Florida Real Property and Business Litigation Report

Volume XII, Issue 15
April 15, 2019
Manuel Farach

Austin Commercial, L.P. v. L.M.C.C. Specialty Contractors, Inc., Case No. 2D18-1051 (Fla. 2d DCA 2019).
The mere existence of a dispute resolution mechanism in a construction prime contract does not vitiate the arbitration provision contained in the subcontract.

Broz v. Reece, Case No. 3D18-273 (Fla. 3d DCA 2019).
The statute of limitations in a negligence suit against a surveyor is not tolled by the Delayed Discovery Doctrine.

Benitez v. Eddy Leal, P.A., Case No. 3D18-771 (Fla. 3d DCA 2019).
An attorney's charging lien must be filed before final judgment; otherwise, it is ineffective.

Keys Country Resort, LLC v. 1733 Overseas Highway, LLC, Case No. 3D18-1013 (Fla. 3d DCA 2019).
Competing affidavits arguing whether or not a particular parcel was intended to be included in a mortgage require that a motion for summary judgment of reformation of the mortgage be denied and that the issue of intent be determined through trial.

Weiner v. Maulden, Case No. 4D18-2170 (Fla. 4th DCA 2019).
Consolidation of two cases for discovery and trial (but not for all other purposes) does not consolidate the two cases for proposals for settlement such that a plaintiff offeror must make the proposal for settlement to the two defendants in the two cases.

Royal Palms Senior Apartments Limited Partnership v. Construction Enterprises, Inc. of Tennessee, Case No. 5D18-2182 (Fla. 5th DCA 2019).
The AIA construction contract requiring arbitration of construction disputes does not necessarily require arbitration of disputes after final payment is due.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

AUSTIN COMMERCIAL, L.P., a Delaware limited partnership, Appellant, v. L.M.C.C. SPECIALTY CONTRACTORS, INC., d/b/a MIMS CONSTRUCTION COMPANY, a Florida corporation, Appellee.	)	Case No. 2D18-1051

Opinion filed April 10, 2019.

Appeal from the Circuit Court for Hillsborough County; Paul L. Huey, Judge.

Aaron H. Reichelson, Marie Tomassi, and Patrick J. Poff of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., Tampa, for Appellant.

Douglas A. Wallace and Joseph T. Eagleton of Brannock & Humphries, Tampa; and Derin Parks of Grimes Goebel Grimes Hawkins Gladfelter & Galvano, P.L., Bradenton, for Appellee.

BADALAMENTI, Judge.

Austin Commercial, L.P. (Austin) appeals from a nonfinal order denying its motion to compel arbitration of its dispute with L.M.C.C. Specialty Contractors, Inc., d/b/a Mims Construction Company (Mims). We hold that Austin and Mims entered into

a valid contract mandating arbitration of the underlying lawsuit initiated by Mims. We thus reverse the trial court's order denying Austin's motion to compel arbitration and remand for entry of an order granting Austin's motion to compel arbitration.

The Hillsborough County Aviation Authority (HCAA) awarded a contract to Austin for construction of a consolidated rental car facility and automated people mover at the Tampa International Airport. The project proceeded in two parts: the design phase (Part 1) and the construction phase (Part 2). Mims served as one of Austin's subcontractors on both phases of the project. For each of the two phases, Austin entered into a contract with the HCAA (the prime contracts). The prime contracts state that any action initiated by either party, HCAA or Austin, would be resolved in state court as follows: "Any action initiated by either party associated with a claim or dispute, and the exclusive venue and jurisdiction for any such action, will be brought in the appropriate State Court in and for Hillsborough County, Florida."

After entering into the prime contract for Part 1 with HCAA, Austin executed a "Consultant Agreement" with Mims that served as Austin and Mims's subcontract for the design phase. Section 19.1 of the subcontract between Austin and Mims contained the following provision:

> Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be subject to the dispute resolution procedures, if any, set out in the Prime Contract between Austin and the [HCAA]. Should the Prime Contract contain no specific requirement for the resolution of disputes or should the [HCAA] not be involved in the dispute, any such controversy or claim shall be resolved by arbitration pursuant to the Construction Industry Rules of the American Arbitration Association then prevailing, and judgment upon the award by the Arbitrator(s) shall be entered in any Court having jurisdiction thereof.

Austin subsequently executed the "Part 2 Contract" with HCAA governing the construction phase of the project. Thereafter, and consistent with a Memorandum of Understanding between Austin and Mims attached to the Consultant Agreement, Austin executed a Work Order with Mims that extended Mims's work on the airport project to the second phase of the project. The Work Order incorporated the terms and conditions of the Consultant Agreement (including the dispute resolution provision) and served as Austin and Mims's subcontract for the construction phase.

After Mims completed its construction work for Part 2 of the project, Mims filed an amended complaint in Hillsborough County state court for, among other things, breach of contract against Austin under quasi-contractual and equitable theories. It further requested a declaration that it was not required to arbitrate its claims against Austin. HCAA is not a party to the lawsuit. The gravamen of Mims's lawsuit is that Austin did not pay Mims for the services it had provided after it received full payment for the project from HCAA. Mims further alleged that Austin did not employ Mims for all services for the project it had promised to Mims. Austin subsequently filed an amended motion to stay and compel arbitration of the claims.

During the hearing on the motion, Austin argued that Mims agreed to arbitrate the dispute because "the dispute resolution provision [in the Consultant Agreement] says if the owner is not involved in the dispute, you don't go to their dispute resolution procedure, but instead do arbitration." The trial court, however, construed the arbitration clause contained in the Consultant Agreement—and incorporated by reference into the Work Order for Part 2—to deny Austin's motion to compel arbitration. The trial court reasoned that because the prime contract between HCAA and Austin

contained a dispute resolution provision providing for litigation of disputes, Austin and Mims were required to litigate their dispute. Austin appeals, arguing that the trial court erred in its interpretation of the Consultant Agreement's dispute resolution provision.

Because the trial court's order denying the motion to compel arbitration is based entirely on its construction of the contract documents, our standard of review is de novo. SCG Harbourwood, LLC v. Hanyan, 93 So. 3d 1197, 1199 (Fla. 2d DCA 2012). In ruling on a motion to compel arbitration of a given dispute, courts must consider three elements: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Here, the only element in dispute is whether the parties executed a valid written agreement to arbitrate their claims.

