Florida Real Property and Business Litigation Report

Volume XII, Issue 16
April 22, 2019
Manuel Farach

Glass v. Nationstar Mortgage, LLC, Case No. SC17-1387 (Fla. 2019).
Jurisdiction was improvidently granted in the case. The opinion of January 4, 2019 awarding attorney's fees notwithstanding lack of connexity between the parties is withdrawn, and jurisdiction is discharged.

Casasanta v. Sailshare 296 LLC, Case No. 1D17-4862 (Fla. 1st DCA 2019).
The following is a sufficient pre-injury exculpatory clause in an "as is" residential lease:

> The Lessee(s) acknowledge and agree that they have independently examined and inspected the premises and are fully satisfied with the condition of the cleanliness and repair. The Lessee(s) agree that they waive any claims, rights or actions against Landlord, Agent or other person or entity for any alleged failure to disclose any defects in the premises. Lessee(s) further stipulate that they are leasing the property in "As-Is" condition and that no representations as to the present condition or future repair of the premises have been made except for those agreed upon in writing either made part of this agreement or by separate instrument.

Maguire-Ress v. Stettner, Case No. 4D18-2742 (Fla. 4th DCA 2019).
A party seeking summary judgment in a replevin action where the defense states that the items in question were gifted must set forth evidence as to his/her own intent (donative or not).

CalAtlantic Group, Inc. v. Dau, Case No. 5D18-1281 (Fla. 5th DCA 2019).
Whether or not the mutuality provision of Florida Statute section 57.105(7) applies depends on the cause of action sought, not on the outcome of the litigation. The following provision entitles defendants to an award of fees in homeowner association litigation:

> Section 1. Violation. If any person claiming by, through or under Declarant, or its successors or assigns, or any other person, shall violate or attempt to violate any of the covenants herein, it shall be lawful for the Declarant or any person or persons owning real estate subject to these covenants to bring any proceeding at law or in equity against the person or persons violating or attempting to violate any such covenant including action to enjoin or prevent him or them from so doing, or to cause the violation to be remedied and to recover damages or other dues for such violation. If the party or parties bringing any such action prevail, they shall be entitled to recover from the person or persons violating the restrictions the costs incurred by such prevailing party, including reasonable attorney's fees and disbursements incurred through all appellate levels. Invalidation of any of these covenants by judgment of court order shall in no way affect any of the other covenants and provisions, contained herein, which shall remain in full force and effect.

Supreme Court of Florida

No. SC17-1387

MARIE ANN GLASS,
Petitioner,

vs.

NATIONSTAR MORTGAGE, LLC, etc., et al.,
Respondents.

April 18, 2019

PER CURIAM.

Respondent's Motion to Recall Mandate is hereby granted. The opinion of this Court dated January 4, 2019, is hereby withdrawn, and this opinion is substituted in its place. *See* § 43.44, Fla. Stat. (2018) ("An appellate court may, as the circumstances and justice of the case may require, reconsider, revise, reform, or modify its own opinions and orders for the purpose of making the same accord with law and justice."); Fla. R. Jud. Admin. 2.205(b)(5). In light of the substituted opinion, we hereby deny Respondent's Motion for Clarification.

We initially accepted review of the decision of the Fourth District Court of Appeal in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA

2017), based on express and direct conflict with the decision of the First District Court of Appeal in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. 1st DCA 2008). Upon further consideration, we conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this review proceeding.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.
LABARGA, J., dissents.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fourth District - Case No. 4D15-4561

(Broward County)

F. Malcolm Cunningham, Jr. and Amy L. Fischer of The Cunningham Law Firm, P.A., West Palm Beach, Florida,

for Petitioner

Marc James Ayers of Bradley Arant Boult Cummings LLP, Birmingham, Alabama,

for Respondent

Nicholas A. Vidoni of Watson, Soileau, DeLeo & Burgett, P.A., Cocoa, FL; and Beau Bowin of Bowin Law Group, Melbourne, Florida,

for Amicus Curiae Brevard County Legal Aid, Inc.

Michael Wrubel of Michael Jay Wrubel, P.A., Davie, Florida,

for Amicus Curiae Jerry Warren and Michael Jay Wrubel, P.A.

Brian K. Korte of Korte & Wortman, P.A., West Palm Beach, Florida,

for Amicus Curiae Korte & Wortman, P.A.

