McGLINCHEY STAFFORD
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Florida Real Property and Business Litigation Report

Volume XII, Issue 27
July 8, 2019
Manuel Farach

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> 8. OPERATING EXPENSES / FIXED INCREASES: Notwithstanding anything to the contrary contained in the Lease, Operating Expenses (as the term is defined in Section 2.3 of the Lease) shall increase annually during the Term by the fixed amount of three percent (3%) per calendar year over the Operating Expenses in effect for the immediately preceding calendar year, notwithstanding the actual amount of Operating Expenses otherwise allocable to the Leased Premises.

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A lender may not move to conform the pleadings with the evidence to allow introduction of a loan modification agreement when same was not pled.

Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1804
Lower Tribunal No. 17-23549

Sandra Lapciuc, et al.,
Appellants,

vs.

Isaac Lapciuc, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Dennis J. Murphy, Judge.

Legon Fodiman, P.A., and Todd R. Legon and William F. Rhodes, for appellants.

Berger Singerman, LLP, and James D. Gassenheimer, Ashley Dillman Bruce, and Stephanie M. Chaissan, for appellees.

Before LOGUE, SCALES, and HENDON, JJ.

HENDON, J.

Sandra Landman a/k/a Sandra Lapciuc and PaulDan, LLC, appeal from the trial court's order granting Isaac Lapciuc and Del Valle Brands, Inc.'s emergency motion to enforce a settlement agreement. We affirm in part and reverse in part.

Isaac Lapciuc ("Isaac") is the 85% majority shareholder and president of Del Valle Brands ("DVB"), while Sandra Landman ("Sandra") is a 15% minority shareholder of DVB. DVB is a warehouse operation located in the building solely owned by PaulDan LLC, whose sole shareholder is Sandra. DVB leases the warehouse space from PaulDan pursuant to the terms of a Triple-Net Lease. Sandra and Isaac are former spouses whose respective rights to DVB and PaulDan were decided by a June 2013 marital settlement agreement ("MSA")[1] and by the May 2017 settlement agreement ("Settlement Agreement").

The Settlement Agreement arose out of a dispute over Isaac's purchase of Precision Trading ("Precision" or "New Business"). Isaac allegedly pledged certain DVB assets and cross-collateralized those assets with the assets of Precision in connection with financing the acquisition. Sandra objected to the proposed acquisition and filed a shareholder derivative action against Isaac and DVB. The

[1] Under the 2013 MSA, Isaac agreed to pay Sandra $4 million as full satisfaction of the equitable distribution amount for the buy-out, and after that amount was funded, Sandra was reissued a 15% interest in DVB and received a ten-year employment contract from DVB paying her $200,000 a year. Also, as part of the MSA, Isaac assigned all of his right, title, and interest in PaulDan to Sandra, leaving Sandra as its sole member.

parties entered into the Settlement Agreement. The trial court dismissed the derivative action and all the associated amended complaints, counterclaims, and third-party suits with prejudice, retaining jurisdiction to enforce the incorporated Settlement Agreement.

In 2018, Isaac negotiated increases in DVB's and Precision's portfolios to expand both businesses. With the new demands for product, Isaac applied to increase the businesses' already existing asset-based line of credit ("LOC") by an additional $7 million (from $23 million for DVB and from $10 million for Precision) in order to finance the new inventory demands. The additional LOC was to have the same terms as the original LOC. Sandra objected, asserting that she had the right to approve or object to the new LOC, and claimed that the loan terms were not commercially reasonable pursuant to provision 2(c)iii of the Settlement Agreement, which provides:

> iii. No Additional Indebtedness. **Except for commercially reasonable and prudent expenditures on behalf of the New Business**, Isaac will not incur or guaranty any additional indebtedness exceeding the amounts currently available to be borrowed through pending bank or other loans unless the proceeds of the same are used to reduce the then outstanding balance of Isaac's and DVB's obligation to pay Sandra under her Employment Agreement with DVB.

(Emphasis added). After multiple communications between the parties, Mercantile Bank ("Bank") decided it would not close on the increased LOC until the dispute with Sandra was resolved, either by a court order or by Sandra's agreement to the

new LOC. When Sandra refused to give her consent to the increased LOC, and the new business contracts were about to suffer from lack of additional inventory, Isaac filed a motion to enforce the Settlement Agreement.

