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Manuel Farach

Lyday v. Myakka Valley Ranches Improvement Association, Inc., Case No. 2D17-1726 (Fla. 2d DCA 2019).
An untimely (not filed prior to the expiration of the thirty-year period) preservation notice under Florida Statute section 712.03 cannot reestablish interests extinguished by the Marketable Record Title Act.

Dyck-O'Neal, Inc. v. Norton, Case No. 2D17-4968 (Fla. 2d DCA 2019).
The statute of limitations for a deficiency suit does not accrue until the foreclosure judgment and sale.

LB Judgment Holdings, LLC v. Boschetti, Case Nos. 3D18-1190, 3D18-1323, and 3D18-1726 (Fla. 3d DCA 2019).
The proponent of a lis pendens must only make a minimal "fair showing" of a "nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit," and need not prove same by a preponderance of the evidence. Moreover, the amount of any lis pendens bond typically consists of attorney's fees in having the lis pendens removed (not the entire litigation); damages relating to the effects on title, measured by the difference between the value of the property on the date the lis pendens is imposed and the date it is removed; and the expenses of preservation and maintenance of the property for the interval between recordation and discharge.

Woodson Electric Solutions, Inc. v. Port Royal Property, LLC, Case No. 3D18-2194 (Fla. 3d DCA 2019).
The last element of a cause of action for fraudulent misrepresentation into a contract occurs where the contract is signed and venue is properly laid in that location.

Volvo Aero Leasing, LLC v. Vas Aero Services, LLC, Case Nos. 4D17-2618 and 4D17-3531 (Fla. 4th DCA 2019).
A defendant cannot be held liable for interference with a business relationship when it has a supervisory interest in how the relationship is conducted, or a potential financial interest in how a contract is performed.

AP Atlantic, Inc. v. Silver Creek St. Augustine, LLLP, Case No. 5D18-1656 (Fla.5th DCA 2019).
A non-signatory to a contract containing an arbitration provision may enforce the arbitration provision when the signatory is relying on the contract to enforce claims against the non-signatory.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SCOTT LYDAY and TAMMY LYDAY,

Appellants,

v.

MYAKKA VALLEY RANCHES IMPROVEMENT ASSOCIATION, INC., a not-for-profit Florida corporation; and VIVIAN ZABIK,

Appellees.

Case No. 2D17-1726

Opinion filed March 15, 2019.

Appeal from the Circuit Court for Sarasota County; Lon Arend, Judge.

Frederic B. O'Neal, Windermere, for Appellants.

James H. Burgess, Jr., of Burgess, Harrell, Mancuso, Colton & La Porta, P.A., Sarasota, for Appellees.

KELLY, Judge.

Scott and Tammy Lyday appeal from the final judgment entered in favor of the appellee, Myakka Valley Ranches Improvement Association, Inc.,[1] in an action in

[1]Appellee Vivian Zabik died during the pendency of this appeal.

which the Lydays challenged the enforceability of the Association's Declaration of Restrictions. Because we conclude the Marketable Record Titles to Real Property Act[2] (MRTA) extinguished the Association's restrictions as to the Lydays' property, we reverse.

Myakka Valley Ranches is a subdivision originally developed by Myakka Valley, Inc. It consisted of an unrecorded plat and Units I-V. Between 1965 and 1978, Myakka Valley, Inc., filed and recorded Declarations of Restrictions on the unrecorded plat and on each of the five units of the subdivision. The restrictions for Unit II were filed and recorded on April 14, 1971. In 1982, Myakka Valley, Inc., assigned all of its rights and responsibilities under the Declarations of Restrictions to the Association.

On March 12, 2010, the Lydays obtained title to Lot 76 in Unit II of the subdivision. The dispute underlying this action arose when the Association voted to impose an assessment on the lot owners in Unit II and the Lydays refused to pay. Subsequently, the Association filed a lien against the Lydays' property.

As a result of the Association's actions, the Lydays filed a multicount complaint seeking declaratory and other relief. At the heart of the action was the Lydays' contention that the restrictions pertaining to Unit II generally, and to their lot specifically, had been extinguished by MRTA and thus, the Association had no authority to impose an assessment on their lot. The Association filed a counterclaim and third-party complaint which, among other things, sought a declaration that the restrictions were enforceable and that the Lydays owed the Association the past due assessments as well as attorney's fees and costs.

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[2]Ch. 712, Fla. Stat. (2015).

The Lydays and the Association filed competing motions for summary judgment both of which asked the court to determine whether MRTA had extinguished the Association's right to enforce the restrictions as to the Lydays' lot. The trial court ultimately determined that MRTA had not extinguished the restrictions. It denied the Lydays' motions, granted the Association's motions for summary judgment as to all counts in its second amended counterclaim and third-party complaint, and entered a judgment in favor of the Association. We reverse the judgment in favor of the Association because we conclude MRTA extinguished the restrictions as to the Lydays' lot. For the same reason, we reverse the denial of the Lydays' motions for summary judgment.

The legislature enacted MRTA to "simplify and facilitate land transactions." Blanton v. City of Pinellas Park, 887 So. 2d 1224, 1227 (Fla. 2004); Matissek v. Waller, 51 So. 3d 625, 628 (Fla. 2d DCA 2011). Section 712.02, Florida Statutes (2015), provides that "[a]ny person . . . vested with any estate in land of record for 30 years or more, shall have a marketable record title . . . free and clear of all claims except" those set forth as exceptions in section 712.03. This is echoed in section 712.04, which states that a marketable title "is free and clear of all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title" unless it comes within one of the exceptions set out in section 712.03.[3] Otherwise, the statute declares the interest to be "null and void." § 712.04; see also Matissek, 51 So. 3d at 629.

[3]"Root of title" is defined as "any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when marketability is being

It is undisputed that the restrictions applicable to the Lydays' lot in Unit II predate the Lydays' root of title and that they are more than thirty years old. Thus, they are "null and void" unless they fall within one of the exceptions contained in section 712.03. See §§ 712.02, .04; Matissek, 51 So. 3d at 629; Berger v. Riverwind Parking, LLP, 842 So. 2d 918, 922 (Fla. 5th DCA 2003). The Association acknowledges that the exception provided for in section 712.03(1), which exempts interests created prior to the root of title if they are specifically identified in subsequent muniments of title, is inapplicable to the Lydays' lot. Instead, the Association relies on section 712.03(2), which exempts "[e]states, interests, claims, or charges, or any covenant or restriction, preserved by the filing of a proper notice in accordance with the provisions hereof."

Section 712.05(1) sets forth the method for preserving a claim pursuant to section 712.03(2):

> A person claiming an interest in land or a homeowners' association desiring to preserve a covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a written notice in accordance with this chapter. Such notice preserves such claim of right or such covenant or restriction or portion of such covenant or restriction for up to 30 years after filing the notice unless the notice is filed again as required in this chapter.

The restrictions for Unit II were first recorded April 14, 1971, and on October 1, 1971, the developer filed a warranty deed subject to the deed restrictions transferring title to a parcel in Unit II. Thus, the Association had until 2001 to file its preservation notice pursuant to section 712.05(1). The Association filed its preservation notice on January

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determined. The effective date of the root of title is the date on which it was recorded." § 712.01(2).

4, 2004, but by then MRTA had already extinguished the restrictions rendering them "null and void." See § 712.04; see also, e.g., Matissek, 51 So. 3d at 629 n.6.

We reject the Association's contention that its untimely preservation notice can breathe life back into its restrictions after they are extinguished by MTRA. To come within the exception set forth in section 712.03(2), a party must file a "proper notice in accordance with the provisions hereof." A notice that is not filed within the thirty-year period is not in accordance with section 712.05(1). As the Florida Supreme Court explained long ago: "The Marketable Record Title Act . . . provides for a simple and easy method by which the owner of an existing old interest may preserve it. *If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished.*" City of Miami v. St. Joe Paper Co., 364 So. 2d 439, 442 (Fla. 1978) (emphasis added). The court added that "[b]y the Marketable Record Title Act, any claim or interest, vested or contingent, present or future, is cut off unless the claimant preserves his claim by filing a notice within a 30-year period. If a notice is not filed, the claim is lost." Id. at 443 (citation omitted) (quoting Catsman, The Marketable Record Title Act and Uniform Title Standards, Volume 3, § 6.2, Florida Real Property Practice (1965)); see also Fla. Dep't of Transp. v. Clipper Bay Invs., LLC, 160 So. 3d 858, 863 (Fla. 2015) ("[The MRTA] eliminates all stale claims to real property, with certain enumerated exceptions, unless notice of these claims is filed in a procedurally proper manner." (alteration in original) (quoting City of Jacksonville v. Horn, 496 So. 2d 204, 206 (Fla. 1st DCA 1986))).[4]

[4]Because an untimely notice cannot revive covenants and restrictions that have been extinguished, in 2004 the legislature enacted section 720.403, Florida Statutes, to provide a process for communities with covenants extinguished by MRTA to

Because MRTA extinguished the Association's restrictions as to the Lydays' lot, it was error for the trial court to grant the Association's motions for summary judgment on its counterclaims and third-party claims. Accordingly, we reverse the final judgment in favor of the Association and direct the court to enter a judgment in favor of the Lydays on the Association's counterclaims and third-party claims. We also reverse the order denying the Lydays' motion for summary judgment on count three of their amended complaint. On remand, the court is directed to enter summary judgment in favor of the Lydays as to count three of their amended complaint and to conduct further proceedings as to the Lydays' claims in counts four and five of their amended complaint.