Peter Ticktin, Jamie Alan Sasson, and Kendrick Almaguer of The Ticktin Law Group, P.L.L.C., Deerfield Beach, Florida,

for Amicus Curiae The Ticktin Law Group, P.L.L.C.

Mandy L. Mills and Matt Bayard of Legal Services of Greater Miami, Inc., Miami, Florida; Lynn Drysdale of Jacksonville Area Legal Aid, Inc., Jacksonville, Florida; and Alice M. Vickers of Florida Alliance for Consumer Protection, Inc., Tallahassee, Florida,

for Amici Curiae Florida Legal Aid and Legal Services Consumer Group, Legal Services of Greater Miami, Inc., Jacksonville Area Legal Aid, Inc., and Florida Alliance for Consumer Protection, Inc.

Geoffrey E. Sherman, Jacquelyn Trask, Yanina Zilberman, and Roy D. Oppenheim of Oppenheim Pilelsky, P.A., Weston, Florida; and Bruce S. Rogow and Tara A. Campion of Bruce S. Rogow, P.A., Fort Lauderdale, Florida,

for Amicus Curiae Frederick and Janelle Sabido and Oppenheim Pilelsky, P.A.

Robert R. Edwards of Choice Legal Group, P.A., Fort Lauderdale, Florida; David Rosenberg of Robertson, Anschutz & Schneid, P.L., Boca Raton, Florida; Marissa M. Yaker of Padgett Law Group, Tallahassee, Florida; and Andrea R. Tromberg of Tromberg Law Group, P.A, Boca Raton, Florida,

for Amicus Curiae American Legal and Financial Network

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-4862

ELIZABETH CASASANTA,

Appellant,

v.

SAILSHARE 296 LLC, and
WILSON MINGER AGENCY, INC.,

Appellees.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

April 16, 2019

ON MOTION FOR WRITTEN OPINION

PER CURIAM.

We have before us Appellant's motion for written opinion. We grant Appellant's motion, withdraw our former opinion from December 27, 2018, and substitute this opinion in its place.

Background

Appellant challenges final summary judgment orders granted in favor of Appellees, arguing that the exculpatory clause in a lease agreement was ambiguous and therefore unenforceable, and void as a matter of public policy.

In 2015, Appellant and her husband entered into a residential lease agreement for a single-family home. Appellant inspected the

property and agreed to take it in an "as-is" condition. While living on the property, Appellant brought a negligence action against Appellee Sailshare 296 LLC, the fee simple title owner of the property, and against Appellee Wilson Minger Agency, Inc., the property manager, alleging that a picket fence on the property collapsed, causing injury to Appellant.

In separate motions for summary judgment, both Appellees argued that the exculpatory clause in the lease agreement released them from liability for Appellant's injuries. The exculpatory clause at issue here reads:

> The Lessee(s) acknowledge and agree that they have independently examined and inspected the premises and are fully satisfied with the condition of the cleanliness and repair. The Lessee(s) agree that they waive any claims, rights or actions against Landlord, Agent or other person or entity for any alleged failure to disclose any defects in the premises. Lessee(s) further stipulate that they are leasing the property in "As-Is" condition and that no representations as to the present condition or future repair of the premises have been made except for those agreed upon in writing either made part of this agreement or by separate instrument.

The trial court granted final summary judgment in favor of Appellees, finding that the exculpatory language clearly and unambiguously relieved them of any liability for negligence. Appellant timely appealed the trial court's orders.

Analysis

The enforceability of a pre-injury exculpatory clause that does not contain express language releasing a part of liability for negligence is reviewed de novo. *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 260 (Fla. 2015). In *Sanislo*, the supreme court held that "the absence of the terms 'negligence' or 'negligent acts' in an exculpatory clause does not render [an] agreement per se ineffective to bar a negligence action." *Id.* at 271.

The lease agreement in this case supports the trial court's decision to grant summary judgment. Appellant and her husband

agreed upfront that they had independently examined and inspected the premises. They raised no complaints about the short, decorative picket fence out front. According to the lease, "no damage existed . . . [and the lessees were] fully satisfied with the [property's] condition of . . . repair." There was no indication, for instance, of rotting wood, missing slats, or any improper leaning or weakness with the fence. Having acknowledged no problems, lessees rented the property "As-Is" and broadly "waive[d] any claims, rights or actions against the Landlord, Agent or other person or entity for any alleged failure to disclose any defects in the premises." With these terms, we conclude that Appellant waived her claim against Appellees for failing to safely maintain, inspect, and repair a "dangerous" picket fence. *See Sanislo*, 157 So. 3d at 271.