As an initial matter, we reject Mims's argument that it did not enter into a subcontract with Austin for Part 2 of the project. The trial court necessarily determined that there was a valid contract for Part 2 of the project. That is, the trial court relied on language incorporated into the Work Order, the agreement between Austin and Mims for Part 2 of the project, in denying Austin's motion despite Mims's argument at the hearing that the parties did not enter into a contract for Part 2. If the parties never entered into a valid contract, there would have been no need for the trial court to interpret and apply the arbitration clause. Thus, necessary and implicit to its ruling that the agreement between Austin and Mims did not compel arbitration is a finding that the parties did indeed execute a valid subcontract for Part 2.

"It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." OBS Co. v. Pace Const. Corp., 558 So. 2d 404, 406 (Fla. 1990). With this in mind, we hold the existence of a subcontract between Austin and Mims for Part 2 is supported by the language of and attachments to the Work Order. The Work Order, which incorporated Part 1's Consultant Agreement, contained the phrase "MIMS PART 2" on the top of every page. The Work Order is signed by representatives of both Austin and Mims. Under a section labeled "SCOPE OF WORK," Austin and Mims agreed that "[t]he Work covered by this Work Order will be performed under the terms and conditions of the Part 1 Consultant Agreement." (Emphasis added.) The parties further agreed that "[t]he Scope of Sublet Work shall be also defined by the Part 2 Contract Documents as contained in the Exhibits listed below and attached hereto by reference, the Austin Part 2 Contract with attachments and Part 2 Supplemental Agreement with attachments as if attached hereto." Exhibit A of the Work Order, consistent with the Memorandum of Understanding appended to the Consultant Agreement, expanded the scope of Mims's services by adding, among other positions, an Assistant Superintendent and Project Engineer to facilitate Part 2 of the project.

Accordingly, an examination of the Work Order and its included attachments confirms that the Work Order served as the subcontract for Mims's work on the construction phase of the project. See OBS Co., 558 So. 2d at 406. Because the Work Order served as the subcontract between Austin and Mims for the construction phase of the project, their dispute arising from Mims's work on that phase is governed

by the Consultant Agreement's dispute resolution provision incorporated into the Work Order. See Henderson Inv. Corp. v. Int'l Fid. Ins. Co., 575 So. 2d 770, 771-72 (Fla. 5th DCA 1991) (holding that surety could compel arbitration where it had incorporated an arbitration clause from the construction contract into its performance bond).

Concluding that Austin and Mims executed a valid subcontract for the construction phase of the project, we next address whether they agreed to arbitrate their claims. The Consultant Agreement's dispute resolution provision incorporated into the contract provides in relevant part:

> Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be subject to the dispute resolution procedures, if any, set out in the Prime Contract between Austin and the [HCAA]. Should the Prime Contract contain no specific requirement for the resolution of disputes or should the [HCAA] not be involved in the dispute, any such controversy or claim shall be resolved by arbitration . . . .

Austin argues that the provision provides for two exceptions to the applicability of the prime contract's dispute resolution provision but the trial court's reasoning only addressed one of the exceptions; namely, that the prime contract "contain[ed] no specific requirement for the resolution of disputes." Mims does not appear to defend or advance the trial court's ruling that because the prime contract between HCAA and Austin contained a dispute resolution provision, Mims was not compelled to arbitrate its claims against Austin. Instead, Mims advances a tipsy-coachman argument that the Consultant Agreement's dispute resolution provision is inapplicable because HCAA is "involved" in its dispute with Austin. We disagree with Mims's contention.

We are mindful that Florida public policy favors arbitration of disputes and thus "courts should resolve doubts concerning the scope of such agreements in favor of arbitration." Stinson-Head, Inc. v. City of Sanibel, 661 So. 2d 119, 120 (Fla. 2d DCA 1995). That said, the "determination of whether an arbitration clause requires arbitration of a particular dispute necessarily 'rests on the intent of the parties.' " MDC 6, LLC v. NRG Inv. Partners, LLC, 93 So. 3d 1145, 1147 (Fla. 2d DCA 2012) (quoting Seifert, 750 So. 2d at 636). To ascertain the parties' intent, we examine the plain language of the contract. Id.; see also Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, 640 (Fla. 2d DCA 2016) (explaining that we are bound by the plain meaning of a contract's text when interpreting a contract). We construe a contract, "including the arbitration and the limitation provisions, in a way that gives a reasonable meaning to all the terms, rather than in a way that will render part of the contract of no effect." Orkin Exterminating Co. v. Petsch, 872 So. 2d 259, 263 (Fla. 2d DCA 2004).

Turning to the trial court's interpretation of the Consultant Agreement's arbitration provision, the trial court found that the mere existence of a dispute resolution provision within the prime contract rendered the Consultant Agreement's arbitration mandate inapplicable. The trial court's interpretation of the Consultant Agreement's dispute resolution provision does not give a reasonable meaning to its incorporated terms from the prime contract; namely, the applicability of the prime contract's dispute resolution provision. The unambiguous language of the Consultant Agreement's dispute resolution provision provides for two exceptions to the applicability of the dispute resolution procedures set out in the prime contract: (1) the prime contract "contain[s] no specific requirement for the resolution of disputes," **or** (2) the HCAA is not

"involved in the dispute." If either of these two circumstances exists, the dispute "shall be resolved by arbitration." As will be explained, the trial court's finding that the mere existence of a dispute resolution provision within the prime contract, which does not have bearing on the lawsuit initiated by Mims here, requires litigation of the dispute between Mims and Austin belies the plain and ordinary language of the prime contract's dispute resolution provision.

The prime contract, governing Austin and HCAA, requires litigation of disputes that are "initiated by either party." (Emphasis added.) Thus, if Austin or HCAA initiates "[a]ny action," "the exclusive venue" of that action is "the appropriate State Court in and for Hillsborough County, Florida." Reading the dispute resolution provision of the prime contract together with the dispute resolution provision of the Consultant Agreement, as we must, leads us to the conclusion that the trial court's finding that the mere existence of a dispute resolution provision within the prime contract mandated litigation of Mims's and Austin's dispute was erroneous. This is because the prime contract's dispute resolution provision is wholly inapplicable to Mims's and Austin's dispute, as neither HCAA nor Austin initiated the lawsuit at issue here. To hold otherwise effectively contravenes the plain and ordinary language of the prime contract's dispute resolution provision, which is only applicable to lawsuits initiated by HCAA or Austin. Cf. Bioscience W., 185 So. 3d at 640 (instructing courts to construe contracts as a whole to give meaning to every provision). Because Mims initiated the underlying action against Austin, the dispute resolution provision found in the prime contract is inapplicable to the dispute between Mims and Austin.