Reversed and remanded with instructions.

SLEET and SALARIO, JJ., Concur.

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revive them. See Fla. S. Comm. on Health, Aging & Long-Term Care, SB1184 (2004), Staff Analysis & Economic Impact Statement (Mar. 29, 2004) (available at Fla. Dep't of State, Bureau of Archives & Mgmt., Fla. St. Archives, Tallahassee, Fla.); Gary A. Poliakoff & Donna Berger, The Reinstatement of Covenants, Conditions, and Restrictions Extinguished by the Marketable Record Title Act, 79 Fla. B.J. 14 (2005).

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DYCK-O'NEAL, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D17-4968
	)	
TERESA NORTON and SAMUEL NORTON,	)	
	)	
	)	
Appellees.	)	
	)	

Opinion filed March 15, 2019.

Appeal from the Circuit Court for Hendry County; James D. Sloan, Judge.

David M. Snyder of David M. Snyder, P.A.; Tampa; Susan B. Morrison of Law Offices of Susan B. Morrison, Tampa; and Joshua D. Moore of Law Offices of Daniel C. Consuegra, Tampa, for Appellant.

Alexander Allred of Castle Law Group, P.A., Largo, for Appellees.

LUCAS, Judge.

Dyck-O'Neal, Inc. (DONI), appeals a final summary judgment entered in favor of the Nortons. For the reasons explained below, we reverse and remand for further proceedings.

In 2006, the Nortons executed a promissory note and mortgage on their home in Hendry County, Florida, in favor of Bank of America, N.A. When the Nortons failed to make an installment payment, Bank of America initiated foreclosure proceedings and eventually obtained a final judgment of foreclosure in 2009 for $197,586.52. A year later, the Federal National Mortgage Association (Fannie Mae) purchased the subject property at a foreclosure sale for $100. At the time of the sale, a real estate appraiser had appraised the property's value at $60,000. In 2014, Fannie Mae assigned the final judgment and note to DONI.

Two months later, DONI initiated a deficiency action against the Nortons, seeking a deficiency judgment in the amount of $137,586.52 plus interest, costs, and attorney's fees. It is undisputed that DONI filed this lawsuit before July 1, 2014, but more than five years from the date the Nortons first defaulted on their promissory note.[1]

In response to DONI's complaint, the Nortons raised several affirmative defenses, two of which are relevant to this appeal. In their first affirmative defense, the Nortons claimed that Fannie Mae issued a Form 1099-A tax filing stating that the value of the Nortons' property was $205,285.35. The Nortons did not receive an amended 1099-A stating that the value of the property was actually $60,000. The Nortons

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[1]Until July 1, 2013, section 95.11(2)(b), Florida Statutes' five-year limitation for actions on a contract founded on a written instrument would have applied to DONI's cause of action. On July 1, 2013, section 95.11(5)(h) came into effect, which reduced the limitation period for deficiency claims related to notes secured by a mortgage against certain kinds of residential property to one year "after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure." See ch. 2013-137, § 1, at 1627, Laws of Fla. (2013). The legislature specified that any action that would have been timely under section 95.11(2)(b) before July 1, 2013, would have to be commenced within five years after the action accrued or by July 1, 2014, "whichever comes first." Id.

claimed that they "relied on" the amount represented in the Form 1099-A Fannie Mae had filed when they prepared their individual tax returns. Accordingly, they argued, estoppel should prevent DONI from bringing its deficiency action against them. In their second affirmative defense, the Nortons argued that DONI's lawsuit was barred by the statute of limitations. Citing to Bartram v. U.S. Bank National Ass'n, 211 So. 3d 1009 (Fla. 2016), the Nortons also argued that DONI should have brought its lawsuit within five years of the date of their default on their promissory note. As the Nortons defaulted in 2008, but DONI did not file its complaint until 2014, the Nortons claimed that DONI's lawsuit was barred by section 95.11(2)(c), Florida Statutes (2014).

DONI and the Nortons filed competing motions for summary judgment. The trial court denied DONI's motion, ruling that the Nortons had raised the "affirmative defense of the statute of limitations which raises a question of law and may be a viable defense." The trial court granted the Nortons' motion for summary judgment. The court's judgment cited two bases for its ruling: (1) under Bush v. Whitney Bank, 219 So. 3d 257 (Fla. 5th DCA 2017), the statute of limitations barred DONI's lawsuit, and (2) summary judgment was proper because DONI was estopped from pursuing a deficiency action against the Nortons. DONI now appeals the circuit court's summary judgment.

We review a circuit court's entry of summary judgment under a de novo standard of review. Herendeen v. Mandelbaum, 232 So. 3d 487, 489 (Fla. 2d DCA 2017) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). A party is entitled to summary judgment only "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c).

With respect to the first basis the trial court relied upon when it granted summary judgment for the Nortons, our court has definitively answered the question of when a deficiency action accrues for purposes of the statute of limitations—and it is not the date of default on the underlying note. As we explained at length in Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768, 774-75 (Fla. 2d DCA 2016):

> The final judgment is the instrument on which the deficiency action is based because the note and mortgage merge into the foreclosure judgment where the foreclosure suit is both an action at law for the balance due under the note and an action in equity to foreclose the mortgage. See Manley v. Union Bank of Fla., 1 Fla. 160, 214 (Fla. 1846) ("[A] [person entitled to enforce the note] has, at common law, three remedies, *all of which he may pursue at the same time,* viz: that he may bring suit at law, upon the bond or note secured by the mortgage; institute an action of ejectment, to put himself in possession of the rents and profits of the estate [;] and file a bill in Chancery, to foreclose the mortgage." (emphasis added)); Royal Palm[Corp. Ctr. Ass'n, Ltd. v. PNC Bank, NA], 89 So. 3d [923,] 929–30 [(Fla. 4th DCA 2012)] (concluding that the action on a promissory note and the action to foreclose the mortgage may be done simultaneously in one action, as is the common case in Florida, leaving only the deficiency action if the sale fails to satisfy the final judgment). . . .
>
> "Thus, any action based upon the mortgage note in this case was extinguished by the judgment of foreclosure and, consequently, an action for deficiency is not based upon the mortgage note, but instead arises from the final judgment entered and subsequent foreclosure sale." Chrestensen[v. Eurogest, Inc.], 906 So. 2d [343,] 345 n.4 [(Fla. 4th DCA 2005)] . . . .
>
> . . . A plaintiff seeking a deficiency must establish "1) entry of final judgment of foreclosure; 2) sale of the foreclosed property pursuant to the judgment; [and] 3)

> issuance of a certificate of title for the property." Frohman v. Bar-Or, 660 So. 2d 633, 636 (Fla. 1995).

(Alterations in original.) Ours is not the only district court of appeal to have reached this conclusion. See Chrestensen, 906 So. 2d at 346 ("[W]e hold that the statute of limitations for a deficiency judgment does not begin to run until the foreclosure judgment and foreclosure sale, not at the default date of the underlying mortgage note."); see also Sueter v. Wells Fargo Bank, N.A., 5D17-3821, 2019 WL 405601, *1 (Fla. 5th DCA Jan. 29, 2019) (citing and quoting Aluia, 205 So. 3d at 775, for the elements of a deficiency cause of action); Dyck-O'Neal, Inc. v. Germany, 236 So. 3d 1194, 1194-95 (Fla. 5th DCA 2018) (reversing summary judgment and citing Chrestensen's holding that "the statute of limitations to seek a deficiency judgment does not begin to run until after the entry of foreclosure judgment and subsequent foreclosure sale").