In addition, Appellant's injury did not arise from a defect or a dangerous condition. The fence's modest features were "as apparent to the tenant as they were to the landlord." *Menendez v. Palms W. Condo. Ass'n*, 736 So. 2d 58, 62 (Fla. 1st DCA 1999). Rather, the accident and injury arose from Appellant's poor decision to use an insubstantial decorative fence as a seat. The three-foot fence was made with pointy, dog-eared pickets protruding from the top and was obviously not meant to support her weight. *See id.* at 61 (limiting the duty to correct defects or dangerous conditions to matters involving "inherently unsafe or dangerous conditions that are not readily apparent to the tenant").

AFFIRMED.

ROBERTS and OSTERHAUS, JJ., concur; B.L. THOMAS, C.J., concurs in result only with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, C.J., concurring in result only.

I disagree with the majority's holding that the exculpatory clause was enforceable, but I concur with the decision to affirm because the picket fence was not a dangerous defective condition and therefore summary judgment was correctly granted to Appellees.

The Exculpatory Clause

For an exculpatory clause to be considered unambiguous and therefore enforceable, "the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away." *Southworth & McGill, P.A. v. Southern Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. 1st DCA 1991). In *Sanislo v. Give Kids the World, Inc.*, the supreme court held that "the absence of the terms 'negligence' or 'negligent acts' in an exculpatory clause does not render [an] agreement per se ineffective to bar a negligence action." 157 So. 3d at 271. In *Sanislo*, however, although the clause did not use the word negligence, it expressly waived "any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages . . . and physical injury of any kind." *Id.* at 261. The supreme court held that this clause was unambiguous and therefore enforceable because it had no other reasonable meaning than to bar negligence actions. *Id.* at 271.

By contrast, the clause at issue here does not clearly state what suits are purportedly waived, and it makes no mention of injuries caused by negligence or of injuries at all. A person of ordinary intelligence reading this clause might believe that, by agreeing to "waive any claims, rights or actions against Landlord, Agent or other person or entity for any alleged failure to disclose any defects in the premises[,]" he or she was merely waiving potential breach of contract or warranty claims for property defects. Such an interpretation is even more reasonable given that the clause was written into the section of the lease describing the lessee's obligations for damage caused to the premises; the clause speaks of "cleanliness and repair" and contrasts responsibility for damage to the property with damage incurred by "ordinary wear and tear." A lessee could therefore reasonably infer that this

exculpatory clause governs his or her financial responsibility for repairs, not personal injury lawsuits.

I disagree with the majority's holding that the clause at issue is unambiguous. I would hold that the exculpatory clause could not serve as the basis for a final summary judgment.

Dangerous Defective Condition

In *Menendez v. The Palms West Condominium Ass'n, Inc.*, this Court held that the absence of a doorscope in an apartment door was not a defect or a dangerous condition, and that the features of the door were "as apparent to the tenant as they were to the landlord." 736 So. 2d 58, 62 (Fla. 1st DCA 1999). Because there was no defect, the defendant had no legal duty to correct any defect. *Id.* Although this Court acknowledged a landlord's duty to protect a tenant under section 83.51, Florida Statutes, the Residential Landlord and Tenant Act, we held that the Act did not impose a duty to install doorscopes. *Id.*

Similarly, in *Fitzgerald v. Cestari*, a young child was injured when she ran through a sliding glass door. 569 So. 2d 1258, 1258 (Fla. 1990). The supreme court held that the landlord of the property was "relieved from liability for failing to ascertain that the sliding glass door was not made of safety glass as required by the applicable building code." *Id.* at 1260. The supreme court approved the summary judgment in favor of the landlord, holding:

> An ordinary sliding glass door is not the type of "dangerous condition" which a landlord is in a better position than the tenant to guard against. The presence of a sliding glass door on the leased premises was clearly apparent to the lessees who, upon taking possession, controlled the manner in which it was used.

Id. at 1261.

