Insurance . . . . Such insurance policies **shall provide coverage for Landlord's contingent liability on such claims or losses, and shall name Landlord as an additional insured party**. . . . Tenant shall maintain sufficient insurance to fully protect Tenant from all losses and damages; **Tenant indemnifies and saves Landlord harmless for any claim for which Tenant was insurable.**

(Emphasis added).

Finally, we consider Paragraph 45, which required Tenant to pay, as additional rent, seventy percent of the Landlord's operating expenses, including

taxes, insurance premiums, and special assessments.[2] Tenant argues, based primarily on this provision, that it was an implied co-insured under the terms of the lease because it paid a pro rata share of Landlord's insurance premiums. Similarly, the dissent seeks to create a bright-line rule—ignoring the other risk-allocating provisions in the lease—that a landlord's insurer cannot sue a tenant in subrogation if the tenant has paid the majority of the landlord's insurance premiums. But because we follow the case-by-case approach, we must examine the lease as a whole to determine whether the parties intended Tenant to be held liable for damages resulting from its alleged negligence. See, e.g., Loo, 27 So. 3d at 750.

Here, it is clear that the parties did not intend to shift the risk of loss for damage caused by Tenant's negligence to Zurich, Landlord's insurer. As we have already explained, the lease explicitly holds Tenant liable for damage caused by its negligence or the negligence of its agents. There are also provisions holding Landlord harmless for such damage. In addition, the lease required Tenant to procure and maintain fire insurance for damage "arising out of accidents occurring in or around the Premises[,]" and Tenant agreed to name Landlord as an additional insured. Although the lease required Tenant to pay a percentage of Landlord's

[2] This type of provision is found "[i]n virtually all commercial leases . . . ." 49 Am. Jur. 2d Landlord and Tenant § 358. The purpose is to assure "that the landlord will actually receive the lease's stated profits, that is, an amount or rent 'net' of the cost of taxes, operating expenses, and the like." Id.

operating costs, including any insurance premiums, nothing in that provision explicitly required Landlord to purchase fire insurance or to name Tenant as an insured under the policy.

According to the dissent, this case is "remarkably similar" to Kennerson, a case in which the First District held that an insurer was not entitled to subrogation from the tenants. However, a careful reading of Kennerson reveals that the lease provisions there are markedly different from the provisions here. Although the tenants in Kennerson paid a pro rata share of the fire insurance, the court did not rely on that fact alone. Instead, the court considered the lease as a whole. For instance, the lease in Kennerson provided that "damage caused by fire 'shall be repaired by and at the expense of [landlord].'" 661 So. 2d at 328. Moreover, the parties agreed that the tenant "would be excused even from paying rent for damaged premises while [the landlord] applied insurance proceeds . . . to effect repairs." Id. Finally, the lease in Kennerson had "no provision making [tenant] liable for damages its negligence might cause." Id. at 329.

Here, in contrast, the parties agreed that Tenant would be "fully responsible" for damage caused by fire, and Landlord had no obligation to make repairs "occasioned by any intentional or negligent act of Tenant, its agents, or its employees." Further, the parties explicitly agreed that Tenant would be liable for damages caused by its negligence, that it would maintain its own fire insurance for

damage claims "arising out of accidents occurring in or around the Premises[,]" and that Landlord would be held harmless for such damage claims. Thus, unlike in Kennerson, the risk-allocating provisions in this case do not evidence the parties' intent to shift the risk of loss from a negligent tenant to the landlord's insurer; instead, the clear intent of the parties was that Tenant or Tenant's insurer would bear the risk of loss due to damage resulting from Tenant's negligence.[3]

Finally, we address the dissent's contention that our case-by-case approach "runs afoul of the economic realities underlying these sorts of provisions in a lease . . . ."[4] This policy argument is similar to one that formed the basis of the Sutton decision. In holding that there should be a presumption against subrogation, the Sutton court explained that its anti-subrogation approach "is derived from a recognition of a relational reality, namely, that both landlord and tenant have an

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[3] The risk-allocating provisions in this case also distinguish it from Cape Publications. There, the Fifth District found—based on the landlords' express agreement to purchase insurance and tenant's payment of a pro rata share of the premium—that the parties intended that the risk of loss be borne by the landlords' insurer. Cape Publ'ns, 63 So. 3d at 896. However, the court, in its case-by-case approach, never mentions any provisions in the lease explicitly holding the tenant liable for damage resulting from its own negligence.