The trial court mistakenly relied on Bush, 219 So. 3d at 259, a case that held that a breach of contract claim following an approved short sale transaction was not subject to section 95.11(5)(h). Bush, however, does not apply to the kind of claim DONI has alleged. The "shortfall" the bank was contractually permitted to pursue following the short sale in Bush is not the same as a deficiency claim that would arise following a foreclosure judgment and sale.[2] Rather, as Bush made clear in its opening

[2]The Nortons never really explain how Bush advances their argument about accrual. As best as we can gather from their brief and oral arguments, the Nortons appear to be applying Bush along the following line: (1) if Bush's holding applies to their case, then (2) section 95.11(5)(h) would not apply to DONI's claim, so that, by implication, (3) DONI's claim would be subject to section 95.11(2)(b)'s five-year statute of limitations, which (4) "begins to run by default when the last elements of the cause of action accrues," which (5) the Nortons maintain would be the breach of their promissory note. That argument would not carry them very far, though, as it is over-weighted with inference. The Bush opinion only discussed why a breach of contract

sentence, the claim before that court was one that sounded in breach of contract. Id. at 257. This distinction between the breach of contract claim in Bush versus the deficiency claim in Aluia—between a breach of contract cause of action following a short sale and an in rem or quasi in rem claim arising from a deficiency after a foreclosure sale—is both readily apparent and critically important because "a deficiency does not exist without a foreclosure judgment and sale." Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P., 222 So. 3d 647, 652 (Fla. 2d DCA 2017). In its context, we would have no cause to disagree with Bush's analysis at all. But section 95.11(5)(h) does apply here, where a plaintiff seeks a deficiency judgment, a foreclosure judgment has been entered, and the clerk of the circuit court has issued a certificate of title. See Aluia, 205 So. 3d at 774-75; Sueter, 2019 WL 405601, *1; Germany, 236 So. 3d at 1194-95.

As a matter of law, DONI's deficiency claim could not accrue for purposes of the statute of limitations until the entry of a foreclosure judgment and subsequent foreclosure sale. Therefore, DONI's action was timely under section 95.11(5)(h), and the trial court's entry of summary judgment on the basis that the statute of limitations had expired was incorrect.

Turning to the trial court's second basis for granting summary judgment in favor of the Nortons, we agree with DONI that the record before us does not "conclusively demonstrate that no genuine issue of material fact exists" such that the Nortons were entitled to judgment as a matter of law. See Maldonado v. Publix Supermarkets, 939 So. 2d 290, 293 (Fla. 4th DCA 2006) (further observing that "[t]he

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claim following a short sale would not be subject to section 95.11(5)(h); the opinion was silent about deficiency claims.

proof [for summary judgment] must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party" (quoting Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966))). The Nortons' motion, memorandum, and affidavit asserted only that the Nortons "relied" (in some unspecified way) on DONI's predecessor's filing of a Form 1099-A when they prepared their individual tax returns. But an equitable estoppel defense requires pleading and proof of (1) a representation about a material fact that is contrary to a later asserted position; (2) reliance on that representation; and (3) *a detrimental change in position* as a result of that reliance. See Winans v. Weber, 979 So. 2d 269, 274-75 (Fla. 2d DCA 2007); Watson Clinic, LLP v. Verzosa, 816 So. 2d 832, 834 (Fla. 2d DCA 2002); MDS (Canada) Inc. v. Rad Source Techs., Inc., 720 F.3d 833, 852 (11th Cir. 2013) (applying Florida law). A party asserting equitable estoppel must show more than mere reliance; the reliance must also yield some manner of an adverse or detrimental change in the party's position. Verzosa, 816 So. 2d at 835. The Nortons proffered no evidence whatsoever showing how or why the filing of this tax form caused them any detrimental change.[3] Thus, they did not meet their initial burden of presenting a "crystallized, conclusive" record that would support their defense, Lucey v.

[3]We would agree with DONI that the Nortons' affidavit, which furnished the only evidence that the Nortons "relied" on this tax form's filing, appears irregular, perhaps even ineffective, in several respects. However, DONI failed to provide a transcript of the summary judgment hearing, and there is no written motion or memorandum filed below challenging the affidavit's propriety. We have no way of knowing whether DONI ever brought this issue to the trial court's attention, and thus we cannot consider the argument in this appeal. See Johnson v. Deutsche Bank Nat'l Tr. Co. Ams., 248 So. 3d 1205, 1211 (Fla. 2d DCA 2018) (observing that although "a lack of a transcript, in and of itself, will not necessarily prohibit appellate review of the evidence underlying a summary judgment ruling, it could in some cases stymie the fullness of a legal argument challenging that ruling on appeal if there is a question about whether the argument was preserved").

1010 Logic, Inc., 208 So. 3d 1236, 1238 (Fla. 2d DCA 2017) (quoting Hastings v. Demming, 682 So. 2d 1107, 1110 (Fla. 2d DCA 1996)), and so the trial court's summary judgment cannot be affirmed on that basis.

Accordingly, we reverse the judgment below and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

LaROSE, C.J., and LENDERMAN, JOHN C., ASSOCIATE SENIOR JUDGE, Concur.

Third District Court of Appeal

State of Florida

Opinion filed March 13, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1190, 3D18-1323, and 3D18-1726
Lower Tribunal No. 12-11004

LB Judgment Holdings, LLC,
Appellant,

vs.

Luis R. Boschetti, et al.,
Appellees.

Appeals from non-final orders from the Circuit Court for Miami-Dade County, Rodolfo A. Ruiz, Judge.

Alejandro Vilarello, for appellant.

Bell Rosquete Reyes and Javier A. Reyes and Armando Rosquete; Aran Correa & Guarch and Alexander Esteban and Jorge A. Perez; Greenberg Traurig, P.A., and Julissa Rodriguez and Stephanie L. Varela; Sanchez-Medina, Gonzalez, Quesada, Lage, Gomez & Machado LLP, and Peter A. Gonzalez and James C. Kellner; Peterson, Baldor & Maranges, PLLC, and Matthew Maranges, Michael P. Peterson, Jose I. Baldor and Ceasar X. Delgado, for appellees.

Before SALTER, LOGUE[1] and LINDSEY JJ.

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[1] Judge Logue did not participate in the oral argument conducted in these cases.

SALTER, J.

LB Judgment Holdings, LLC ("LB Judgment"),[2] judgment creditor (as assignee from Ocean Bank) under a 2015 money judgment exceeding $10 million against Fountains 149, LLC, and Luis R. Boschetti ("Boschetti"), seeks review[3] of a non-final order discharging notices of lis pendens filed against a group of impleaded companies in proceedings supplementary initiated to collect the judgment. LB Judgment contends that the impleaded entities held property (a) in which Boschetti had a property interest, or a debt or other obligation owed to him by, the impleaded companies, or (b) acquired by fraudulent transfer from Boschetti.

We have consolidated the three cases seeking review of related non-final orders:

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[2] LB Judgment Holdings, LLC, was substituted for the prior owner of the money judgment sought to be collected in the circuit court proceedings supplementary. In this opinion, "LB Judgment" refers to those prior owners/assignors as well.

[3] Although each of the cases was initiated as an appeal from a non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(B), there are numerous reported Florida appellate opinions treating orders regarding lis pendens and lis pendens bonds as appropriate for certiorari review rather than under the non-final order rule addressing injunctions. Here, as in Rodriguez v. Guerra, 254 So. 3d 521, 521 n.1 (Fla. 3d DCA 2018), we acknowledge both forms of review of such orders and conclude that the result "would have been the same had appellant filed a petition for certiorari relief rather than an appeal."

- LB Judgment Holdings, LLC v. Boschetti, Case No. 3D18-1190. This case seeks review of the order discharging LB Judgment's notices of lis pendens filed against real estate held by seventeen of the impleaded entities.[4]
- 1051 North Venetian Drive, LLC v. LB Judgment Holdings, LLC, Case No. 3D18-1323. Several of the impleaded entities appeal an order denying their motion to quash service and to dismiss for lack of personal jurisdiction.
- Boschetti v. LB Judgment Holdings, LLC, Case No. 3D18-1726. In this case, the impleaded entities and certain "interested non-parties" seek review of one part of the bond order requiring LB Judgment to post eighteen bonds in connection with their lis pendens filings, totaling approximately $18,000,000.00 in face amount. Those appellants challenge the circuit court's determination of attorneys' fees in the computation of one of the eighteen lis pendens bonds. LB Judgment cross-appealed the

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[4] LB Judgment also challenged the subsequent lis pendens bond amount order in its appeal in Case No. 3D18-1190. The bond order was entered pursuant to a relinquishment after the notice of appeal was filed in Case No. 3D18-1190. The relinquishment was granted in order to provide a more complete record for this Court's consideration of a stay pending appeal (framed by LB Judgment's motion for review). We then consolidated all three of the related appeals. We address all of the parties' arguments pertaining to the bond amounts, whether initially raised in Case No. 3D18-1190 or in Case No. 3D18-1726, in the section of this opinion containing the analysis of Case No. 3D18-1726.

order as to all seventeen of the property-specific bonds as well as the separate bond established for the impleaded defendants' attorneys' fees.