Here, the picket fence was clearly apparent and was not the type of dangerous condition which the landlord was in a better position than the tenant to guard against. Appellant controlled the manner in which the fence was used, *see Fitzgerald*, 569 So. 2d at 1261, and it is a matter of common understanding that a picket

fence is not designed to support the full weight of a person. *See Youngblood v. Pasadena at Pembroke Lakes South, Ltd.*, 882 So. 2d 1097, 1098 (Fla. 4th DCA 2004) (affirming summary judgment because, as a matter of common understanding, a towel rack was not designed to support the weight of a person). Because the picket fence did not constitute a dangerous defective condition, I would affirm the trial court's orders granting summary judgment, under the tipsy coachman doctrine. *See Gladden v. Fisher Thomas, Inc.*, 232 So. 3d 1146, 1147 n.1 (Fla. 1st DCA 2017) ("The 'tipsy coachman' doctrine allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' if there is 'any basis which would support the judgment in the record.'") (quoting *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)).

Appellee Sailshare did not argue absence of defect in its summary judgment motion. *See Agudo, Pineiro & Kates, P.A. v. Harbert Constr. Co.*, 476 So. 2d 1311, 1315 n.3 (Fla. 3d DCA 1985) ("the 'right for the wrong reason' appellate maxim does not apply in summary judgment proceedings where the issue was never raised in the motion for summary judgment."). However, at the time of Appellee Sailshare's summary judgment hearing, Appellee Sailshare had adopted Appellee Wilson Minger Agency's lack-of-defect argument, and the legal outcome of the issue would apply equally to both Appellees. *See Bernard Marko & Assocs., Inc. v. Steele*, 230 So. 2d 42, 44 (Fla. 3d DCA 1970) (holding that procedural issues "in no way prejudiced" the plaintiff, "because the defendants occupied the same legal position relative to the grounds of the motion for summary judgment"). Thus, because the trial court could properly have granted summary judgment based on the lack of any dangerous or defective condition, I would affirm the orders below on that basis.

Jonathan D. Simpson of Simpson Law Firm, Fort Walton Beach, for Appellant.

Richard S. Johnson, Niceville, for Appellee Sailshare 296 LLC.

Lucian B. Hodges and Richard A. Fillmore of Luther, Collier, Hodges & Cash, L.L.P., Pensacola, for Appellee Wilson Minger Agency, Inc.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JEANNINE LARA MAGUIRE-RESS,
Appellant,

v.

BRETT STETTNER, individually, d/b/a **STETTNER INVESTMENT DIAMONDS,** and **STETTNER INDUSTRIES, INC.**
Appellees.

No. 4D18-2742

[April 17, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lisa S. Small, Judge; L.T. Case No. 50-2017-CA-005038-XXXX-MB/AH.

Eric A. Simon, Boca Raton, for appellant.

Thomas Regnier of Tom Regnier Appeals, P.A., Sunrise, for appellees.

LEVINE, J.

Appellee, a jewelry dealer, filed a replevin action seeking to recover sixteen items from appellant, his ex-girlfriend. The items included jewelry, decorative items, and other accessories valued by the ex-boyfriend at $200,000. The trial court granted summary judgment in favor of the ex-boyfriend, and the ex-girlfriend appealed raising several arguments. We find one of these arguments to have merit and reverse.

The parties began dating while the ex-girlfriend was in the midst of a divorce. The relationship eventually ended, and the ex-boyfriend filed a complaint to recover sixteen items from the ex-girlfriend that he claimed to have brought to the ex-girlfriend's home for her to use temporarily while they were dating. The items included a promise ring, pieces of art, fashion accessories, and jewelry. The ex-girlfriend claimed as a defense that the ex-boyfriend had in fact gifted her the items during the relationship. The ex-boyfriend responded that he never intended that the items be gifts.

The ex-boyfriend moved for summary judgment. In support of his motion, he cited the ex-girlfriend's deposition testimony from her divorce

case. During this deposition, the ex-girlfriend was asked about items she had received from the ex-boyfriend, who at the time was her new boyfriend:

> [Q]: And what items or personal property of Mr. Stettner's are in your house?
>
> . . . .
>
> [A]: There's an art piece that's like a crystal or a glass thing of a girl and a boy, there's a Tiffany ashtray, there's probably more like some art pieces.
>
> . . . .
>
> [Q]: Okay. Has he bought you gifts?
> [A]: I think.
> [Q]: Besides your ring.
> [A]: I think a bottle of perfume or something. Like little things like maybe perfume.