[4] Under the dissent's approach, almost every commercial lease is transformed into an insurance policy providing coverage for negligent tenants because virtually all commercial leases require the payment of operating expenses. See supra note 2. This is not the law in Florida. Were it, insurance companies would find themselves on the hook for damages caused by negligent tenants whom they have never met much less had the opportunity to assess and assign risk in calculating the amount of the premium being charged to their landlords under the landlords' own policies of insurance.

insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest." 532 P.2d at 482. But we do not follow the Sutton approach, and we agree with other courts that have taken the case-by-case approach that "courts have no business adding insureds to an insurance policy in order to achieve their perception of good public policy." Rausch, 882 A.2d at 815 (citing 56 Assocs. ex rel. Paolino v. Frieband, 89 F. Supp. 2d 189, 193 (D.R.I. 2000)); see also Am. Family, 757 N.W.2d at 591 ("The insurer has a right to choose whom it will insure and did not choose to insure the lessees . . . ." (quoting 6A, J.A. Appleman, Insurance Law and Practice § 4055 at 78 (2005))).

III. CONCLUSION

Based on our review of the lease as a whole, and in light of this Court's decision in Loo, we conclude that Tenant is not an implied co-insured under Zurich's policy, and therefore, Zurich may proceed with its subrogation action against Tenant. Accordingly, because we find the trial court erred in concluding that Tenant was an implied co-insured with Landlord under its policy with Zurich and in dismissing Zurich's subrogation action against Tenant, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

EMAS, C.J., concurs.

The issue in this case is whether a landlord's insurer can bring a subrogation action against a tenant whose alleged negligence caused fire damage to the rented building when, under the lease, the tenant paid the majority of the premiums for the landlord's fire insurance. Until this case, the answer in Florida was no, a tenant who paid the insurer's premiums could not be sued in subrogation by the insurer. Because the majority opinion departs from well-established Florida law and the modern trends across the country, I respectfully dissent.

The crucial provisions of the lease specify that (1) in addition to other rent, the tenant will pay 70% of the landlord's expenses including "premiums for all insurance applicable to the Building," which premiums for the first year of the lease were agreed to be $20,654.45; (2) the tenant will pay any increased premiums for the landlord's building insurance caused by the tenant's use; and (3) "[i]n the event of loss or damage to the Building, the Premises and/or any contents, each party shall first exhaust its own insurance coverage before making any claim against the other party." Taken together, these lease provisions indicate that the "parties plainly agreed to shift the risk of fire damage to an insurance company." Cont'l Ins. Co. v. Kennerson, 661 So. 2d 325, 328 (Fla. 1st DCA 1995).

Kennerson is remarkably similar to this case. In Kennerson, a landlord's insurer sued a tenant in subrogation for allegedly causing the fire that damaged the rental property. The lease at issue in Kennerson, like the one at issue here, required the tenant to pay "in addition to the rent elsewhere provided herein, as additional rent hereunder, its pro rata share of all costs of fire and extended coverage insurance for the shopping center." Id. at 326. Because the tenant was paying the premiums for the landlord's fire insurance, the court held that the landlord's insurer could not sue the tenant in subrogation. The First District concluded:

> a landlord's insurer cannot exercise any right of subrogation against a merely negligent tenant to recover money paid the landlord under a fire insurance policy, where the landlord has agreed to bear the expense of repairing fire damage and has assumed responsibility for procuring fire insurance, the cost of which the tenant has agreed to bear and has in fact borne.

Id. at 330.

When examining a commercial transaction, a court must consider the economic realities that informed the bargain between the parties. Under the majority's reading of the lease, the tenant is essentially required to obtain two fire insurance policies to insure the same building from the same risk of loss. The tenant must pay the premiums for a fire policy to protect the landlord from the tenant's negligence, and it must pay the premiums for a second fire policy to protect himself from his own (the tenant's) negligence. This reading makes no economic sense from

the perspective of either the landlord or the tenant: it increases the economic rent to the tenant with no corresponding benefit to the landlord.