Turning to the second exception to mandatory arbitration set forth in the Consultant Agreement, we must decide whether HCAA is "involved" in the lawsuit Mims initiated against Austin. Mims argues that it qualifies for this exception to the arbitration mandate because HCAA is "involved" in its dispute with Austin. Mims asserts that even though it did not name HCAA as a party to the lawsuit, HCAA is nonetheless involved in the dispute because of HCAA's status as a third-party beneficiary of the subcontract.[1] We disagree.

First, such a broad interpretation of the term "involved" would render the exception superfluous because HCAA, according to the prime contracts, is a third-party beneficiary to "all agreements, subcontracts and purchase orders of [Austin]." (Emphasis added.) See Universal Prop. & Cas. Ins. Co. v. Johnson, 114 So. 3d 1031, 1036 (Fla. 1st DCA 2013) ("A contract is not to be read so as to make one section superfluous, and so '[a]ll the various provisions of a contract must be so construed . . . as to give effect to each.' " (alteration in original) (quoting Univ. of Miami v. Frank, 920 So. 2d 81, 87 (Fla. 3d DCA 2006))).

Next, Mims's proposed, broad interpretation of "involved" invites an interpretation contrary to its plain and ordinary meaning. "Involve" is defined, in pertinent part, as "[t]o relate to or affect" or "[t]o show to be a participant; connect or implicate." American Heritage Dictionary, 923 (5th ed. 2018); see also Bioscience, 185 So. 3d at 640 (explaining that we may consult dictionaries to discern the plain meaning of contractual language); State v. Elder, 975 So. 2d 481, 483-84 (Fla. 2d DCA 2007)

[1]The prime contracts between Austin and the HCAA provide that "[HCAA] will be identified as an intended third party beneficiary of all agreements, subcontracts and purchase orders of [Austin] related to this Agreement."

(" 'Involve' is defined, in pertinent part, as 'to draw in as a participant,' to 'implicate,' 'to relate closely,' to 'connect,' 'to have an effect on,' to 'concern directly,' to 'affect.' " (quoting Webster's Third New International Dictionary 1191 (1986))).

Applying these definitions, HCAA is clearly not "drawn in as a participant" to the lawsuit because it is not a party to the lawsuit and, as such, need not participate in it. Indeed, the allegations of Mims's operative complaint show that HCAA has paid Austin "in full for all work performed on the TIA Project." Thus, whether Mims is paid by Austin does not affect HCAA. The financial dispute Mims has initiated against Austin is solely between those two parties and does not "involve" HCAA.

Furthermore, one would not ordinarily understand an entity to be "involved" in a dispute where that entity is neither drawn into the dispute nor affected by the dispute. Only an impermissible, strained textual interpretation of "involved in the dispute" would yield a conclusion that HCAA would be affected by a financial dispute between Austin and Mims. Cf. Bioscience, 185 So. 3d at 641 (explaining that the trial court's interpretation of a contractual provision was contrary to the contractual language's plain meaning). Accordingly, supported by the allegations in Mims's complaint, it is difficult to discern that Mims's dispute with Austin affects or implicates HCAA.[2] See Elder, 975 So. 2d at 483-84. Because HCAA is not "involved" in Mims's lawsuit initiated against Austin, it does not meet the second exception to the Consultant Agreement's mandatory arbitration provision. Thus, reading all contractual provisions as a whole, Mims's dispute with Austin "shall be resolved by arbitration," as provided by

[2]This interpretation was also favored by the trial court. In its discussion with the parties during the hearing, the court commented that "the owner's not involved [in the dispute]."

the dispute resolution provision found in the Consultant Agreement and incorporated into Austin and Mims's Work Order.

Accordingly, we reverse the trial court's order denying Austin's motion to compel arbitration and remand for entry of an order granting its motion and referring the dispute to arbitration. See Orkin, 872 So. 2d at 266.

Reversed; remanded with instructions.

CASANUEVA and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed April 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-273
Lower Tribunal No. 11-224-M

Margaret A. Broz,
Appellant,

vs.

R.E. Reece, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Margaret A. Broz, in proper person.

No Appearance for appellees.

Before SALTER, SCALES and HENDON, JJ.

PER CURIAM.

Affirmed. Notwithstanding the facts that (1) the hearing on the appellees/defendants' motion to dismiss was noticed and conducted as an

evidentiary hearing and (2) the trial court heard the appellant/plaintiff's testimony before dismissing the first amended complaint with prejudice, our task as a reviewing court is unaffected. The order dismissing the first amended complaint with prejudice is subject to a de novo standard of review. United Auto. Ins. Co. v. Law Offices of Michal I. Libman, 46 So. 3d 1101, 1103 (Fla. 3d DCA 2010). We consider the allegations within the four corners of the complaint and its attachments to be true, Coriat v. Global Assurance Group, Inc., 862 So. 2d 743, 743 (Fla. 3d DCA 2003), as well as all reasonable inferences drawn from those allegations, United Automobile Insurance Co., 46 So. 3d at 1103-04.

Dismissal with prejudice, with its denial of the right to amend the complaint again, should not be granted unless the privilege of amendment has been abused, there is prejudice to the opposing party, or further amendment would be futile. Gerber Trade Fin., Inc. v. Bayou Dock Seafood Co., 917 So. 2d 964, 968 (Fla. 3d DCA 2005); World Class Yachts, Inc. v. Murphy, 731 So. 2d 798, 800 (Fla. 4th DCA 1999).

The first amended complaint, its attachments, and the circuit court's own dockets establish that: the defendants prepared the survey of Ms. Broz's half of a residential duplex property, 427 26th Street Ocean, Marathon, Florida, before she purchased it in 2005; Ms. Broz is an attorney; the survey erroneously switched the street address and legal description for Ms. Broz's half of the duplex for the legal

description and street address for the other half of the duplex, 409 26th Street Ocean, Marathon; the survey error caused Ms. Broz to be served with a foreclosure complaint on a mortgage that was intended to encumber the other half of the duplex, not Ms. Broz's half; that foreclosure commenced in December 2006 and the complaint was personally served on her in January 2007; and Ms. Broz filed her lawsuit against the surveyors in July 2011.