At the August 28, 2018 hearing on the motion to enforce, the trial court noted that Sandra withdrew her objection to the LOC, while maintaining that she did not "consent" to the LOC nor waive her rights to challenge the LOC in the future. Isaac's counsel stated that the Bank would not close without both a court order approving the LOC pursuant to the Settlement Agreement and a reaffirmation of the Lease's self-executing subordination clause (either by Sandra or the court), because Sandra had indirectly threatened the Bank with legal action should it grant the LOC to Isaac. Sandra's counsel argued against any order from the court "approving" the LOC or the Lease, stating that decision would amount to a declaratory judgment without an evidentiary hearing necessary to prove the legitimacy of the LOC or the Lease. After hearing both parties' arguments, and noting Sandra's withdrawal of her objection to the LOC, the trial court granted in part Isaac's Motion to Enforce the Settlement Agreement. The court found that DVB and Precision were authorized to enter into the LOC. The court also found that the Lease is valid and enforceable, and that the subordination clause is self-executing. Sandra appealed.

The crux of Sandra's objection to the increased LOC – and indeed, the salient issue at the hearing – was whether that additional indebtedness was "commercially

reasonable and prudent," as provision 2(c)iii of the Settlement Agreement required. The determination of that question, however, necessitated a full evidentiary hearing. Nevertheless, over Sandra's counsel's strenuous objection, and without any documentary or testimonial evidence that the increased LOC was a **"**commercially reasonable and prudent" expenditure, the trial court implicitly found that the LOC was commercially appropriate by authorizing Del Valle and Precision to proceed with the LOC. The trial court should not have decided the merits of the motion to enforce the Settlement Agreement without any evidentiary support in the record to evaluate the commercial reasonableness, or not, of the increased LOC. See, e.g., Empire Blue Cross Blue Shield v. Pub. Health Tr. of Dade Cty., 546 So. 2d 1077, 1078 (Fla. 3d DCA 1989) (holding that an evidentiary hearing was necessary on motion to enforce a settlement agreement where the value of certain medical services required under the settlement agreement was undetermined).

The trial court additionally found that the Lease between the parties was valid and enforceable and that the Landlord's subordination clause was self-executing. Once again, the trial court made this ruling without any evidentiary support, and where that issue had not been raised in the motion but was argued for the first time at the motion hearing. To be clear, "the granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process." Miami-Dade Cty. Bd. of Cty.

Comm'rs v. An Accountable Miami-Dade, 208 So. 3d 724, 734 (Fla. 3d DCA 2016) (quoting Celebrity Cruises, Inc. v. Fernandes, 149 So. 3d 744, 750 (Fla. 3d DCA 2014) (quoting Connell v. Capital City Partners, LLC, 932 So. 2d 442, 444 (Fla. 3d DCA 2006)); see also Mizrahi v. Mizrahi, 867 So. 2d 1211, 1213 (Fla. 3d DCA 2004) ("Due process protections prevent a trial court from deciding matters not noticed for hearing and not the subject of appropriate pleadings."); Epic Metals Corp. v. Samari Lake E. Condo. Ass'n, Inc., 547 So. 2d 198, 199 (Fla. 3d DCA 1989) ("A trial court violates a litigant's due process rights when it expands the scope of a hearing to address and determine matters not noticed for hearing.").

As the increased LOC has since been funded, we affirm that portion of the order allowing that transaction to proceed. We reverse in part and remand with directions to the trial court to strike paragraphs 2 and 3 of the order on appeal, as those rulings were made without the necessary evidentiary hearing.

Affirmed in part, reversed in part and remanded.

Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-88
Lower Tribunal No.16-5479

Dezer Intracoastal Mall, LLC,
Appellant,

vs.

Seahorse Grill, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

Rosenthal Law Group, and Alex P. Rosenthal and Amanda Jassem Jones (Weston), for appellant.

Phillips, Cantor & Shalek, P.A., and Gary S. Phillips and Jeffrey B. Shalek (Hollywood), for appellee.

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

HENDON, J.