Because it runs afoul of the economic realities underlying these sorts of provisions in a lease, the majority's reading of the lease runs contrary to the modern trend of authority that bars subrogation against a tenant contractually obligated to pay a landlord's insurance premiums. The majority of courts that have considered this issue have held that such provisions are properly read to indicate the parties' agreement to shift the risk of a fire loss from the parties to the insurance carrier. See id. at 330-31 & n.1 (citing the great weight of authority from numerous jurisdictions supporting the proposition that a landlord's insurer had no right of subrogation against the tenant that either directly or indirectly paid its premiums).

The majority attempts to distinguish Kennerson by focusing on lease provisions other than those relied upon by Kennerson and the majority of jurisdictions. The crucial lease provision in Kennerson, which was the express basis for its holding, is substantively the same as the crucial provision here. It required the tenant to pay the landlord's fire insurance premiums, but did not require the landlord and tenant to be named as co-insureds for the fire insurance. Id. at 328.[5]

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[5] The addendum to paragraph 15 of the lease deals with fire insurance. Admittedly, paragraph 10 of the lease, which concerned general liability insurance for tort claims by third parties, required the landlord and tenant to be named as co-insureds. The Kennerson opinion expressly points out, however, that paragraph 10 "contrasts with the addendum to paragraph 15" in this regard. Id. The opinion further notes that the

The Fifth District reached a result similar to Kennerson in Underwriters of Lloyds of London v. Cape Publications, Inc., 63 So. 3d 892, 896 (Fla. 5th DCA 2011). In Cape Publications, the Fifth District held that

> [t]he lease expressly provides that the [landlord] would purchase a property and casualty insurance policy, which undisputedly covered fire damage on the commercial building. The parties further agreed that [the tenant's] rent included its pro rata share of the premium. These specific provisions . . . plainly indicate that the parties intended the risk of loss be borne by the [landlord's] insurer.

Id.

The majority's attempt to distinguish Cape Publications is also unpersuasive. Whether or not the lease at issue here "expressly" provided that fire insurance be purchased, the lease "expressly" provided the tenant must pay fire insurance premiums, thereby clearly and unequivocally indicating the intent of the parties that the risk of fire loss be borne by the landlord's insurer whose premiums were being paid by the tenant.

State Farm Florida Insurance Co. v. Loo, 27 So. 3d 747 (Fla. 3d DCA 2010), the main case relied upon by the majority, is not controlling because the tenant in that case did not pay the premiums for the fire insurance, as occurred here. In fact,

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"agreement to carry general liability insurance constitutes additional protection that would apply in circumstances involving liability to injured third parties not at issue here." Id. at 328 n.2 (emphasis added) (citations and quotations omitted).

the court in Loo distinguished Kennerson on this basis while still approving the way Kennerson "relied on lease provisions requiring the landlord to bear the expense of repairing any fire damage and to procure fire insurance on the property, the cost of which the tenant has agreed to bear and has in fact borne." Id. at 753 (citations and quotations omitted).

The majority suggests I am taking a legal position whereby "every commercial lease is transformed into an insurance policy providing coverage for negligent tenants." But that is of course the case for any commercial lease where the tenants are paying fire insurance premiums for a policy to protect the building from their own negligence. In the final analysis, I merely submit that we follow the rather unremarkable and well-established law that an insurance company cannot bring an action in subrogation against a tenant for a fire loss covered by fire insurance for which the tenant pays the premiums. See Kennerson, 661 So. 2d at 330; Cape Publ'ns., 63 So. 3d at 894-96; Loo, 27 So. 3d at 752-53.

For these reasons, I think the trial court was correct. I would uphold the trial court's final order of dismissal.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CARYN HALL YOST-RUDGE,
Appellant,

v.

A TO Z PROPERTIES, INC., a Florida Corporation,
Appellee.

No. 4D17-3204

[February 6, 2019]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Barbara W. Bronis, Judge; L.T. Case No. 432016CA000484.

Caryn Hall Yost-Rudge, Stuart, pro se.