The motion to dismiss the first amended complaint maintained that Ms. Broz had conceded an irremediable bar to her claim based on the statute of limitations. The parties are on common ground that the applicable statute, section 95.11(3)(a), Florida Statutes (2007), specifies a four-year limitation period for "[a]n action founded on negligence." The cause of action accrues "when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (2007).

The first amended complaint itself establishes that the owner of the other half of the duplex defaulted on his mortgage loan, with the result that Fremont Investment & Loan commenced a lawsuit against Ms. Broz (erroneously, and only by virtue of the mistaken legal description and address) in December 2006.[1]

Ms. Broz failed to pursue her alleged negligence claim within four years from the date the erroneous addresses and legal descriptions damaged her rights as owner

[1] The foreclosure complaint itself was attached to the first amended complaint. The court entered an order dismissing a prior version of the complaint in this case finding that Ms. Broz was served with the foreclosure complaint on January 6, 2007.

of her half of the duplex. The period from service of the foreclosure complaint upon her until the filing of her own lawsuit was over four years and six months. Further amendment could not change that fatal flaw, as her first amended complaint and attachments acknowledged that the misdirected foreclosure led her to the discovery of the survey, street address, and legal description transpositions for the two halves of the duplex.[2]

Ms. Broz's contentions that the applicable four-year statute for negligence was tolled, or that her cause of action accrued later under the delayed discovery doctrine, are unavailing. The first amended complaint and attachments do not include, nor does this record suggest that any further amendment could include, any allegation supporting a tolling claim under section 95.031, Florida Statutes (2007).

This Court has also construed the delayed discovery doctrine cautiously and narrowly, following Florida Supreme Court precedent, in cases of intentional torts arising from childhood sexual abuse and "specific historical and procedural facts" quite unlike anything presented here. Cisco v. Diocese of Steubenville, 123 So. 3d 83, 84 (Fla. 3d DCA 2013).

For these reasons, the final order and dismissal with prejudice are affirmed.

[2] Ms. Broz's initial slander of title claim, dismissed upon consideration of an earlier version of her complaint and a stipulation that the applicable statute of limitations for that claim was two years, was not realleged by her in the first amended complaint.

Third District Court of Appeal

State of Florida

Opinion filed April 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-771
Lower Tribunal No. 12-17915

Orlando Benitez, Jr.,
Appellant,

vs.

Eddy Leal, P.A.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge.

León Cosgrove and Scott B. Cosgrove and Jeremy L. Kahn and Aaron C. Brownell, for appellant.

Eddy Leal, for appellee.

Before SALTER, SCALES and LINDSEY, JJ.

SALTER, J.

Orlando Benitez, Jr. ("Client"), appeals a final order imposing a charging lien[1] asserted by attorney Eddy Leal and his professional association, Eddy Leal, P.A. (collectively, "Attorney"). The order awarded the Attorney a charging lien against the Client for $29,459.91, plus interest. For the reasons which follow, we reverse the order and vacate the charging lien, without prejudice to the Attorney's rights to pursue collection of his unsecured claim for fees against his former client.

The underlying circuit court case was a 2012 commercial mortgage foreclosure case brought by the Client, initially represented by the Attorney, against a borrower. The Client obtained a pretrial order requiring the borrower to make monthly payments during the pendency of the foreclosure action, as provided by section 702.10(2)(f), Florida Statutes (2012). The Attorney then successfully represented the Client in an appeal of that pretrial order brought by the mortgagor.[2] On remand, the Client was awarded a final judgment of attorneys' fees and costs in the amount of $29,459.91 for the Attorney's successful representation in the appeal.

---

[1] The final order sought to be reviewed was entered October 30, 2017, shortly before the trial judge retired. Thereafter, a motion for rehearing was filed by the Client and granted by a successor judge. The matter was reopened for an evidentiary hearing, in the successor judge's order of December 14, 2017. On March 30, 2018, a third judge determined that the successor judge lacked jurisdiction to review or rehear the final order under Groover v. Walker, 88 So. 2d 312 (Fla. 1956), and reinstated that final order. The Client's timely appeal of all three orders followed.

[2] Andros Dev. Corp. v. Benitez, 178 So. 3d 918 (Fla. 3d DCA 2015). This Court dismissed the appeal for lack of jurisdiction.

In October 2016, the Attorney moved to withdraw from further representation of the Client. Neither the motion to withdraw nor the order granting it disclosed any claim for unpaid fees or for a lien on the Client's judgment in the case, any proceeds of collection, or any other property of the Client.

In February 2017, successor counsel for the Client obtained a final judgment of foreclosure against the borrower and two guarantors.[3] A week later, the Attorney filed and served a notice of filing and asserting a charging lien by Attorney "on all judgments rendered in the [foreclosure case], and on all money due from any and all Defendants on any such judgments, and any and all assets, property, money, proceeds retained, receive, or recovered by [the Client] or any of his assigns in connection with this matter."

The Attorney attached to that notice a copy of the Client's answers to interrogatories (executed before the Attorney's withdrawal from representation of the Client) in which the Client disclosed that he had not paid the Attorney the fees and costs incurred in the successful appeal, and that there was no written retainer or fee agreement between the Attorney and the Client regarding the underlying foreclosure and appeal.

---

[3] The final judgment, totaling $1,928,812.14, included a line item for attorneys' fees of $29,459.91, but did not differentiate between fees attributable to the Attorney and to successor counsel for the Client. The final judgment also specified that all sums comprising the total, including the attorneys' fees, were payable exclusively to the Client.

In March 2017, the trial court heard the Attorney's motion for a charging lien. The trial court marked up the form of order submitted by the Attorney; rather than granting or denying the motion, the trial court merely "recognize[d]" that the Attorney's motion for charging lien for attorneys' fees and costs had been filed on February 23, 2017, "as reflected on the docket." The trial court marked out a paragraph in the proposed order which would have specified that the Attorney "does have and recover a charging lien, together with statutory post-judgment interest from today, against [Client] for any and all money recovered from [the obligors in the underlying action] because of judgments assets, property, proceeds retained, received or recovered in this matter."

Seven months later, the Attorney filed an emergency motion for imposition of a charging lien and noticed it for a hearing three business days later. At that hearing, conducted only one day before the trial judge retired, the court proceeded with a non-evidentiary hearing on the motion. The transcript of the hearing indicates that the trial court thought it had already granted a charging lien.