For the reasons which follow, we reverse and vacate the order discharging the notices of lis pendens (Case No. 3D18-1190); we affirm the order sought to be appealed by several of the impleaded entities (Case No. 3D18-1323); and we affirm the bond order as to the seventeen properties owned by impleaded parties as well as the "Attorneys' Fees Bond," in the appeal and cross-appeal in Case No. 3D18-1726. As each of the three appeals has been taken from a non-final order, we vacate our temporary stay of the bond order, allowing full pretrial discovery and trial to ensue.

I. The Order Discharging the Notices of Lis Pendens (3D18-1190)

A. Standard of Review and "Fair Nexus"

This appeal turns on a legal issue, and thus our review is de novo. Section 48.23, Florida Statutes (2018), governs notices of lis pendens and the prerequisites for filing them. Section 48.23(3) specifies that when, as here, the underlying lawsuit is not founded on a "duly recorded instrument" or a lien claimed under part I of chapter 713, Florida Statutes (governing construction liens), "the court shall control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions."

Florida's courts have carefully prescribed the procedures to be followed by the trial courts in controlling and discharging a lis pendens in the cases that are not founded on a recorded instrument or construction lien. Trial courts and reviewing courts alike must balance (a) the lis pendens proponent's need to place non-parties on notice of the proponent's claims affecting the owner's real property, and (b) the damages that may be suffered by the owner (as third parties may turn away from the property because of the cloud of litigation) should the proponent's claims fail to prevail.

The balancing is achieved through two considerations: (1) is there a "fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit"? Chiusolo v. Kennedy, 614 So. 2d 491, 492 (Fla. 1993); and (2) if there is such a nexus, what is the appropriate amount of a lis pendens bond to be required of the proponent, bearing "a reasonable relationship to the amount of damages which the property-holder defendant demonstrates will likely result if it is later determined that the notice of lis pendens was unjustified"? Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc., 675 So. 2d 915, 918 n.2 (Fla. 1996).

"Fair nexus" is the issue we address in Case No. 3D18-1190, while lis pendens bond amounts are addressed here as part of Case No. 3D18-1726. Importantly, at the preliminary procedural point of a motion to dismiss the lis

pendens before trial, the evaluation of "fair nexus" is not a trial or mini-trial on the merits of all elements of the lis pendens proponent's claims. Rather, "[t]he relevant question is whether alienation of the property or the imposition of intervening liens...conceivably could disserve the purposes for which lis pendens exists. Where the answer is yes, fair nexus must be found." Von Mitschke-Collande v. Kramer, 869 So. 2d 1246, 1250 (Fla. 3d DCA 2004) (alteration in original) (quoting Chiusolo, 614 So. 2d at 492).

In Acapulco Construction, Inc. v. Redavo Estates, Inc., 645 So. 2d 182, 183 (Fla. 3d DCA 1994), this Court highlighted that distinction: "Clearly, it was not the plaintiffs' burden to establish their constructive trust claim by the greater weight of the evidence, but only to establish a 'fair nexus' between the apparent legal or equitable ownership of the subject property and the dispute involved in the instant lawsuit." We also observed that this requirement could be satisfied by a plaintiff through "an evidentiary showing of only a good faith, viable claim." Id.

In Regents Park Investments, LLC v. Bankers Lending Services, Inc., 197 So. 3d 617, 621 (Fla. 3d DCA 2016), we provided additional guidance, observing that "it is impracticable to require a proponent of a lis pendens to fully prove each element of its claim in an evidentiary hearing where the case has not been noticed for trial and the parties may not even have completed discovery." We agreed with our sibling district court's holding in Nu-Vision, LLC v. Corporate Convenience,

Inc., 965 So. 2d 232, 236 (Fla. 5th DCA 2007), that the lis pendens proponent must make "a minimal showing that there is at least some basis for the underlying claim[] [a]nd . . . show that he or she has a good faith basis to allege facts supporting a claim, and that the facts alleged would at least state a viable claim."

B. The Record in the Present Case

With these authorities in mind, we turn to the case at hand. LB Judgment's amended motion to commence proceedings supplementary includes allegations detailing its efforts to collect the $10,094,867.71 final judgment against Boschetti and Fountains 149, LLC, between entry of the judgment in February 2015 and the filing of the amended motion three years later. Those efforts culminated in nary a dime collected.

But those efforts and diligent investigation did ascertain that certain assets of Boschetti had been transferred to the control of his wife, his brother, and his brother's wife and daughter, through single-purpose entities controlled by them. At least some of the alleged transfers were pursuant to conveyances signed by Boschetti between the commencement of the underlying lawsuit and the entry of the final judgment sought to be collected, with multi-million dollar closing proceeds paid into a family-controlled entity. The supplemental complaint filed against the alleged alter ego entities claims that Boschetti transferred ownership in many of the entities to his wife, sister-in-law, and daughter-in-law "without

receiving reasonably equivalent value, if any, in exchange," and that he transferred cash and capital to his spouse and the entities for the operation of the entities' real estate development business, concealing proceeds of the real estate activities from LB Judgment.

The supplemental complaint alleged two primary theories for direct claims against impleaded persons and entities. First, LB Judgment contended that certain entities were "alter ego entities"; that is, that Boschetti and his brother were "de facto owners" of those entities and controlled the disposition of assets that were, in whole or in part, Boschetti's property otherwise amenable to execution in connection with LB Judgment's unsatisfied judgment.

Second, LB Judgment alleged that Boschetti had engaged in fraudulent transfers of assets in order to avoid collection of LB Judgment's judgment, subject to avoidance under sections 726.105 and 726.106, Florida Statutes (2017).[5] These statutes and the remaining provisions of chapter 726 define circumstances in which a transfer is fraudulent as to a creditor based on the actual intent of the transferor/debtor, or in which the debtor transfers assets or assumes obligations without receiving a "reasonably equivalent value in exchange." Section 726.108, "Remedies of creditors," permits a broad assortment of remedies to a creditor

[5] LB Judgment also alleged a civil conspiracy to hinder, delay, or defraud LB Judgment, as among Boschetti and the impleaded defendants, and an action for declaratory relief to determine LB Judgment's legal and equitable interests in the impleaded parties and designated properties.

entitled to relief from fraudulent transfers, including avoidance of the transfer or obligation "to the extent necessary to satisfy the creditor's claim," attachment, injunctive relief, receivership, and "[a]ny other relief the circumstances may require."

LB Judgment's commencement of proceedings supplementary is authorized by section 56.29, Florida Statutes (2017). In Longo v. Associated Limousine Services, Inc., 236 So. 3d 1115, 1120 (Fla. 4th DCA 2018), the Fourth District observed that "the current statutory scheme set forth in section 56.29(2) is well-suited to fraudulent transfer cases," though the court questioned whether "the legislature contemplated cases involving alter ego liability." The Fourth District ultimately considered that question and approved such a theory of recovery: "in cases alleging alter ego liability, the description requirement of section 56.29(2) is satisfied if the judgment creditor describes any property of an alter ego of the judgment debtor not exempt from execution in the hands of any person, or any property, debt, or other obligation due to an alter ego of the judgment debtor which may be applied toward the satisfaction of the judgment." Id. at 1121.

LB Judgment filed over 1,000 pages of corporate and property records, a spreadsheet of "ties to Luis Boschetti" for the impleaded single-purpose entities,[6]

[6] The spreadsheet used check marks to indicate when an impleaded defendant was engaged in real estate development; when it had the same managers, including Boschetti; when it had the same address of record; when it used the same realtors; when it identified the developer as "BF Group" or "Insignia Development Partners,

as well as website screenshots (deleted as collection efforts intensified) of advertisements for a Boschetti company and its portfolio of properties owned by the impleaded defendants. LB Judgment also claims "a pattern of baseless, repetitive objections and motions to quash subpoenas aimed only to delay and obstruct post-judgment discovery" (a claim vigorously denied by Boschetti and the impleaded defendants).

Answering the question framed in Chiusolo, we conclude that the record demonstrates a fair nexus between the apparent legal or equitable ownership of the property described in the notices of lis pendens and the dispute embodied in the supplementary proceeding. Simply stated, if LB Judgment proves its allegations, it may recover the judgment debt through an execution and sale of the property or other assets transferred to Boschetti, or controlled by him, to the extent of that debt and the extent of Boschetti's interest in a particular property or asset.

Subject to the requirements of sections 56.29 and chapter 726, Florida Statutes, LB Judgment may avail itself of the remedies provided by those statutes and need not stand by as a judgment debtor transfers or controls assets in a scheme to avoid the application of the assets to the judgment debt. The proceedings supplementary statute allows a judgment creditor "to ferret out what assets the judgment debtor may have or what property of his others may be holding for him,

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LLC"; when there was overlapping bank signature authority; and when it used the same attorneys.

or may have received from him to defeat the collection of the lien or claim, that might be subject to the execution." Young v. McKenzie, 46 So. 2d 184, 185 (Fla. 1950) (quoted in Longo, 236 So. 3d at 1118).