Alexander D. Gonano of Gonano & Harrell, Fort Pierce, for appellee.

LEVINE, J.

One of the hallmarks of the Florida Constitution is the provision protecting the familial home by enforcement of homestead protections in article X, section 4 of the Florida Constitution. That provision provides that a married owner of homestead real estate may alienate the homestead by sale only if joined by the spouse. Fla. Const. art. X, § 4(2)(c).

In this case, the husband sold the property, claimed by appellant ("wife") to be protected by homestead, without the wife's agreement or signature on the warranty deed. Appellee ("buyer") claims that municipal violations regarding the safety of that property resulted in an injunction prohibiting the wife and her husband from occupying the property which, in turn, resulted in their abandonment of the property. The buyer claims further that if the property was abandoned, then the property lost its homestead protection, obviating the buyer's need to obtain the wife's written consent to her husband's sale of the property.

We find, consistent with the Florida Constitution, that the wife must agree to the sale of the property and that her being prevented from returning to the property due to an injunction for municipal violations was

not an abandonment that destroyed the homestead protections of the property. We find the trial court erred in granting partial summary judgment and finding that the wife had no homestead interest in the property sold by the husband without her consent. We therefore reverse.

The wife lived on the property at issue with her husband until March 2010.[1] On March 5, 2010, after a series of code compliance issues with the City of Stuart and Martin County deeming the property unsafe, the wife and her family were ordered by a court to vacate the property and enjoined from occupying or residing on it. They complied and never resumed residence on the property, instead living in rented residences or staying with friends. Eventually, the government cleared debris and certain structures from the property.

In March 2015, the wife's husband sold the property to the buyer and Capital C, Inc., who later quit-claimed its interest to the buyer. The wife was not a party to the warranty deed. The buyer then filed a complaint to quiet title and for relief declaring that the wife and her husband had no homestead interest in the property.

The wife, pro se, answered the complaint, asserting that the transfer was legally insufficient without her signature due to her continuing homestead interest in the property. She generally alleged that she maintained an intent to return to the property and had been trying over the course of several years to return it to habitable condition. The wife concluded that because she intended to return and never claimed another homestead, the property remained her homestead even in her absence. When the buyer moved for partial summary judgment on its claim as to the wife, the wife responded by again denying abandonment of the property.

After a hearing on the summary judgment motion, the trial court entered partial final summary judgment in favor of the buyer. In doing so, it noted that the wife had failed to file any affidavits in opposition to summary judgment and had not raised any affirmative defenses in her answer. The court ruled that, at the time of the sale to the buyer, the property was not the homestead of the wife or her husband, so the buyer acquired the property free and clear as a result of the husband's sale. This

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[1] The wife and her husband lived together in their home on the property for several years before legally marrying in August 2010. The record reflects that this home was still standing at and after the date of the marriage despite the family having vacated the property in March 2010.

appeal follows.

We review an order granting summary judgment de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* The party seeking summary judgment is required to present competent evidence demonstrating the non-existence of any material issue of fact. *Bratt ex rel. Bratt v. Laskas*, 845 So. 2d 964, 966 (Fla. 4th DCA 2003). At the summary judgment stage, all doubts are resolved against the moving party. *Id.*

Article X, section 4 of the Florida Constitution applies homestead protection "to the residence of the owner or the owner's family." Fla. Const., art. X, § 4(a)(1). As a result, the married owner of a homestead property may not alienate the property without joinder or consent of his or her spouse. *Vera v. Wells Fargo Bank, N.A.*, 178 So. 3d 517, 519 n.1 (Fla. 4th DCA 2015). The protections of homestead are limited to the residence of the owner and generally require the owner's occupancy of the home with the intent to remain there. *Law v. Law*, 738 So. 2d 522, 524 (Fla. 4th DCA 1999).

The homestead is accorded special status under Florida law and, as such, the Florida Constitution's homestead provisions are construed liberally. *See JBK Assocs. v. Sill Bros., Inc.*, 160 So. 3d 94, 96 (Fla. 4th DCA 2015) ("Homestead exemption laws should be liberally applied to the end that the family shall have shelter and shall not be reduced to absolute destitution.") (quoting *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201, 204 (Fla. 1962)).