The Client's successor counsel emphasized the need for an evidentiary hearing on the charging lien issues. After the non-evidentiary hearing, the Client submitted a response to the trial court raising various issues of fact: whether the Attorney was entitled to raise a charging lien; whether the Client's payments to the Attorney were properly credited; and whether the Client had rights to a setoff. The

Client also argued that the trial court lacked jurisdiction to impose a charging lien because the Attorney's notice and claim were untimely filed.

The trial court then entered the order imposing a charging lien. Following proceedings relating to a motion for rehearing, the order remained in effect, and this appeal followed.

Analysis

Our standard of review on the issue raised by the Client on subject matter jurisdiction is de novo. See Greenberg Traurig, P.A. v. Starling, 238 So. 3d 862, 864-65 (Fla. 2d DCA 2018). We also review de novo the legal sufficiency of the claim of lien, and the propriety of a determination of the claim without an evidentiary hearing. See Nieves v. Viera, 150 So. 3d 1236, 1238-39 (Fla. 3d DCA 2014).

We reject without extensive discussion the Attorney's contention that we lack jurisdiction because the Client's notice of appeal was untimely. The initial order granting a lien was indeed a final order, see Trontz v. Winig, 905 So. 2d 1026, 1027 (Fla. 4th DCA 2005), and the Client's motion for rehearing suspended rendition until a successor judge denied it (and, for the elimination of doubt, reaffirmed that the charging lien order "remains in full force and effect").

As to the claim of a charging lien itself, the Florida Supreme Court has held:

> To impose such a lien, the attorney must show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3)

> either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice.

Daniel Mones, P.A. v. Smith, 486 So. 2d 559, 561 (Fla. 1986). In that case, the Supreme Court also observed that such liens are creatures of common law, and are governed exclusively by case law.

In this case, there are two shortcomings in the Attorney's claim which require reversal. The first, a failure to timely notify the Client of the claim of lien, is preclusively fatal to the claim and we reverse and vacate the order on that basis. The Attorney did not file his notice of a purported charging lien until after the final judgment had been entered in favor of his former Client in the case. In Daniel Mones, P.A., the Florida Supreme court held that the claimant/attorney was obligated "to notify his clients in some way before the close of the original proceeding that he intended to pursue the charging lien." Id.

In Schur v. Americare Transtech, Inc., 786 So. 2d 46, 48 (Fla. 3d DCA 2001), this Court affirmed the denial of a charging lien as untimely. In that case, the attorney claiming the lien "did not pursue the charging lien before the entry of the final judgment," such that "the fourth requirement of timely notice had not been met" (referring to the fourth prerequisite for a charging lien as specified in Daniel Mones, P.A. and other cases). Id.

The Attorney responds with an argument that the final judgment was not truly final until the disposition of the borrowers' timely motions for rehearing and relief

from the final judgment under Florida Rules of Civil Procedure 1.530 and 1.540. We disagree. The pendency of such motions affects "rendition" of the final judgment for appellate purposes, but the Attorney was not a party to the case (and had withdrawn as counsel over a year earlier), had not moved to intervene or been allowed to do so, and had not objected to the trial court's determination of the liquidated amounts awarded in the final judgment. Further, the borrowers' motions for rehearing and relief from judgment were denied, such that the final judgment (entered before the Attorney's claim of a charging lien was asserted) was not affected.

The Attorney's "notice" was too late to permit the parties and the trial court to consider and determine it before the entry of the final judgment. We cannot speculate what adjustments, if any, might have been made to the sums claimed by the Client in the final judgment had the Attorney filed the claim of charging lien before the final judgment was considered and entered by the trial court.

The Attorney's "notice" appears to have recognized that the claim was untimely. The notice included a request that "if a judgment has been entered, [the Attorney] respectfully requests that this Court vacate the judgment until this Court adjudicates the charging lien." The Attorney did not advance this request before the trial court, and the trial court never vacated the final judgment to adjudicate the late-filed claim.

Although our resolution of the first issue, timeliness, is dispositive of the appeal, we also consider the second shortcoming raised by the Client so that it may be addressed on any further appellate review. That second shortcoming is the trial court's failure to conduct an evidentiary hearing before approving the imposition of the Attorney's charging lien.

There is no written agreement between the Attorney and Client regarding the fees to be charged, the terms and timing of payment, or any specific funding source.[4] There was no admissible evidence that there was any "express or implied understanding for payment of attorney's fees out of the recovery." Daniel Mones, P.A., 486 So. 2d at 561. While represented by the Attorney, however, the Client did engage in conduct, and he signed interrogatory answers, acknowledging his obligation to the Attorney for the appellate attorneys' fees actually awarded by the trial court after remand. But that conduct and the interrogatory responses did not address any lien rights, or particular funds or property as a source of secured recovery, as against the Client. Any implication that the foreclosure itself, and any property or payment recovered in that lawsuit, would fund the liability to the

[4] In this case, as in other reported and unreported disputes between lawyers and clients, there is a teaching point that lawyers should heed their own usual advice to "get it in writing." In the case of a fee contingent in whole or in part on a recovery for the client, of course, the agreement is only enforceable if "such fee agreement is reduced to a written contract, signed by the client and by a lawyer for the lawyer or for the law firm representing the client." R. Regulating Fla. Bar 4-1.5(f)(2).

Attorney, would have required an evidentiary hearing (and thus reversal and remand by this Court). The trial court's conclusion that "an evidentiary hearing will serve no purpose other than to unfairly delay the imposition of a charging lien" includes no citation to authority and does not withstand appellate scrutiny of the record.

For these reasons, we reverse and vacate the final order imposing a charging lien against the Client for the benefit of the Attorney and authorizing execution to collect the lien. This disposition is without prejudice to the Attorney to pursue payment of any allegedly unpaid fees and costs from his former client as an unsecured claim, though we express no opinion regarding the merits of any such action.

Third District Court of Appeal

State of Florida

Opinion filed April 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1013
Lower Tribunal No. 15-9538

Keys Country Resort, LLC, et al.,
Appellants,

vs.

1733 Overseas Highway, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jacqueline Hogan Scola, Judge.

Law Offices of Scott Alan Orth, P.A., and Scott Alan Orth (Hollywood), for appellants.

Lerman & Whitebook, P.A., and Carlos D. Lerman (Hollywood), for appellee.

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

LOGUE, J.