The ex-boyfriend contended that this deposition testimony contradicted the claim that the sixteen items were a gift by him and in fact demonstrated the ex-girlfriend's understanding that the items—including the glass sculpture, Tiffany ashtray, and art pieces—belonged to him and were not gifts. The ex-girlfriend maintains that the deposition testimony did not support summary judgment, as during the deposition she had merely minimized the number of gifts from the ex-boyfriend so as not to anger her husband at the time.

Our standard of review for an order granting summary judgment is 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 the moving party is therefore entitled to judgment as a matter of law. *Id.* "Summary judgment may be granted only where the facts are so crystallized that nothing remains but questions of law." *Vander Voort v. Universal Prop. & Cas. Ins. Co.*, 127 So. 3d 536, 538 (Fla. 4th DCA 2012).

"The party moving for summary judgment must factually refute or disprove the affirmative defenses [to summary judgment] raised, or establish that the defenses are insufficient as a matter of law." *770 PPR, LLC v. TJCV Land Tr.*, 30 So. 3d 613, 618 (Fla. 4th DCA 2010). Here, we find that the ex-boyfriend failed to "factually refute or disprove" the ex-girlfriend's gift defense. *See id.* The elements of that defense are "(1)

present donative intent, (2) delivery, and (3) acceptance by donee." *Sullivan v. Am. Tel. & Tel. Co.*, 230 So. 2d 18, 20 (Fla. 4th DCA 1969).

The ex-boyfriend's own summary judgment evidence—the deposition testimony—left open an issue of material fact as to donative intent. Specifically, the ex-girlfriend's divorce deposition stated that he gave her some "little things." It is not clear that these "little things" do not include any of the items listed in the complaint for replevin. Because "little things" might be understood to include some or all of the sixteen items at issue, there remains an issue of material fact: whether the ex-boyfriend in fact gave those items to the ex-girlfriend as a gift.

Because a genuine issue of material fact remained, summary judgment was improper. *See Aberdeen at Ormond Beach*, 760 So. 2d at 130. As there remains a material issue of fact as to whether the items were a gift, we reverse for further proceedings consistent with this opinion.

Reversed and remanded.

WARNER and GROSS, 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

CALATLANTIC GROUP, INC.,

Appellant,

v. Case No. 5D18-1281

WILLIAM S. DAU, VERONICA L. DAU AND MARK FEESER,

Appellees.

_____/

Opinion filed April 18, 2019

Appeal from the Circuit Court
for Lake County,
G. Richard Singeltary, Judge.

Theodore D. Estes and Justin A. Green, of Divine & Estes, P.A., Orlando, for Appellant.

Adam M. Trumbly and Derek A. Schroth, of Bowen/Schroth, Eustis, for Appellees.

PER CURIAM.

CalAtlantic Group, Inc. ("CalAtlantic") appeals the final order denying its motion for attorney's fees filed after the voluntary dismissal of the lawsuit initiated by William S. Dau, Veronica L. Dau, and Mark Feeser,[1] individually and as representatives of all similarly situated others ("Appellees"). We reverse.

[1] Appellees' counsel filed a notice informing this Court that Appellee, Mark Feeser, passed away on March 7, 2019. At the time of Mr. Feeser's death, this cause was ready for decision, and his death does not affect the disposition of this appeal. See Lowenstein v. U.S.

CalAtlantic is the developer for Waterside Pointe, a residential community in Lake County, Florida. Appellees are residents of Waterside Pointe and class representatives of similarly situated residents of the community. The original developer of Waterside Pointe, The Ryland Group, sold the community properties subject to the Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions of Waterside Pointe ("the Declaration"), which it drafted. Pursuant to the terms of the Declaration, the word "Declarant" refers to The Ryland Group and "its successors and assigns."

The Declaration contains two provisions providing for attorney's fees:

> **ARTICLE IX**
> **USE RESTRICTIONS**
>
> . . . .
>
> Section 1. Violation. If any person claiming by, through or under Declarant, or its successors or assigns, or any other person, shall violate or attempt to violate any of the covenants herein, it shall be lawful for the Declarant or any person or persons owning real estate subject to these covenants to bring any proceeding at law or in equity against the person or persons violating or attempting to violate any such covenant including action to enjoin or prevent him or them from so doing, or to cause the violation to be remedied and to recover damages or other dues for such violation. If the party or parties bringing any such action prevail, they shall be entitled to recover from the person or persons violating the restrictions the costs incurred by such prevailing party, including reasonable attorney's fees and disbursements incurred through all appellate levels. Invalidation of any of these covenants by judgment of court order shall in no way affect any of the other covenants and provisions, contained herein, which shall remain in full force and effect.
>
> . . . .