Dezer Intracoastal Mall, LLC ("Landlord") appeals from a final judgment in favor of Seahorse Grill, LLC ("Tenant"), finding that the Tenant was not in breach of the commercial lease and has paid all amounts due under the lease and the rider to the lease. Based on the clear and unambiguous language of the lease and the rider, we affirm.

The Landlord filed a breach of contract and eviction action against the Tenant, alleging that under the terms of the commercial lease, the Tenant has failed to pay rent and other charges due under the lease.[1] The lease provides that the "rent" includes the "minimum rent" of $19,481 per month (plus applicable sales and use taxes thereon) and "additional rent." As utilized in the lease, the term "additional rent" means any other amounts due under the lease except for the "minimum rent." In the instant case, the "additional rent" in dispute are the "operating expenses." The lease provides, in relevant part, as follows:

> **Section 1.1 REFERENCE PROVISIONS.** Where used in this Lease, the designated terms hereinafter set forth shall have the meanings ascribed by the provisions of this Section 1.1:
>
> . . . .

[1] The lease was originally entered into in October 2011 between the Tenant and MSW Intracoastal Mall, LLC, the then-owner of the property in which the leased premises are situated. Thereafter, in March 2013, CJUF III Intracoastal LLC acquired the property from MSW Intracoastal Mall, and in December 2013, the Landlord acquired the property from CJUF III Intracoastal. It is undisputed that each new owner succeeded to the rights and obligations under the lease originally entered into between the Tenant and MSW Intracoastal Mall.

(k) "Operating Expenses" –Landlord's estimate of Tenant's Proportionate Share of Operating Expenses for the calendar year 2012 is $5,753.31 per month, which amount shall be due from Tenant on the first (1st) day of each month along with the Minimum Rent.

. . . .

Section 2.3 OPERATING EXPENSES. Tenant shall pay to Landlord, as Additional Rent, Tenant's Proportionate Share of all costs and expenses of owning, operating, servicing, managing, maintaining, repairing, replacing, securing, insuring and improving the Shopping Center ("Operating Expenses"), less any contributions to Operating Expenses received by Landlord from Anchor tenants and/or from those outparcel tenants, if any, whose premises are excluded from the calculation of Tenant's Proportionate Share in accordance with the next sentence. . . .

Prior to the Rent Commencement Date and each calendar year thereafter . . . , Landlord shall furnish to Tenant a written estimate of the Operating Expenses and Tenant's Share thereof for the ensuing calendar year or portion thereof. Tenant shall pay to Landlord on the first day of each calendar month during the Term, in advance, one-twelfth of Tenant's Proportionate Share of the Operating Expenses based on Landlord's estimates (which estimates may be adjusted by Landlord at any time upon written notice to Tenant). . . . After the end of each calendar year (or other accounting period used by Landlord), Landlord shall furnish to Tenant a reconciliation statement setting forth in reasonable detail the actual Operating Expenses for the immediately preceding year, Tenant's Proportionate Share for such year, payments made by Tenant for such year and Landlord's new estimate of Tenant's Proportionate Share of the statement, then Tenant shall pay the difference to Landlord within thirty (30) days thereafter. If the statement indicates an overpayment by Tenant, then Tenant shall be entitled to a credit against installments next becoming due hereunder. If Tenant fails to receive the statement with the new estimate, Tenant shall continue to pay Tenant's proportionate Share of Operating Expenses based on the prior estimate and upon receipt of the new estimate shall immediately pay the difference. . . .

. . . .

> **Section 11.28 RIDER.** If any provision contained in a Rider to this Lease is inconsistent with any other provision herein, the provision contained in the Rider shall control unless otherwise provided in the Rider.

Paragraph 8 of the rider to the lease addresses increases in the operating expenses chargeable to the Tenant, and provides as follows:

> By reference hereto, this Rider is hereby incorporated into and made a part of the above referenced Lease between Landlord and Tenant. In the case of any inconsistency between the provisions of this Rider to the Lease and the balance of the Lease, the provisions of this Rider shall govern and control.
>
> . . . .
>
> 8. OPERATING EXPENSES / FIXED INCREASES: Notwithstanding anything to the contrary contained in the Lease, Operating Expenses (as the term is defined in Section 2.3 of the Lease) shall increase annually during the Term by the fixed amount of three percent (3%) per calendar year over the Operating Expenses in effect for the immediately preceding calendar year, notwithstanding the actual amount of Operating Expenses otherwise allocable to the Leased Premises.