It is clear, however, that once homestead is established, it still can be lost due to abandonment. "Once homestead status is acquired, it continues until the homestead is abandoned or alienated in the manner provided by law. To show abandonment, both the owner and his family must have abandoned the property." *Coy v. Mango Bay Prop. and Invs., Inc.*, 963 So. 2d 873, 878 (Fla. 4th DCA 2007) (citation omitted). Consistent with the special status of Florida homestead, a finding of abandonment requires a "strong showing" of intent not to return to the homestead. *In re Herr*, 197 B.R. 939, 941 (Bankr. S.D. Fla. 1996).

Whether a property has been abandoned and thus lost its homestead protections is determined, case by case, in light of the totality of circumstances. *Beensen v. Burgess*, 218 So. 2d 517, 519 (Fla. 4th DCA 1969). Only in light of the totality of circumstances, with all doubts

resolved against the moving party, can it be determined that the owner has abandoned the property and abandoned its homestead protections.

Florida courts have consistently held that a property is not abandoned for the purposes of homestead protection when the owner involuntarily ceases to reside on the property. *In re Estate of Melisi*, 440 So. 2d 584, 585 (Fla. 4th DCA 1983). For example, the Florida Supreme Court held in *Stokes v. Whidden*, 122 So. 566 (Fla. 1929), that a homestead was not abandoned even though the owner of the property had been adjudged insane and committed to a state institution. In that case, unlike this one, the owner's family continued to live on the property. *Id.* at 566; *see also Dean v. Heimbach*, 409 So. 2d 157 (Fla. 1st DCA 1982) (finding homestead not abandoned when father had to leave county as condition of bail but intended to return and family continued to live on property).

Still, courts have also upheld homestead protections even when a property has been left completely unoccupied, as is the case here. One such case is *Crain v. Putnam*, 687 So. 2d 1325 (Fla. 4th DCA 1997). There, the homeowner had been absent from the homestead property for around two years after being placed in a nursing home in a vegetative state; nothing was done with the property during this period. *Id.* at 1326. However, the homeowner's furniture, clothing, and most of her possessions remained on the property, she received mail at the property, and, given her condition, she could not "communicate any intention regarding her residence" or her plans to maintain it as a homestead. *Id.* This court was asked to determine whether the article VII homestead tax exemption still applied to the property in light of this absence. *Id.* We concluded that, under the circumstances, the property retained its homestead character. *Id.* In doing so, we noted that Florida's homestead protections are not subject to a physical presence requirement, nor are they forfeited when a homeowner involuntarily changes his or her residence. *Id.*

Another factually similar and persuasive case is *In re Herr*. In *Herr*, the owner's home was destroyed by a hurricane and the property was rendered uninhabitable after the city demolished the remaining structures on the property. 197 B.R. at 941. The property languished for three years without any action by the debtor, but the debtor maintained that he was planning on selling the property and using the proceeds to purchase a new homestead. *Id.* Because Florida law requires a "strong showing of a debtor's intent not to return to his residence" before the homestead can be considered abandoned, the court held that the property retained its homestead protections. *Id.*

In re Gaines, No. 05-14608, 2007 WL 1228157 (Bankr. M.D. Fla. Apr. 18, 2007), where evidence of homestead intent was lacking, is distinguishable from this case. There, the court concluded that the property was not a homestead where the owner was absent, failed to present any evidence that he actually intended to reoccupy the property, and could not provide factual support as to why he left the property for five years. This is unlike the present case, where the wife provided evidence of ongoing litigation to preserve the property or be able to return to it.

Here, the trial court decided the homestead issue on summary judgment. As discussed above, abandonment turns on intent and is necessarily a fact-intensive inquiry. *See Beensen*, 218 So. 2d at 519 ("The question of whether there has been an abandonment of a homestead so as to deprive it of its status as such under the constitution should be determined by consideration of all of the pertinent facts and circumstances of each case."). The information available to the court at summary judgment gave rise to a genuine issue of material fact. Although the wife did not submit an affidavit in response to the motion for summary judgment or raise affirmative defenses, she did affirmatively deny the allegations of the complaint. Further, the record does contain some evidence indicating there was a conflict of material fact as to whether the wife abandoned the property.