Keys Country Resort, LLC, and 1733-1777 Overseas Highway, LLC (hereinafter "Keys Country") appeal from a final summary judgment for reformation entered in favor of 1733 Overseas Highway, LLC ("Overseas Highway"). While the affidavits filed by Keys Country met its burden as the movant for summary judgment, the affidavits filed by Overseas Highway also met their burden as the opponents by identifying a genuine issue of material fact in dispute. Because the disputed issue of fact can only be resolved by trial, we reverse.

Background

This appeal arises from a dispute over whether certain real property, referred to as the bay bottom parcel, was inadvertently omitted from a mortgage. Keys Country purchased four adjacent parcels of property in Vaca Key consisting of three upland properties and one bay bottom parcel. The four parcels became unified under a single title. Later, in 2005, Keys Country obtained a development loan from Premier American Bank (the "Lender"). The mortgage contained the legal descriptions of the upland parcels, but not the bay bottom parcel. The mortgage was modified four times, but the legal description of the bay bottom parcel was never added. Keys Country defaulted in 2009, and the Lender obtained a final judgment of foreclosure. The property foreclosed upon was subsequently conveyed several times in deeds that did not reference the bay bottom parcel.

In 2015, the Lender filed suit to reform the mortgage to include the bay bottom parcel and for reforeclosure.[1] The Lender argued that omission of the bay bottom parcel was the result of a scrivener's error caused by mutual mistake, and moved for summary judgment. In support, the Lender submitted the affidavit of Jose L. Pruna, a Loan Officer for Premier American Bank. Mr. Pruna stated that the Loan Approval Form for the first mortgage included a legal description of the bay bottom parcel and that "at the time of closing, it was the intent of the [Lender] to encumber the Uplands and the Bay Bottom." He swore the Lender did not discover the omission until 2013, that the "omission was a mistake," and "[a]t all times from the origination of the transaction described in the Loan Approval Form to the present, it had been the intention of the [Lender] to receive a Mortgage for the Uplands and Bay Bottom."

The Lender also submitted evidence that Keys Country stopped treating the bay bottom parcel as an asset after the original foreclosure. Among other things, the Lender submitted evidence that Keys Country and its officers had not listed the bay bottom parcel as an asset in various matters filed after the foreclosure including tax

[1] The names of the parties have changed in the course of the litigation. The Lender, Premier American Bank, the original plaintiff in the foreclosure action, changed its name to Florida Community Bank. Florida Community Bank later transferred the parcels to a related company, FCB Keys Country. FCB Keys Country sold the properties to Overseas Highway which was ultimately substituted into the case as plaintiff as successor-in-interest to FCB Keys Country.

returns, bankruptcy filings, divorce disclosures, and the documents dissolving Keys Country.

In opposition, Keys Country submitted the affidavit of Sandy Segall, a principal of Keys Country. According to Mr. Segall, the absence of the legal description of the bay bottom parcel from the mortgage and its modifications was not an error. To the contrary, he avers, Keys Country never intended to mortgage the bay bottom parcel as part of the loan. The intent was to develop the bay bottom separately and, regardless, the bay bottom had certain environmental issues that prevented the Lender from accepting it as collateral. He explained that the bay bottom parcel was absent from the various tax filings and disclosures because he and others simply forgot that Keys Country owned the bay bottom parcel, likely because its value at those times was minimal.

The trial court granted summary judgment on the reformation claim. The Lender then moved for summary judgment on the reforeclosure claim, which the trial court also granted. This appeal followed.

Analysis

This Court reviews a trial court's ruling on a motion for summary judgment de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Id. Summary

judgment "is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). Because summary judgment tests the sufficiency of the evidence to justify a trial, it "is proper only if, taking the evidence and inferences in the light most favorable to the non-moving party, and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law." Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015).

A court considering summary judgment must avoid two extremes. On one hand, a "party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict." Perez-Rios v. Graham Cos., 183 So. 3d 478, 479 (Fla. 3d DCA 2016) (quoting Martin Petroleum Corp. v. Amerada Hess Corp., 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000)). On the other hand, "a motion for summary judgment is not a trial by affidavit or deposition. Summary judgment is not intended to weigh and resolve genuine issues of material fact, but only identify whether such issues exist. If there is disputed evidence on a material issue of fact, summary judgment must be denied and the issue submitted to the trier of fact." Perez–Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017).

The overarching issue in this case is whether the absence of a legal description for the bay bottom parcel from the original mortgage and its subsequent modifications was intentional or due to a mutual mistake. We hold that the summary judgment evidence submitted by the Lender was sufficient to meet its burden as movant for summary judgment. It therefore became the burden of the Keys Country, as the party opposing the motion, either to (1) file an affidavit indicating they needed additional time to take identified discovery, pursuant to subsection (f) of the summary judgment rule, Fla. R. Civ. P. 1.510.; or (2) file "summary judgment evidence on which the adverse party relies," pursuant to subsection (c) of the rule.

Keys Country chose the second option and filed affidavits in opposition. In this situation, the law of Florida shifts the burden to present evidence from the movant to the party opposing summary judgment:

> If the moving party presents evidence to support the claimed non-existence of a material issue, he will be entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result - that is, evidence sufficient to generate an issue on a material fact. When analyzed in this fashion the summary judgment motion may be categorized as a "pre-trial motion for a directed verdict." At least it has most of the attributes of a directed verdict motion.
>
> The initial burden, therefore, is upon the movant. When he tenders evidence sufficient to support his motion, then the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. The movant, however, does not initially carry the burden of exhausting the evidence pro and con, or even examining all of his opponent's

> witnesses. To fulfill his burden he must offer sufficient admissible evidence to support his claim of the non-existence of a genuine issue. If he fails to do this his motion is lost. If he succeeds, then the opposing party must demonstrate the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented. If he fails in this, he must suffer a summary judgment against him.

Harvey Bldg., Inc. v. Haley, 175 So. 2d 780, 782-83 (Fla. 1965) (citations omitted).[2]

In this regard, the Rule requires that "opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein." Fla. R. Civ. P. 1.510(e). In short, the affidavits opposing summary judgment must identify "admissible evidence that creates a genuine issue of material fact." Panzera v. O'Neal, 198 So. 3d 663, 665 (Fla. 2d DCA 2015) (citing Byrd v. Leach, 226 So. 2d 866, 868 (Fla. 4th DCA 1969)). The purpose of this requirement is "to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." Alvarez v. Fla. Ins. Guar. Ass'n, Inc., 661 So. 2d 1230,

[2] Harvey Building has been continuously cited for over sixty years and remains the black letter law today. See, e.g., The Fla. Bar v. Mogil, 763 So. 2d 303, 307 (Fla. 2000) (citing Harvey Building with approval); Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979) (same); Tank Tech, Inc. v. Valley Tank Testing, L.L.C., 244 So. 3d 383, 389 (Fla. 2d DCA 2018) (same); Cong. Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co., 105 So. 3d 602, 610 (Fla. 4th DCA 2013) (same); Juarez v. New Branch Corp., 67 So. 3d 1159, 1160 (Fla. 3d DCA 2011) (same); Cassady v. Moore, 737 So. 2d 1174, 1178 (Fla. 1st DCA 1999) (same); Magma Trading Corp. v. Lintz, 727 So. 2d 377, 378 (Fla. 5th DCA 1999) (same).