This Court has held that when the jurisdictional requirements of section 56.29 have been met (as here), the statute is to be given a liberal construction to provide the judgment creditor the most complete relief possible. Mejia v. Ruiz, 985 So. 2d 1109, 1112 (Fla. 3d DCA 2008). LB Judgment established the requisite fair nexus to the properties identified in the notices of lis pendens, and we therefore reverse and vacate the order discharging the notices.

II. The Order Regarding Service and Jurisdiction (3D18-1323)

The trial court carefully considered the impleaded defendants' emergency motion to quash service and to dismiss for lack of personal jurisdiction at a specially set ninety-minute hearing in May 2018. The court concluded that the requirements of section 56.29 for the issuance of notices to appear were satisfied and denied the emergency motion, citing Longo, 236 So. 3d 1115.

We find no error in the trial court's order denying the impleaded defendants' emergency motion to quash service and to dismiss for lack of personal jurisdiction.

III. The Lis Pendens Bond Order (3D18-1726)

The impleaded defendants owning the properties subject to the notices of lis pendens appealed, and LB Judgment cross-appealed, the order of July 17, 2018,

requiring LB Judgment to post eighteen separate cash or surety bonds as a condition of the notices of lis pendens (one for each of the seventeen properties owned by impleaded defendants and described in the notices of lis pendens, and one separate bond as prospective damages for attorneys' fees in the event of an ultimate determination that the notices of lis pendens were improvidently filed).

Under the terms of that order, all eighteen bonds (totaling over $18 million) were required to be posted within three calendar days from the date of the order, failing which the notices of lis pendens would be discharged automatically. No provision was made to allow LB Judgment to post individual bonds on some properties, and to decline to post such bonds on others.

The impleaded parties appealed that order, maintaining that the attorneys' fee bond of $1,088,900 impermissibly excluded "attorneys' fees to be foreseeably incurred in prevailing on the merits of [LB Judgment's] underlying claims." LB Judgment cross-appealed the order, contending here that only the fees incurred in obtaining a discharge of the notices of lis pendens could be recoverable and included as a component of the attorneys' fee bond. As already noted, LB Judgment also challenged the seventeen property-specific bond amounts in the motion for review in Case No. 3D18-1190.

A. Damages for Wrongful Lis Pendens—Attorneys' Fees

We repeat the text of section 48.23(3) as it relates to notices of lis pendens for which the underlying claim is not founded on a duly recorded instrument or statutory construction lien: "the court shall control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions." Injunction bonds are addressed by Florida Rule of Civil Procedure 1.610, and subparagraph (b) of that rule specifies that such bonds are "conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined."

As to the attorneys' fees component of a bond, we reject the impleaded parties' argument that such fees include not only those incurred in obtaining a discharge of the lis pendens, but also those fees incurred during the entire litigation in the trial court. See Lake Worth Broad. Corp. v. Hispanic Broad., Inc., 495 So. 2d 1234 (Fla. 3d DCA 1986). The impleaded parties' estimate of $4,678,450.00 in trial and appellate attorneys' fees and costs which might be incurred at the trial of the alter-ego claims is speculative.

The trial court's computation of the incurred fees and costs to date, with an additional allowance for "estimated prospective fees of $541,400," was supported by competent, substantial evidence and will not be disturbed here. The trial court ably followed the methodology for "anticipated attorney's fees incurred by the [property owner] in the event the lis pendens filed by [a lien claimant] was

unjustified." S and T Builders v. Globe Props., Inc., 944 So. 2d 302, 303 (Fla. 2006).

Further, section 48.23(2) limits the notices of lis pendens in the present case to a term of one year, as LB Judgment's pleadings are not founded on a duly recorded instrument or construction lien. In order to keep the notices in place beyond that yearlong term, LB Judgment will be required to give reasonable notice, file a motion, and show good cause for the extension. If that occurs, the statute authorizes the trial court to "impose such terms for the extension of time as justice requires." "Such terms" could, of course, include an increase or reduction in the lis pendens bond amount for attorneys' fees based on developments in the case to that point.

B. Damages Relating to Effects on Title

LB Judgment also contends that the trial court erred in its determination of the amount of the seventeen property-specific lis pendens bonds in the order of July 17, 2018. The amount of each bond was set following a full-day evidentiary hearing. Our review focuses on the legal issues inherent in setting such bonds rather than the dollar amounts of the "unsecured loans" and "capital contributions" placed in evidence by the impleaded parties and apparently relied upon by the trial court as the measure of prospective damages and thus the bond amounts.

As noted at the outset of this opinion, the Supreme Court of Florida held that the amount of a lis pendens bond "should bear a reasonable relationship to the amount of damages which the property-holder defendant demonstrates will likely result if it is later determined that the notice of lis pendens was unjustified." Med. Facilities Dev., Inc., 675 So. 2d at 918 n.2. The leading case on the computation of damages when a lis pendens has been found unjustified is Haisfield v. ACP Florida Holdings, Inc., 629 So. 2d 963 (Fla. 4th DCA 1993).

Haisfield looks back at losses that were actually suffered by a property owner from a lis pendens found to be unjustified, rather than at prospective losses that might be suffered. Its methodology is the best yardstick for evaluating the market value component of damages that may result from a wrongfully-filed lis pendens. Haisfield instructs that such damages, if any, are measured by any decline in market value between the time the lis pendens is recorded and the time it is discharged. The proponent of a lis pendens might pay no damages if the market value increased substantially during that time. See Levin v. Lang, 994 So. 2d 445 (Fla. 3d DCA 2008).

Haisfield also recognizes that the expenses of preservation and maintenance of the property subject to a lis pendens may be awarded for the interval between recordation and discharge if the lis pendens is found to be unjustified and the expenses are a consequence of the unjustified lis pendens.

In the present case, LB Judgment stipulated that it would not maintain a particular notice of lis pendens in the face of a proposed bona fide, arms'-length sale of a property by an impleaded party. The net proceeds of such a sale would be escrowed to abide the outcome of the proceedings supplementary relating to that party. In theory, this provision of the recorded notices would mitigate damages relating to a lost opportunity for sale.

LB Judgment's expert witness computed, for each of the seventeen properties owned by an impleaded defendant, a fair market value sales price and deductions for brokerage, mortgage debt,[7] and past due taxes. This computation, listed as "net market value," corresponded to the impleaded party's equity in the property.

LB Judgment's expert then applied a percentage[8] for loss of use of those proceeds representing the lost investment return on the equity in that property during the period the notice of lis pendens made the owner unable or unwilling to conclude a sale of the property. The resulting figures were compiled in a spreadsheet for all seventeen properties. The "lost interest for six months" was

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[7] On this record, the mortgage debt considered by the expert was based on the mortgage as recorded; the expert did not have discovery documents reflecting the actual balance of the indebtedness or assuring that the mortgage was institutional or at least arms'-length.

[8] The expert used Florida's statutory interest rate on judgments (effective July 1, 2018), 5.97% per annum, as the rate of return on the net sales proceeds calculated for a given property.

then advanced as a reasonable bond amount for the lis pendens on each property. The total for all seventeen properties came to $31,696,500 in gross market value, $11,233,301 in net market value (equity), and $343,242 as the proposed lis pendens bond amount.

The impleaded parties proffered a different model for prospective damages—a model neither supported nor rejected by any Florida case on prospective lis pendens damages or bonds. The impleaded parties argued that the notices of lis pendens and cloud of litigation might cause loan defaults or bankruptcies, such that all of the capital contributions and unsecured loans might be lost and the properties foreclosed upon or sold for unpaid taxes. Under this theory, counsel for the impleaded property owners argued that the notices of lis pendens could cut off all sources of investment for the carrying costs and construction of residences on the affected properties, "essentially, game over for every single one of these companies because they will not be able to meet their obligations," (as counsel characterized it).

The impleaded parties provided accounting records titled "Loans & Capital Contributions" for each entity dated two days before the evidentiary hearing. The trial court ultimately accepted a prospective damages model which assumed for each property: (1) mortgage debt would not exceed the value of the encumbered property, so that the lender would take back the property and the debt would be

extinguished; and (2) the damages would flow from the loss of all unsecured loans and capital contributions in the title holding entity. Using the authenticated accounting statements and the amounts of the unsecured loans and capital contributions provided by the impleaded parties, the trial court accepted a total of $16,993,632.07 (broken out individually for each property) for the seventeen affected properties.

We labor under the same limitations as LB Judgment and the trial court: pretrial discovery on the fraudulent transfer and alter ego allegations was far from complete on the supplemental complaint. LB Judgment may or may not be able to prove that the judgment debtors concealed their interests in some of the investments (unsecured loans and capital contributions) in the impleaded parties—if those allegations were proven, the bond amount could be unfairly high. But the trial court properly did not engage in conjecture on those issues; nor can we. And to reiterate the point, when and if the emergent facts support a higher or lower bond, the trial court has the discretion (upon motion and further hearing) to reconsider the amount.