(underlining added).

At the bench trial, trial court noted that the case involved an interpretation of the lease and the rider, and the parties have agreed that the contract is unambiguous. Despite each party agreeing that the relevant provisions were unambiguous, each party ascribed a different meaning to the provisions.

Following the bench trial, the trial court entered a detailed final judgment in favor of the Tenant. The trial court found that the relevant provisions in the lease

and the rider are clear and unambiguous. Further, the trial court found as follows:

> 11. The Lease sets forth in clear and unambiguous language that the Operating Expenses would only increase each year by the fixed amount of three percent (3%). To find otherwise would be [sic] completely eviscerate the underlined language immediately above. As a result, the exact amount of the Operating Expenses can be determined by the amount of the Operating Expenses for the first year and then increasing that amount by exactly three percent (3%) every year thereafter.

Based on the trial court's interpretation of the lease and the rider, including paragraph 8, the trial court found that the Landlord had received all amounts due from the Tenant, including the operating expenses. Thus, the trial court entered a final judgment in favor of the Tenant. The Landlord's appeal of the final judgment followed.

"The standard of review applicable to the question of whether a contract is ambiguous is de novo." Garcia v. Tarmac Am. Inc., 880 So. 2d 807, 809 (Fla. 5th DCA 2004) (quoting V & M Erectors, Inc. v. Middlesex Corp., 867 So. 2d 1252, 1253 (Fla. 4th DCA 2004)). "The interpretation of a contract involves a pure question of law for which this court applies a *de novo* standard of review." Dirico v. Redland Estates, Inc., 154 So. 3d 355, 357 (Fla. 3d DCA 2014) (quoting Muniz v. Crystal Lake Project, LLC, 947 So. 2d 464, 469 (Fla. 3d DCA 2006)); see N. Star Beauty Salon, Inc. v. Artzt, 821 So. 2d 356, 358 (Fla. 4th DCA 2002) ("A trial court's interpretation of a contract is reviewable by this court under a de novo standard of review provided the language is clear and unambiguous and free of

conflicting inferences."). Further, "when the language is clear and unambiguous, it must be construed to mean 'just what the language therein implies and nothing more.'" Walgreen Co. v. Habitat Dev. Corp., 655 So. 2d 164, 165 (Fla. 3d DCA 1995) (quoting Camichos v. Diana Stores Corp., 25 So. 2d 864, 870 (Fla. 1946)).

In the instant case, based on our de novo review of the lease and the rider, we agree with the trial court's determination that the relevant provisions of the lease and the rider, including paragraph 8 of the rider, are unambiguous. We also conclude that the trial court accurately interpreted the provisions. As the trial court correctly found, pursuant to paragraph 8 of the rider, the operating expenses chargeable to the Tenant will only increase each year by the fixed amount of three percent (3%), "notwithstanding the actual amount of Operating Expenses otherwise allocable to the Leased Premises." Accordingly, we affirm the final judgment under review.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-493
Lower Tribunal No. 14-7149

Julia Davis,
Appellant,

vs.

OneWest Bank, FSB,
Appellee.

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

Legal Services of Greater Miami, Inc. and Jacqueline C. Ledón and Jeffrey M. Hearne, for appellant.

Burr & Forman and Joshua H. Threadcraft (Birmingham, AL), for appellee.

Before SALTER, SCALES and MILLER, JJ.

PER CURIAM.

Julia Davis, the widow of the titleholder (Herbert Davis), signed a reverse mortgage as co-borrower. She did not sign the promissory note for the loan. OneWest Bank sought to foreclose after Mr. Davis's death, which would have dispossessed Mrs. Davis from her homestead.