For one, the wife maintained in her answer that the family was involuntarily "forced off" the property and generally asserted a continuing homestead interest in the property. Additionally, the wife attached to her answer in denial evidence indicating that, after being removed from the property, she was making efforts to remediate it with the intention of returning. These attachments included a 2011 letter from an engineering consultant reflecting that the husband had the property inspected in June 2010 for structural issues with the home. Another 2011 letter indicated that the husband tried to contact the city commission regarding his attempts to bring the property up to code and to "determine the facts concerning my building, on my property." Further, an invoice indicated that the husband paid for waste disposal on the property as late as January 2011. Finally, numerous court filings from the wife indicated that she was fighting to retain the property until at least 2012, supporting her argument that she did not intend to abandon the property.

The trial court erred in granting summary judgment, since the question of the wife's intent relating to the alleged abandonment of the homestead was still in dispute. Viewing the facts in the light most favorable to the wife, the non-movant, genuine issues existed as to her intent to abandon the property or retain the property as her homestead.

In the face of such issues of material fact, it was error to enter summary judgment against her. *See Bratt*, 845 So. 2d at 966.

In conclusion, due to the material conflict of facts and the special status accorded to the protection of the homestead property, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

WARNER and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

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

IMRAN CHAUDHRY,

Appellant,

v. Case No. 5D18-709

DAVID J. PEDERSEN AND MIRIAM PEDERSEN,

Appellees.

_____/

Opinion filed February 8, 2019

Appeal from the Circuit Court
for Orange County,
Heather L. Higbee, Judge.

Barry Rigby, of Law Offices of Barry Rigby, P.A., Orlando, for Appellant.

Lawrence M. Kosto, of Kosto & Rotella, P.A., Orlando, and David J. Pedersen, Orlando, for Appellees.

EVANDER, C.J.

Imran Chaudhry appeals an order granting a motion to dismiss his second amended complaint as to Miriam Pedersen. We have jurisdiction,[1] and reverse the order of dismissal.

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[1] *See Pipeline Constructors, Inc. v. Transition House*, *Inc.*, 257 So. 3d 606, 608 (Fla. 1st DCA 2018) (holding that although order dismissing action was "without prejudice" it had the effect of a final order and, thus, appellate court had jurisdiction).

In his second amended complaint, Chaudhry alleged that he had a fiduciary relationship with David Pedersen and that Mr. Pedersen had agreed to attend a tax sale and purchase a certain parcel of real property on Chaudhry's behalf. It was further alleged that Mr. Pedersen was to thereafter convey the property to Chaudhry. Instead, according to the second amended complaint, Mr. Pedersen acquired the property in his name and that of his wife, Miriam Pedersen, and then refused to convey the property to Chaudhry.

In count I of his second amended complaint, Chaudhry alleged that Mr. Pedersen had breached his contract with Chaudhry and requested that the court compel the Pedersens to convey the property to him. The trial court granted Mrs. Pedersen's motion to dismiss on the ground that the second amended complaint did not allege a cause of action against her. This was error. Florida Rule of Civil Procedure 1.210(a) provides that "any person may be made a defendant who has or claims an interest adverse to the plaintiff" and "[a]ny person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause."

Here, Mrs. Pedersen has an interest in the subject real property that is adverse to Chaudhry's claim and her presence is necessary to a complete determination of Chaudhry's claim that the property should be conveyed to him. *See Santiago v. Sunset Cove Invs., Inc.*, 988 So. 2d 10, 13–14 (Fla. 2d DCA 2008) (holding that in specific performance action brought by prospective purchaser of real property against vendor, third party was required to be joined in action where third party had acquired title to the property from vendor subsequent to alleged agreement between prospective purchaser and vendor); *see also Sudhoff v. Fed. Nat'l Mortg. Ass'n*, 942 So. 2d 425, 427–28 (Fla. 5th DCA 2006) (holding that even though wife had not signed promissory note and was

not on deed to property, wife was necessary party to mortgage foreclosure action where she was on the mortgage and had right of redemption in property).

REVERSED and REMANDED.

LAMBERT and EISNAUGLE, JJ., concur.