We thus affirm the trial court's order setting seventeen separate bond amounts for the properties. We interpret the order to authorize each notice of lis pendens to remain in force or be subject to discharge according to its associated and separate bond requirement, although the separate (and unitary) attorneys' fees

bond applicable to all seventeen notices must also be posted as a condition of the existing order—even if only a single property-related bond is posted.

We reverse that provision of the order requiring that any such bonds be posted within three calendar days (presently stayed by this Court); LB Judgment shall have ten days from the date of this Court's mandate in these cases within which to comply.[9]

IV. Conclusion

The trial court's non-final order discharging the notices of lis pendens is reversed and vacated. The trial court's order denying certain impleaded parties' motions to quash service and to dismiss for lack of personal jurisdiction is affirmed. The trial court's non-final order establishing the amount of seventeen property-specific lis pendens bonds and a separate "Attorneys' Fee Bond" is affirmed, subject to a modification in the time period allotted for LB Judgment to post the bonds in the requisite form and amounts. The seventeen property-related bonds are separate, such that LB Judgment may post any one or more of them, but if any such bond is posted, then the Attorneys' Fee Bond must also be posted for the specified lis pendens to remain in force. Non-compliance with these bond

[9] Section 48.23(4), Florida Statutes (2018), also specifies that the one-year term of the existing notices of lis pendens "does not include the period of pendency of any action in an appellate court."

requirements shall entitle the applicable impleaded property owner to the immediate discharge of the notice of lis pendens relating to that property.

Paragraph 6 of this Court's order or October 9, 2018, temporarily staying the trial court's lis pendens bond order, is hereby vacated and is superseded by the provisions of this opinion pertaining to the eighteen bonds in question.

Non-final orders affirmed in part and reversed in part; temporary stay vacated.

Third District Court of Appeal

State of Florida

Opinion filed March 13, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2194
Lower Tribunal No. 18-29307

Woodson Electric Solutions, Inc., etc., et al.,
Appellants,

vs.

Port Royal Property, LLC, etc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge.

Holmes Fraser, P.A., and Ian T. Holmes, David P. Fraser and Daniel P. Fraser (Naples), for appellants.

Coffey Burlington, P.L., and Jeffrey B. Crockett and Kevin C. Kaplan, for appellee.

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

HENDON, J.

The defendants, Woodson Electric Solutions, Inc., Robert J. Smallwood, and Richard L. Hanson (collectively, "the Defendants"), appeal from a non-final order denying their motion to dismiss and/or transfer for improper venue under section 47.011, Florida Statutes (2018). For the reasons that follow, we affirm.

Port Royal Property, LLC ("the Plaintiff") filed a five-count complaint against the Defendants in Miami-Dade County, stemming from the design, installation, and implementation of an audiovisual and internet systems in a house owned by the Plaintiff in Naples, Collier County, Florida. The Plaintiff's complaint alleges, in part, that the Defendants made misrepresentations as to their expertise, including that they specialized in the design, installation, and implementation of audiovisual systems; the Defendants knew that their representations were false; the Plaintiff justifiably relied on the Defendants' representations; and the Plaintiff was injured and damaged as a result of the misrepresentations. Further, the Plaintiff alleged that the Defendants intentionally misrepresented the quality of the components used for the systems, using several components that are of lower quality and cost than those specified in the contract. The Plaintiff's complaint alleges the following counts: breach of contract (Count I); breach of warranty (Count II); fraudulent misrepresentation (Count III); negligent misrepresentation (Count IV); and negligence (Count V). The Plaintiff alleged that venue is proper in Miami-Dade County because the causes of action

accrued in Miami-Dade County.

The Defendants filed a motion to dismiss for improper venue and/or to transfer venue from Miami-Dade County to Collier County ("motion to dismiss"), asserting that venue is improper under section 47.011. In response to the Defendants' motion to dismiss, the Plaintiff filed the affidavit of its manager. The affidavit provides that prior to entering into the contract, the Defendants made misrepresentations as to their expertise relating to the design, installation, and implementation of the audiovisual systems. These misrepresentations induced the Plaintiff into entering into the contract, which was executed in Miami, Florida. Following a hearing, the trial court denied the Defendants' motion to dismiss and/or to transfer venue. The Defendants' appeal followed.

The Defendants contend that the trial court erred by denying the motion to dismiss. As at least one of the causes of action accrued in Miami-Dade County, we disagree. See Utilicore Corp. v. Bednarsh, 730 So. 2d 853, 854 (Fla. 3d DCA 1999) (noting that venue was proper because at least one of the alleged causes of action accrued in the county where the action was filed).

Section 47.011, Florida Statutes (2018), provides: "Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located." The plaintiff has the option to select venue, and the plaintiff's choice of venue will be honored as long as the choice is

based on one of the three statutory alternatives. See McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc., 39 So. 3d 504, 508 (Fla. 4th DCA 2010). "The plaintiff bears the initial burden of alleging facts in the complaint sufficient to demonstrate that the action was filed in the proper venue." Drucker v. Duvall, 61 So. 3d 468, 471 (Fla. 4th DCA 2011). If a defendant contests the plaintiff's choice of venue, the defendant "has the burden of clearly proving that the plaintiff's venue selection is improper" and must also demonstrate where venue is proper. McDaniel Reserve, 39 So. 3d at 508.

Here, the Plaintiff asserted in its complaint that Miami-Dade County is a proper venue because the causes of action accrued in Miami-Dade County.[1] Thus, if at least one of the causes of action accrued in Miami-Dade County, the Plaintiff's choice of venue is proper.

"For purposes of venue, a tort claim is deemed to have accrued 'where the last event necessary to make the defendant liable for the tort took place.'" McDaniel Reserve, 39 So. 3d 504, 509 (Fla. 4th DCA 2010) (quoting Tucker v. Fianson, 484 So. 2d 1370, 1371 (Fla. 3d DCA1986)). "Stated another way, a cause

[1] The other two statutory alternatives are not applicable. First, none of the defendants reside in Miami-Dade County. Second, there is no "property in litigation" because the claims against the Defendants "have no effect on the title or possession of the property." See McDaniel Reserve, 39 So. 3d at 508 ("Because [the plaintiff's] claims against [the defendant] have no effect on the title or possession of the property and the complaint seeks only an award of money damages, there is no 'property in litigation' for the purpose of the third clause of section 47.011, Florida Statutes.").

of action of this type accrues at the moment the wrong and the injury both accrue." PricewaterhouseCoopers LLP v. Cedar Resources, Inc., 761 So. 2d 1131, 1134 (Fla. 2d DCA 1999); see also Williams v. Goldsmith, 619 So. 2d 330, 332 (Fla. 3d DCA 1993) ("In other words, a tort accrues where the plaintiff first suffers injury.").

As to the Plaintiff's misrepresentation claims, the last event necessary to make the Defendants liable for these tort claims is the injury and/or damages suffered by the Plaintiff as a result of the misrepresentation.[2] Here, the Defendants contend that last element of the misrepresentation causes of action—injury and/or damages—were first realized in Collier County following the completion of the installation of the systems, and therefore, the cause of action accrued in Collier County. We disagree.

Based on the allegations set forth in the complaint, the Defendants made

[2] To prevail on a claim for fraudulent misrepresentation, the Plaintiff must establish: "(1) a false statement concerning a material fact; (2) the representer's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." Howard v. Murray, 184 So. 3d 1155, 1167 n.22 (Fla. 1st DCA 2015) (quoting Specialty Marine & Indus. Supplies, Inc. v. Venus, 66 So. 3d 306, 310 (Fla. 1st DCA 2011)). Similarly, to prevail on a claim for negligent misrepresentation, the Plaintiff must establish: "(1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely . . . on the misrepresentation; and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation." Howard, 184 So. 3d at 1167 n.23 (quoting Specialty Marine, 66 So. 3d at 309 (citation omitted)).

false representations as to their expertise relating to the design, installation, and implementation of the audiovisual systems; the Defendants knew that the representations were false; the Plaintiff relied on these misrepresentations; and the Plaintiff was injured and/or suffered damages as a result of the misrepresentation. As the Plaintiff executed the contract in Miami, the causes of action based on the Defendants' misrepresentations accrued in Miami, although the damages had not been fully realized. See Llano Fin. Grp., LLC v. Petit, 230 So. 3d 141, 144 (Fla. 1st DCA 2017) (noting that a cause of action accrues when the "injury, although slight, is sustained in consequence of the wrongful act of another") (quoting City of Miami v. Brooks, 70 So. 2d 306, 308 (Fla. 1954)). Thus, as the causes of action based on the Defendants' alleged misrepresentation accrued when the contract was signed in Miami, venue is proper in Miami-Dade County. Accordingly, we affirm the trial court's order denying the Defendants' motion to dismiss for improper venue under section 47.011.