Based on our decisions involving similar documents and issues, we reverse the final judgment of foreclosure and remand the case to the trial court for the entry of an involuntary dismissal of the case in favor of Mrs. Davis. OneWest Bank, FSB v. Palmero, 44 Fla. L. Weekly D1049 (Fla. 3d DCA April 24, 2019) (en banc); OneWest Bank, N.A. v. Leek-Tannenbaum, 44 Fla. L. Weekly D1282 (Fla. 3d DCA May 15, 2019); Smith v. Reverse Mortg. Sols., Inc., 200 So. 3d 221, 225 (Fla. 3d DCA 2016); and Edwards v. Reverse Mortg. Sols., Inc., 187 So. 3d 895, 896 (Fla. 3d DCA 2016).[1]

Reversed and remanded, with instructions.

SCALES, J., concurs.

[1] The Palmero and Leek-Tannenbaum opinions are pending on post-opinion motions; the Smith and Edwards cases are not.

MILLER, J., specially concurring.

Although I am constrained by the authority of precedent, neither distinguishable upon legal principle nor material fact, to concur, the concerns expressed in my dissenting opinion in OneWest Bank, FSB v. Palmero, 44 Fla. L. Weekly D1049, D1055 (Fla. 3d DCA April 24, 2019) (Miller, J., dissenting) (discussing the majority's abandonment of long-standing, controlling principles of law) remain.

Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1935
Lower Tribunal No. 08-320-K

The Burton Family Partnership, et al.,
Appellants,

vs.

Luani Plaza, Inc., etc.,
Appellee.

An appeal from the Circuit Court for Monroe County, Timothy J. Koenig, Judge.

Rogers Towers, P.A., and E. Carson Lange and P. Brandon Perkins (Jacksonville), for appellants.

Mitchell J. Cook, P.A., and Mitchell J. Cook, for appellee.

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

MILLER, J.

Appellants, the Burton Family Partnership and Dr. Michael Burton, challenge an amended final judgment awarding attorney's fees and prejudgment interest to appellee, Luani Plaza, Inc. For the reasons set forth below, we affirm in all respects, save for the award of prejudgment interest granted in conjunction with fees incurred litigating the amount of fees.

Dr. Burton owns two units within Luani Plaza, a commercial plaza consisting of businesses and professional offices. "Though not a condominium, the ownership [of units] constitutes 'a common interest community,' as generally described in the Restatement (Third) of Property: Servitudes—'a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal.'" Luani Plaza, Inc. v. Burton, 149 So. 3d 712, 714 (Fla. 3d DCA 2014) (quoting Restatement (Third) of Prop.: Servitudes § 6.2 (2000)). The community is governed by documents, including the recorded Declaration of Covenants, Conditions, and Restrictions (the "Declaration"), and the Amendment to the By-Laws of Luani Plaza, Inc. (the "By-Laws").

Over a decade ago, Dr. Burton filed a declaratory action seeking a determination that he was within his rights to convert his two commercial units into affordable housing units. Luani Plaza filed a separate action to foreclose a lien arising out of unpaid common interest community assessments. The cases were

consolidated, and in 2011, following a bench trial, the trial court entered a final judgment of foreclosure in favor of Luani Plaza, finding fee entitlement under the terms of the Declaration. Dr. Burton appealed the final judgment of foreclosure and this Court affirmed. Burton, 149 So. 3d at 716. It was further determined that the propriety of awarding attorney's fees was "not ripe for review," as no fees had yet been awarded. Id. at 713 n.1.

After the mandate issued, the trial court conducted an evidentiary hearing and entered an amended final judgment awarding attorney's fees. The court awarded fees incurred in the underlying litigation, and, relying upon an expansive fee provision set forth within the By-Laws, further awarded fees incurred in litigating the amount of fees, otherwise known as "fees on fees." See, e.g., Geary v. Butzel Long, P.C., 13 So. 3d 149, 153 (Fla. 4th DCA 2009) (characterizing fees incurred in litigating the amount of fees as "fees on fees"). The court also awarded prejudgment interest on the total merged fee amount back to 2011, the date fee entitlement under the Declaration was initially determined by court order. The instant appeal ensued.