Bank Nat'l Ass'n, 253 So. 3d 86, 87 n.1 (Fla. 2d DCA 2018) (citations omitted); Colucci v. Colucci, 309 So. 2d 67, 67 (Fla. 2d DCA 1975).

ARTICLE XII
ENFORCEMENT OF NON-MONETARY DEFAULTS

. . . .

> Section 7. Enforcement By or Against Persons. In addition to the foregoing, the Declaration may be enforced by the Declarant, the Association, or any Member by any procedure at law or in equity against any Person violating or attempting to violate any provisions herein, to restrain any violation, to require compliance with the provisions contained herein, to recover damages, or to enforce any lien created herein. The expense of any litigation to enforce this Declaration shall be borne by the Person against whom enforcement is sought, provided such proceeding results in a finding that such Person was in violation of the Declaration. The prevailing party in any such action shall be entitled to recover its reasonable attorneys' fees, costs and disbursements through the appellate level.

Appellees filed a complaint against CalAtlantic as "successor by merger to The Ryland Group." They sought specific performance of an alleged oral contract they entered into with CalAtlantic and a declaratory judgment finding that CalAtlantic breached the Declaration by failing to adequately maintain the Waterside Pointe common areas and amenities. After CalAtlantic filed a motion to dismiss but before it answered Appellees' amended complaint, Appellees voluntarily dismissed the lawsuit.

CalAtlantic filed a motion for entitlement of costs and attorney's fees, alleging in part that it was entitled to such pursuant to the Declaration and section 57.105(7), Florida Statutes (2017). The trial court denied CalAtlantic's motion on the bases that: it did not bring an action to prevent, remedy, or recover damages by a party "violating or attempting to violate" the Declaration; there was no finding of a violation of the Declaration; and there was no order adjudicating the case on the merits.

On appeal, CalAtlantic argues that the trial court erred in its interpretation of the attorney's fees provisions of the Declaration and in its finding that section 57.105(7) did not apply. We agree.

Section 57.105(7), Florida Statutes (2017), provides:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

The purpose of section 57.105(7) is "simply to ensure that each party gets what it gives." Fla. Hurricane Prot. & Awning, Inc. v. Pastina, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) (quoting Inland Dredging Co. v. Pan. City Port Auth., 406 F. Supp. 2d 1277 (N.D. Fla. 2005)). However, "[t]he statute is designed to even the playing field, not expand it beyond the terms of the agreement." Id. Appellees rely on Subway Restaurants, Inc. v. Thomas, 860 So. 2d 462 (Fla. 4th DCA 2003), and maintain that awarding CalAtlantic attorney's fees would impermissibly expand the scope of the attorney's fees provisions of the Declaration because a breach is required to trigger the entitlement to fees, and here, a breach did not occur.[2] We find that Subway is distinguishable.[3]

---

[2] Appellees also make what is essentially a tipsy coachman argument and ask this Court to affirm the denial of attorney's fees because the record does not demonstrate that The Ryland Group vested its rights to CalAtlantic. "A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment. . . . [and] the appellee should be permitted to explicate any legal basis supporting the trial court's judgment." State v. Hankerson, 65 So. 3d 502, 505 (Fla. 2011), as revised on denial of reh'g (June 30, 2011). However, this Court "cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." Foley v. Azam, 257 So. 3d 1134, 1139 n.3 (Fla. 5th DCA 2018) (citing Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009), review denied, No. SC18-2120, 2019 WL 1349273 (Fla. Mar. 26, 2019)). Throughout the proceedings, Appellees and CalAtlantic repeatedly referred to CalAtlantic as The Ryland Group's successor by merger; the record does not reflect that this was in dispute, and the trial court's order contains no factual findings regarding the issue. "Inasmuch as the trial court did not consider that issue, we decline to do so as well." Id.

[3] Appellees cite multiple cases for the same proposition, all of which are distinguishable for the same reason as Subway. See Placida Prof'l Ctr., LLC v. F.D.I.C., 512 F. App'x 938 (11th Cir. 2013); Pastina, 43 So. 3d at 895; Anderson Columbia Co. v. Fla. Dep't of Transp., 744 So. 2d 1206, 1207 (Fla. 1st DCA 1999); Indem. Ins. Co. of N. Am. v. Chambers, 732 So. 2d 1141, 1143 (Fla. 4th DCA 1999).