The remaining arguments raised by the Defendants do not merit discussion.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VOLVO AERO LEASING, LLC,
Appellant,

v.

VAS AERO SERVICES, LLC f/k/a **VOLVO AERO SERVICES CORP.,** a Delaware limited liability company, and **H.I.G. CAPITAL, LLC,** a Delaware limited liability company,
Appellees.

Nos. 4D17-2618 and 4D17-3531

[March 13, 2019]

Consolidated appeals and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Donald W. Hafele, Judge; L.T. Case No. 50-2014-CA-003164-XXXX-MB.

Alec H. Schultz, Derek E. León, and Jennifer R. Zinn of León Cosgrove LLP, Coral Gables, for appellant.

Ceci C. Berman and Joseph T. Eagleton of Brannock & Humphries, Tampa, Kenneth J. Ronan of Lavalle, Brown & Ronan, P.A., Boca Raton, and Charles Wender of Charles Wender Attorney at Law, Chartered, Boca Raton, for appellees Vas Aero Services, LLC, and H.I.G. Capital, LLC.

LEVINE, J.

Appellant claims that the trial court erred in denying several claims against the appellees, including its claim of tortious interference with a business relationship. We find that appellee H.I.G. Capital was not a "stranger to the business relationship" and thus could not be held liable for tortious interference. We further find that the other issues on direct appeal are without merit and affirm those issues without further discussion.

As to the cross-appeal, we also find that the trial court did not err in granting partial summary judgment on the breach of contract claim as to the issue of damages. All parties agreed there was a breach of contract. Only the amount of damages remained to be determined. The cross-appellant did not produce any evidence to counter the affidavit and

supporting documents filed in support of the motion for summary judgment. The law is clear that to defeat a motion for summary judgment supported by competent evidence, the opposing party must present evidence—not merely argument—to create an issue of material fact. Cross-appellant merely asserted there was an issue as to the amount of damages. That is not enough. We also affirm the remaining issues raised on cross-appeal.

Volvo Aero Leasing ("VAL") leased aviation products, while VAS Aero Services, formerly known as Volvo Aero Services ("VAS"), sold aviation products. VAS originally established VAL in 2000 to provide leasing services. Subsequently, VAL was transferred to Volvo Financial Services, while VAS remained a Volvo Group company until 2010 when AB Volvo, the parent company of Volvo Group, decided to get out of the aviation business.

In 2010, VAL and VAS entered into a transaction support agreement ("TSA") to facilitate the purchase of equipment by VAS from VAL when the equipment was returned at the end of a lease by third parties. VAL would provide VAS advanced notice when equipment was coming off lease. VAS then would inspect the equipment to determine the condition of each item. If the equipment was returned in the required condition, VAS would then purchase the equipment for a pre-negotiated residual value. An exhibit to the TSA included an agreed residual value that was "calculated on a per item basis" and subject to casualty loss, early termination, or term extension. The TSA required VAS to remit the purchase price for each item within thirty days of receiving an invoice or the equipment.

On the same date as the TSA, a purchase agreement ("PA") memorialized the sale of VAS by Aero Holdings to Vas Aero Holdings. The PA provided that when VAS purchased assets leased by SR Technics ("SRT") pursuant to the TSA, the fair market value of the assets would be determined by either mutual agreement or by an appraisal process as set forth in the PA. If the fair market value was less than the agreed residual value, then VAL had to compensate VAS for the difference.

Three months after the creation of the TSA and PA, VAS entered into a management service agreement ("MSA") with H.I.G. Capital. Pursuant to the MSA, H.I.G. was to provide management, consulting, and financial advisory services to VAS for a yearly fee of $600,000.

In 2014, VAL filed a complaint against VAS and later added H.I.G. as a defendant. VAL alleged that VAS failed to purchase certain equipment under the TSA: a Boeing 737 airplane, two reverse thrusters, and two sets

of equipment coming off lease from SRT in 2012 and 2013. VAL raised claims for breach of contract against VAS (count I), conversion by VAS (count II), civil theft by VAS (count III), accounting as to VAS (count IV), tortious interference with business relationship as to H.I.G. (count V), civil conspiracy as to H.I.G. and VAS (count VI), and replevin as to VAS (count VII).

As to the tortious interference claim, VAL claimed that H.I.G. used its control over VAS to prevent VAS from satisfying its contractual obligations. In its amended answer and affirmative defenses, VAS denied VAL's allegations that H.I.G. refused to allow VAS to make any payments to VAL to satisfy VAS's contractual obligations.

VAL moved for summary judgment on the breach of contract claim, alleging it was undisputed that VAS breached the TSA. VAL alleged that the principal amount owed for the 2012 and 2013 SRT returns and the reverse thrusters was $4,786,786. In support, VAL submitted an affidavit from its president setting forth the amount of principal and interest for each claim. In further support of summary judgment, VAL submitted copies of invoices and documents containing residual values. VAL also submitted a deposition from VAS's CFO and COO authenticating invoices and documents containing residual value amounts.

VAS opposed summary judgment, arguing that VAL's summary judgment evidence was insufficient and that the amount of damages remained in dispute. VAS argued that under the TSA, VAS had the ability to dispute the amount due and owing, to pay less depending upon the condition in which the equipment was returned, and to have a different set of rules apply for items returned before the expiration of the lease.

The trial court granted summary judgment as to liability and damages for the 2012 and 2013 SRT returns and the reverse thrusters. The court found damages in the amount of $4,786,786, representing the "undisputed" amount of principal payments due to VAL pursuant to the terms of the contract.

During a bench trial on the remaining claims, VAS presented evidence that H.I.G. and VAS were both within the "H.I.G. family tree." The two individuals at the top of the VAS "ownership chain" owned 100% of the voting shares of H.I.G., and an H.I.G. affiliate owned 88% of the holding company that owned VAS. H.I.G. and VAS had a "common economic interest" and had the "same ultimate shareholders." In addition to receiving yearly compensation, H.I.G. would be entitled to additional compensation if VAS were sold. H.I.G. had also assisted in drafting the

TSA, which provided that H.I.G. was entitled to a copy of any notice VAL sent to VAS. VAS also introduced evidence that it did not have sufficient funds to pay all of its obligations, so it had to prioritize which payments to make. The board of directors collectively decided not to pay VAL. Although some members of the board were affiliated with H.I.G., others were not.

The trial court rejected VAL's tortious interference claim, finding that H.I.G. was not a stranger to the business relationship between VAL and VAS. H.I.G. indirectly owned and directly controlled VAS. Additionally, H.I.G. had a significant financial interest in VAS. The court concluded that H.I.G. acted with a supervisory interest in how the relationship between VAS and VAL was conducted when it caused VAS to stop payments to VAL.

The court awarded VAL $4,786,786 for breach of contract regarding the 2012 and 2013 SRT returns and the reverse thrusters. The court further awarded VAL $1,362,521, which was the difference between the residual amount of $4,462,521 and the $3.1 million resale price for the Boeing 737 aircraft. This appeal ensued.

"When a decision in a non-jury trial is based on findings of fact from disputed evidence, [we review it] for competent, substantial evidence." *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008). "However, where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo*." *Id.*

VAL argues that the trial court erred in finding H.I.G. not liable for tortious interference with the TSA between VAL and VAS. According to VAL, H.I.G. admitted in its amended answer that it told VAS not to pay VAL.

In order to establish tortious interference with a business relationship, the plaintiff must prove: "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal rights; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the interference." *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 385 (Fla. 4th DCA 1999). Critically to this claim, "[f]or the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship." *Id.* at 386.

The evidence did not show an "intentional and unjustified interference" with a business relationship. *See id.* at 385. Rather, the evidence showed

that VAS did not have sufficient funds to pay all of its bills, so VAS had to prioritize what payments it should make. VAS's board of directors collectively decided not to pay VAL.

Even if H.I.G. had caused the non-payment, "a defendant is not a stranger to a business relationship, and thus cannot be held liable for tortious interference, when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed." *Palm Beach Cty. Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090, 1094 (Fla. 4th DCA 2009).

Clearly, H.I.G. had both a supervisory and financial interest in VAS. The trial court determined, and the record showed, that H.I.G. indirectly owned VAS and directly controlled VAS. H.I.G. also had a significant financial interest in VAS. H.I.G. provided management, consulting, and financial advisory services to VAS. H.I.G. received yearly compensation for its services and would be entitled to additional compensation if VAS were sold. H.I.G. assisted in drafting the TSA and was also to receive a copy of any notice VAL sent to VAS. Further, VAS and H.I.G. had common economic interests and shared the "same ultimate shareholders." Two of the owners of VAS also owned 100% of the voting shares of H.I.G., and an H.I.G. affiliate owned 88% of the holding company that also owned VAS. *See Babson Bros. Co. v. Allison*, 337 So. 2d 848, 850 (Fla. 1st DCA 1976) (holding that corporation that did not own stock in another corporation had privilege to interfere with contract where the stockholders of the first corporation owned the stock of the second corporation and "all of the stock of the two corporations was held by two families").