1232 (Fla. 3d DCA 1995) (quoting Pawlik v. Barnett Bank of Columbia Cty., 528 So. 2d 965, 966 (Fla. 1st DCA 1988)).

Here, the affidavit of Mr. Segall contained testimony clearly be admissible at trial. According to Mr. Segall, the upland parcels were to be developed separately from the bay bottom parcel. The mortgage was obtained only to develop the upland parcels. The bay bottom parcel was not included in the mortgage because it was never intended to be included. Along with the simple fact that the legal description of the bay bottom parcel was never included in the mortgage or subsequent modifications, this testimony was sufficient to create a genuine issue of material fact as to whether the absence of the legal description of the bay bottom parcel was intentional or a mutual mistake. Questions regarding the relative credibility or weight of the evidence cannot be resolved on summary judgment, but must be left for the trier of fact. Hernandez v. United Auto. Ins. Co., 730 So. 2d 344, 345 (Fla. 3d DCA 1999) ("In ruling on a motion for summary judgment, it is well-established that the court may neither adjudge the credibility of the witnesses nor weigh the evidence.").

Because we conclude that the trial court erred in granting summary judgment of reformation, we need not reach the other issues raised on appeal.

Reversed and remanded.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NEIL J. WEINER,
Appellant,

v.

JENNIFER MAULDEN,
Appellee.

No. 4D18-2170

[April 10, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John B. Bowman, Judge; L.T. Case No. CACE15-019337.

Warren B. Kwavnick of Cooney Trybus Kwavnick Peets, PLC, Fort Lauderdale, for appellant.

Scott T. McCullough of McCullough & Leboff, P.A, Davie, for appellee.

KLINGENSMITH, J.

Appellant Neil Weiner, the defendant in the action below, appeals the trial court's denial of his motion for attorneys' fees resulting from a proposal for settlement served upon Jennifer Maulden. For the reasons set forth below, we reverse the order denying attorneys' fees and remand for the trial court to determine a reasonable fee to be awarded.

Two plaintiffs, Maulden and David Holzberg, filed separate lawsuits against Appellant due to an automobile accident. Appellant moved to consolidate the cases. The trial court granted the motion, but only for the purposes of discovery, and later granted Appellant's second motion to consolidate the cases for trial. Maulden moved for reconsideration of the consolidation or, in the alternative, asked that the court impanel two separate juries.

While Maulden's motion for reconsideration was pending, Appellant served separate proposals for settlement on Maulden and Holzberg. He offered Maulden $51,000 to resolve all of her claims, including costs and interest, but excluding attorneys' fees and punitive damages, which were not part of the claim in dispute. Notably, Appellant sent the proposal to

Maulden under the specific case caption and case number associated with her case without any reference to Holzberg's case.[1] Maulden failed to accept the proposal for settlement within thirty days.

Maulden's case went to trial. The jury returned a verdict in favor of Maulden for $21,320, which was later reduced to $5,497.20 after set-offs. Appellant then moved for entitlement to attorneys' fees under section 768.79, Florida Statutes (2016), which the trial court denied. This appeal follows.

A party's entitlement to attorneys' fees is reviewed *de novo*. *See Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 852 (Fla. 2016).

According to section 768.79(1):

> In any civil action for damages . . . if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him . . . from the date of filing of the offer if . . . the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

"[T]he offer of judgment statute creates an entitlement to attorneys' fees when the statutory and procedural requirements have been satisfied. The mandatory language of section 768.79 reinforces the notion that a proper offer automatically creates that entitlement, unless the offer is made in bad faith." *Anderson*, 202 So. 3d at 856 (citations omitted). "Thus, an offer that complies with section 768.79 and [Florida Rule of Civil Procedure] 1.442 creates a 'mandatory right' to collect attorneys' fees." *Id.* (quoting *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995)).

There is no dispute that the amount awarded to Maulden following trial was sufficient to trigger Appellant's entitlement to fees under section 768.79(1). However, Maulden claims that Appellant's proposal for settlement failed to apportion the total amount between her and Holzberg, thus leaving her reasonably uncertain whether her acceptance would extinguish Holzberg's claims in light of the consolidation. Maulden argues this proposal was a statutorily ambiguous "joint offer" that failed to

[1] Appellant also sent Holzberg a proposal for settlement that was virtually identical to the proposal he sent to Maulden, aside from the names of the parties and the total settlement amount. Holzberg accepted Appellant's proposal just prior to trial.

apportion the damages amount among the offerees, thus making it invalid. We disagree.

"The supreme court has recently held that 'when a single offeror submits a settlement proposal to a single offeree . . . *and the offer resolves pending claims by or against additional parties who are neither offerors nor offerees*, it constitutes a joint proposal that is subject to the apportionment requirement . . . ." *Miley v. Nash*, 171 So. 3d 145, 149 (Fla. 2d DCA 2015) (emphasis added) (quoting *Audiffred v. Arnold*, 161 So. 3d 1274, 1280 (Fla. 2015)). "A [joint] proposal for settlement not strictly conforming to rule 1.442(c)(3)'s apportionment requirement is unenforceable." *Peltz v. Tr. Hosp. Int'l, LLC*, 242 So. 3d 518, 520 (Fla. 3d DCA 2018).

Maulden's argument fails because the trial court consolidated the cases for two specific purposes: discovery and trial. Her claims did not merge with Holzberg's claims under the consolidation orders because "[w]here cases are consolidated for discovery and trial, they do not lose their individual identities as distinct, separately filed actions." *SPS Dev. Co., LLC v. DS Enters. of Palm Beach, Inc.*, 970 So. 2d 495, 497 (Fla. 4th DCA 2007); *accord Wagner v. Nova Univ., Inc.*, 397 So. 2d 375, 377 (Fla. 4th DCA 1961). As expressly stated in the consolidation orders, the parties' cases against Appellant, *and not their individual claims*, were consolidated. Maulden and Holzberg each retained their independent causes of action.