In Subway, the plaintiff sued a franchisee for eviction, and the franchisee counter-sued for wrongful eviction, a civil rights violation, and breach of contract. Id. at 462. The franchisee prevailed and sought attorney's fees pursuant to a fee provision in the parties' agreement. Id. at 462–63. The trial court awarded the franchisee attorney's fees, and the plaintiff appealed, arguing that the franchisee was not entitled to the award under section 57.105(6), Florida Statutes (2002).[4] Id. at 463. The Fourth District agreed and reversed the award because the parties' agreement only provided for attorney's fees in actions for collecting unpaid rent; the eviction claim and counterclaims never triggered the plaintiff's limited entitlement to attorney's fees, and thus, the franchisee could not collect such fees pursuant to section 57.105(6). Id. at 464.

Like in Subway, here, the trial court denied CalAtlantic's motion for attorney's fees partially on the basis that CalAtlantic "did not bring an action as described." However, we find that Appellees brought an action as described in the Declaration. The attorney's fees provisions in the Declaration applied to lawsuits for violations of the Declaration or to enjoin or enforce duties therein. Accordingly, Appellees' lawsuit—seeking a declaratory judgment that CalAtlantic breached the Declaration—fell within the scope of both attorney's fees provisions. Had Appellees prevailed, they would have been entitled to recover attorney's fees.

The attorney's fees provisions in the Declaration are similar to the fee provision in GEMB Lending, Inc. v. RV Sales of Broward, Inc., No. 09-61670-CIV, 2010 WL 5313482 (S.D. Fla. Dec. 20, 2010). In GEMB, the plaintiff unsuccessfully sued the defendants to collect delinquent payments on a loan. Id. at *1–2. The defendants sought attorney's fees

[4] The language of section 57.105(6), Florida Statutes (2002), is identical to the statute at issue.

pursuant to the provision in the loan, which stated, "If you default, you agree to pay our costs for collecting amounts owing, including court costs, reasonable attorneys' fees." Id. at *2. The plaintiff argued that the defendants did not trigger section 57.105(7) because they did not seek to enforce a contract provision against them or allege a breach, default, or misconduct. Id. at *3. The Southern District rejected the plaintiff's argument and explained:

> The present case is clearly distinguishable from Subway. Florida Statute § 57.105(7) allows a party to invoke mutuality even if they are a "defendant." Thus, [the plaintiff] need not have defaulted on anything to trigger the statute and fee provision. Rather, it is [the plaintiff's] unsuccessful attempt to sue the [defendants] for default and collection which resulted in the [defendants] incurring attorney's fees. Florida law allows them to recoup these fees from [the plaintiff] under the terms of the parties' agreement.

Id. at *4.

As in GEMB, here, we hold that the availability of attorney's fees was determined by the cause of action asserted in Appellees' complaint, not the disposition of the case. Provided that the contract is not found to be unenforceable between the parties, if a claim is within the scope of an attorney's fees provision, the party defending against that claim is entitled to attorney's fees pursuant to section 57.105(7) if the party prevails. "It is well-settled that when a plaintiff takes a voluntary dismissal the defendant is deemed the prevailing party and therefore is entitled to attorney's fees if the contract authorizes an award of attorney's fees." Casarella, Inc. v. Zaremba Coconut Creek Parkway Corp., 595 So. 2d 162, 163 (Fla. 4th DCA 1992) (citing Stuart Plaza, Ltd. v. Atl. Coast Dev. Corp. of Martin Cty., 493 So. 2d 1136 (Fla. 4th DCA 1986)). Thus, because Appellees' claim was within the scope of the attorney's fees provisions of the Declaration, pursuant to section 57.105(7), CalAtlantic was entitled to attorney's fees for prevailing against Appellees' claim.

Limiting a party's entitlement to attorney's fees on the outcome of a dispute rather than the cause of action asserted in the pleadings is contrary to the purpose of section

57.105(7). To hold otherwise would enable a drafting party to construct attorney's fees provisions around the ambit of section 57.105(7), resulting in an uneven playing field and thereby defeating the protection afforded by the statute. Accordingly, we reverse the order denying CalAtlantic's motion for attorney's fees and remand with instructions to grant CalAtlantic's motion for costs and attorney's fees.

REVERSED and REMANDED with instructions.

ORFINGER, COHEN and HARRIS, JJ., concur.