Suffice it to say that there was competent substantial evidence showing that the relationship between H.I.G. and VAS gave rise to the privilege for H.I.G. to involve itself in the business relationship between VAS and VAL. Clearly, there was competent substantial evidence to demonstrate that H.I.G. was not a stranger to the business relationship.

As to the cross-appeal, we find that the trial court did not err. We affirm on all the issues raised, but we write to discuss why the trial court did not err in granting partial summary judgment as to the amount of damages for the breach of contract claim made by VAL.

We review this order granting a summary judgment utilizing the de novo standard of review. *Eco-Tradition, LLC v. Pennzoil-Quaker State Co.*, 137 So. 3d 495, 496 (Fla. 4th DCA 2014).

In this case, the only contested issue was the amount of damages. Both

sides conceded there was a breach of contract and that VAS owed money to VAL. The only question that remained was the amount of damages.

The party moving for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). Once the movant tenders competent evidence, "the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist." *Id.*

VAL met its burden by submitting (1) a sworn affidavit from its president listing the amount of all its "claims" or damages; (2) invoices and documents listing the residual value of the SRT 2012 and 2013 returns as well as the reverse thrusters; and (3) the deposition of VAS's CFO and COO which reflected that the invoices and documents containing the residual value amounts were authenticated.

VAS, on the other hand, did not submit any affidavits or other counterevidence on the question of damages. Instead, it merely asserted that an issue existed as to the amount of damages and made only a generic reference to the terms of the TSA which allowed for an adjustment of the pre-negotiated residual values. However, the TSA also required VAS to remit the purchase price for each item within thirty days of receiving an invoice or the equipment. VAS did not challenge the residual price upon receiving any invoices or equipment, nor did VAS specifically contest the residual price and subsequent damages with evidence at the time of summary judgment. VAS did not present any evidence that it sought to challenge the amount due on the ground that the equipment was returned before the lease expired or that the equipment was not returned in the required condition. Simply put, VAS never presented evidence of attempting to adjust the pre-negotiated residual value as agreed to in the TSA. Thus, VAS neither disputed the amount due either according to the terms of the TSA, nor later by counterevidence at summary judgment.

One cannot defeat a motion for summary judgment by merely stating there is a material issue of fact or by generically referencing the existence of a contract. *See Landers*, 370 So. 2d at 370. Rather, the opposing party must show, with counterevidence, that there is a material issue of fact. *See BK Marine Constr., Inc. v. Skyline Steel, LLC*, 231 So. 3d 469, 472 (Fla. 4th DCA 2017) (finding issues of material fact remained as to the amount of damages where moving party submitted invoices and opposing party filed deposition transcript stating that it was unclear which invoices corresponded to contract); *R. Plants, Inc. v. Dome Enters., Inc.*, 221 So. 3d 752, 754 (Fla. 3d DCA 2017) (affirming summary judgment where motion

included affidavit with the damages plaintiff suffered and defendant did not produce counterevidence on the amount of damages); *Ins. Co. of N. Am. v. Julien P. Benjamin Equip. Co.*, 481 So. 2d 511 (Fla. 1st DCA 1985) (finding no genuine issue of material fact as to damages where opposing party did not file any countervailing affidavits or otherwise controvert the assertions in the affidavit filed in support of the motion for summary judgment and the attached invoices).

The obligation to present specific counterevidence is especially important here, where there was no dispute that there was a breach of contract, and the contract contained pre-negotiated residual values. VAS cannot complain where it conceded it breached a contract with pre-set remedies, but it did not present any evidence contesting the affidavits and other documents submitted in support of the motion for summary judgment.

The dissent relies on a deposition excerpt wherein VAS's CFO referred to a range of $2 to $3 million dollars in damages, excluding the Boeing 737. The dissent argues that this figure is "considerably less" than the $4,786,786 judgment granted. Initially, VAS never relied on this deposition testimony as counterevidence to establish a specific amount owed. *See Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 326 (Fla. 1st DCA 2011) (finding argument not raised in response to motion for summary judgment or in motion for rehearing was not preserved for appeal). Further, the deposition testimony was not sufficient to reveal a genuine issue of material fact. The dissent neglects to include that the CFO gave this estimate in response to a question asking for the amount due "without pinning you down to a precise dollar amount." Additionally, during same line of questioning, the CFO also estimated damages in the range of $6 to $8 million, minus approximately $4 million for the aircraft. So even within the same deposition relied upon by the dissent, the CFO testified to a damage figure close to the amount granted by the summary judgment.

In conclusion, we find the trial court was correct in this case on the appeal as well as on the cross-appeal. As such, we affirm on all issues.

Affirmed.

DAMOORGIAN, J., concurs.
WARNER, J., concurs in part and dissents in part with opinion.

WARNER, J., concurring in part and dissenting in part.

I agree with the majority opinion except as to the affirmance of the partial summary judgment on damages, which was the subject of VAS's cross-appeal. There were disputed issues of fact as to the amount of the damages, revealed in VAL's filings in support of summary judgment. For instance, the contract itself provides an extensive process to determine the amounts due to VAL, after the lease expiration or termination on the equipment. The invoices from VAL to VAS do not establish that this process was followed. And VAL submitted the deposition of the Chief Financial Officer of VAS, in which he testified that what VAS owed to VAL, minus the amount for the Boeing 737, was more in the range of $2 to $3 million, considerably less than the $4,786,786 the court awarded. The CFO stated that, in addition to VAS's cash problems, the invoices from VAL were not paid because there was an ongoing disagreement as to what was due. Because VAL's own submissions showed that the amount of payment was disputed, summary judgment as to the amount of damages should not have been granted.

* * *

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

AP ATLANTIC, INC., A NORTH CAROLINA CORPORATION SUCCESSOR BY ASSIGNMENT FROM AP GULF STATES, INC., A TEXAS CORPORATION, D/B/A ADOLFSON & PETERSON CONSTRUCTION,

Appellant,

v.

Case No. 5D18-1656

SILVER CREEK ST. AUGUSTINE, LLLP, A FLORIDA LIMITED PARTNERSHIP,

Appellee.

_____/

Opinion filed March 15, 2019

Nonfinal Appeal from the Circuit Court for St. Johns County,
J. Michael Traynor, Judge.

Lauren V. Purdy and William E. Adams, Jr., of Gunster, Yoakley & Stewart, P.A., Jacksonville, for Appellant.

Robert J. Hauser, of Pankauski Hauser PLLC, West Palm Beach, Frederick R. Brock, of Gartner, Brock and Simon, Jacksonville, and Robert A. Sweetapple, of Sweetapple, Broeker & Varkas, PL, Boca Raton, for Appellee.

PER CURIAM.

Appellant, AP Atlantic, Inc., a non-signatory to a construction contract, appeals the denial of its motion to compel arbitration after the trial court concluded that the contract's arbitration provision did not apply to non-signatories. The construction contract was signed by Appellee, Silver Creek St. Augustine, LLLP, and Appellant's affiliate, AP Gulf States, Inc. We reverse because a non-signatory may enforce an arbitration provision when a signatory makes a claim against the non-signatory that arises out of the contract.

Generally, "a non-signatory to a contract containing an arbitration agreement . . . cannot compel a signatory to submit to arbitration." *Koechli v. BIP Int'l, Inc.*, 870 So. 2d 940, 943 (Fla. 1st DCA 2004). However, an exception to this rule is "when the claims relate directly to the contract and the signatory is relying on the contract to assert its claims against the non-signatory." *Id.* at 944 (citations omitted).

In this case, Appellee is a signatory and has alleged claims below against Appellant directly related to both performance and payment under the contract. In these rare circumstances, Florida courts have determined that a non-signatory to the contract may enforce an arbitration provision against a signatory. *See, e.g.*, *Roman v. Atl. Coast Constr. & Dev., Inc.*, 44 So. 3d 222, 224 (Fla. 4th DCA 2010); *Koechli*, 870 So. 2d at 945; *Cuningham Hamilton Quiter, P.A. v. B.L. of Miami, Inc.*, 776 So. 2d 940, 943 (Fla. 3d DCA 2000). Accordingly, we reverse the order denying Appellant's motion to compel arbitration and remand with directions that the trial court grant the motion.

REVERSED and REMANDED.

EVANDER, C.J., EISNAUGLE and HARRIS, JJ., concur.