Further, the proposal explicitly stated that acceptance would resolve all damages "in this action." This language refers to the case number and the named parties identified in the proposal. Appellant's proposal did not mention any other pending claims, cases, or parties that would be affected by her acceptance. It also did not mention Holzberg, nor did the case style or caption of her proposal include Holzberg's name or case number. Because the express terms of Appellant's proposal only addressed Maulden and *her* claims, its language created no ambiguity as to what would be settled. Nor would a reasonable reading of its terms create doubt about whether Maulden's acceptance of the proposal would also settle Holzberg's claims.

Therefore, we conclude that Appellant's proposal for settlement served upon Maulden was proper under sections 768.79(1) and (2) and rule 1.442(c). We reverse the trial court's order denying Appellant's entitlement to attorneys' fees under the proposal for settlement and remand for proceedings consistent with this opinion.

Reversed and remanded with instructions.

MAY 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

ROYAL PALMS SENIOR APARTMENTS LIMITED PARTNERSHIP,

Appellant,

v.

Case No. 5D18-2182

CONSTRUCTION ENTERPRISES, INC. OF TENNESSEE D/B/A CONSTRUCTION ENTERPRISES, INC. FORUM ARCHITECTURE & INTERIOR DESIGN INC., BH-FFS, LLC D/B/A BRADCORP FLORIDA II, LLC, ET AL.,

Appellees.

_____/

Opinion filed April 12, 2019

Nonfinal Appeal from the Circuit Court for Brevard County,
Jeffrey Mahl, Judge.

James. C. Prichard, Evan J. Small, Megan A. Picataggio, and Greg K. Demers, of Ball Janik LLP, Orlando, for Appellant.

Jeffrey M. Paskert and Dara L. Dawson, of Mills Paskert Divers P.A., Tampa, for Appellee, Construction Enterprises Inc. of Tennessee d/b/a Construction Enterprises, Inc.

No Appearance for Other Appellees.

COHEN, J.

Royal Palms Senior Apartments Limited Partnership ("Royal Palms") appeals the nonfinal order entered in favor of Construction Enterprises Inc. of Tennessee d/b/a Construction Enterprises, Inc. ("CEI") staying Royal Palms' lawsuit pending mediation and arbitration. Royal Palms argues that the trial court erred in finding that a valid arbitration agreement existed and that its claim was subject to arbitration.[1] We affirm the trial court's finding that the parties had a valid agreement to arbitrate certain claims. However, because it is unclear whether Royal Palms' claim was one subject to arbitration, we remand for a determination of that issue.

In December 2006, the parties entered into a contract for CEI to construct the Royal Palms Senior Apartments. The agreement was comprised of the "AIA Document A201–1997 General Conditions of the Contract for Construction" ("General Conditions") and a supplementary document ("Supplementary Conditions"), which modified and deleted portions of the General Conditions and controlled if the two documents conflicted.

In October 2017, Royal Palms filed a complaint against CEI alleging negligence, vicarious liability, breach of contract, and breach of applicable building codes. CEI moved to dismiss or alternatively, to compel mandatory and exclusive dispute resolution procedures, including mediation and arbitration. After a hearing on CEI's motion, the trial court determined that the mediation and arbitration provisions of the General Conditions were binding and enforceable. It stayed the case and ordered mediation followed by arbitration if mediation was unsuccessful. This appeal followed.

[1] Royal Palms also argues that the trial court applied an improper standard in determining that a valid arbitration agreement existed. The trial court never announced what standard it used in making its determination, and thus, this argument lacks merit.

"Under both federal statutory provisions and Florida's arbitration code, there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (quoting Terminix Int'l Co. v. Ponzio, 693 So. 2d 104, 106 (Fla. 5th DCA 1997)). Here, Royal Palms' arguments implicate only the first two prongs of the Seifert test.

Although courts generally favor arbitration, "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." Id. (citing Seaboard Coast Line R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (Fla. 1982)). Thus, while ambiguities regarding prong two—the scope of an arbitration clause—should be resolved in favor of arbitration, prong one—the existence of an enforceable arbitration clause—should not. See Seaboard, 690 F.2d at 1352 ("Although Federal policy requires us to resolve any doubt about the application of an arbitration clause in favor of arbitration, the Federal policy cannot serve to stretch a contract beyond the scope originally intended by the parties." (citations omitted)).

While the Supplemental Conditions eliminated some of the General Conditions related to arbitration, multiple provisions contemplating arbitration remained. "An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." Nabbie v. Orlando Outlet Owner, LLC, 237 So. 3d 463, 466 (Fla. 5th DCA 2018) (citing Seabreeze Rest., Inc. v. Paumgardhen, 639 So. 2d 69, 71 (Fla. 2d DCA 1994)).

Pursuant to the General Conditions as modified by the Supplementary Conditions, the "exclusive procedure[]" for resolving claims arising before final payment is due is to submit such claims to the Architect for a final, binding decision. If the parties are not satisfied with the Architect's decision, they may mediate the claim. If mediation is unsuccessful, the only remaining option is to arbitrate the claim. Thus, because the General Conditions as modified by the Supplementary Conditions require arbitration of claims arising before final payment is due if the parties are unsatisfied with the Architect's decision and mediation is unsuccessful, we find that the trial court did not err in determining that the parties had a valid agreement to arbitrate.

However, the contract is silent regarding the procedure for resolving claims that arise after final payment is due. The provisions comprising the "exclusive procedures" for resolving such claims reference litigation, mediation, and arbitration. Because those claims are not required to be submitted to the Architect, they are not subject to arbitration if mediation is unsuccessful. A party cannot be forced to arbitrate a claim it did not agree to arbitrate. See Seifert, 750 So. 2d at 633 (citing Seaboard, 690 F.2d at 1352).

The record is less clear regarding the second prong of the Seifert test—whether Royal Palms' claim was an arbitrable issue. The trial court's order mandating mediation followed by arbitration did not include a determination of whether Royal Palms' claim arose before or after final payment was due. Thus, it is unclear whether Royal Palms was required to arbitrate its claim. Accordingly, we remand for a determination of that matter and proceedings, if any, consistent with this opinion.

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

BERGER and EDWARDS, JJ., concur.