STANDARD OF REVIEW

Entitlement to attorney's fees based on the interpretation of a statute or contract is subject to de novo review. State Farm Fla. Ins. Co. v. Silber, 72 So. 3d 286, 288 (Fla. 4th DCA 2011) (citation omitted). "The standard of review for an award of attorney's fees, whether based on contract or statute, is abuse of

discretion." Universal Beverages Holdings, Inc. v. Merkin, 902 So. 2d 288, 290 (Fla. 3d DCA 2005) (citing Thomas v. Perkins, 723 So. 2d 293, 294 (Fla. 3d DCA 1998)). Finally, "[a] trial court's decision concerning a plaintiff's entitlement to prejudgment interest is reviewed de novo." Berloni S.p.A. v. Della Casa, LLC, 972 So. 2d 1007, 1011 (Fla. 4th DCA 2008) (citation omitted).

LEGAL ANALYSIS

Appellants challenge the trial court's award of fees incurred in litigating the amount of fees. Generally, "[i]t is settled that in litigating over attorney'[s] fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney's fees incurred in litigating the amount of attorney's fees." N. Dade Church of God, Inc. v. JM Statewide, Inc., 851 So. 2d 194, 196 (Fla. 3d DCA 2003) (citations omitted). Nonetheless, certain contractual fee provisions are sufficiently broad to warrant an exception. See Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC, 88 So. 3d 386, 389 (Fla. 4th DCA 2012) (holding that the phrase "any litigation" was sufficiently broad to encompass "fees incurred in litigating the amount of fees").

Here, the By-Laws allow for the recovery of fees "for litigating the issue of the amount of fees to be awarded" in both the trial and appellate proceedings. The court was bound to enforce its terms. See I. Kushnir Hotels, Inc. v. Durso, 912 So. 2d 633, 636 (Fla. 4th DCA 2005) (holding that the trial court was bound to enforce

prevailing party fee provision, as it constituted a contract); see also Windsor Falls Condo. Ass'n, Inc. v. Davis, 265 So. 3d 709, 711 (Fla. 1st DCA 2019) ("Although we do not reject the argument that a contract can provide for an award of attorney's fees, including fees incurred for litigating the fee amount itself, we hold that the trial court did not err in denying Appellant such an award."). Thus, we find no error in the award of fees on fees.

Appellants further challenge the amount of the fee award. As the trial court did indeed consider competent, expert testimony in conjunction with its finding of reasonableness, we conclude that appellants have failed to demonstrate any error in the amount of fees awarded. See Baker v. Varela, 416 So. 2d 1190, 1193 (Fla. 1st DCA 1982) ("No abuse of discretion has been shown in the trial court's award of attorney's fees based on the evidence as to the number of hours expended in preparation and trial, the skill and expertise demanded and exhibited by plaintiff's counsel, the nature and complexity of the litigation, the results obtained, and the several other factors touched upon at the attorney's fees hearing.").

Finally, appellants urge error in the grant of prejudgment interest for fees incurred in litigating the amount of fees. In Florida, entitlement to prejudgment interest is governed by the "loss theory," as was thoroughly explicated by the Florida Supreme Court in Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212, 214-15 (Fla. 1985):

> [S]ince at least before the turn of the century, Florida has adopted the position that prejudgment interest is merely another element of pecuniary damages. While doing so, the Court recognized and rejected an alternative but traditional rationale—that prejudgment interest was to be awarded as a penalty for defendant's "wrongful" act of disputing a claim found to be just and owing. This view is still the rule of some jurisdictions. The distinction between liquidated and unliquidated claims is closely linked to this "penalty theory" of prejudgment interest. To punish a defendant for failure to pay a sum which was not yet certain or which he disputed would be manifest injustice. But where the amount is certain and the defendant refuses to surrender it because of defenses determined to be meritless, the defendant may properly be punished for abuse of his privilege to litigate. Under the "loss theory," however, neither the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.
>
> . . .
>
> In short, when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss.

(Internal citations omitted) (footnotes omitted). Thus, the loss theory necessarily presupposes that there was a "wrongful deprivation" and that "plaintiff is to be made whole from the date of the loss once liability . . . is set by the fact finder." Boulis v. Fla. Dep't of Transp., 733 So. 2d 959, 961 (Fla. 1999).

In the context of attorney's fees, "prejudgment interest . . . is awardable only if there is an appropriate basis for awarding that interest." Id. at 962. Accordingly, contemporary, binding jurisprudence dictates that interest accrues "from the date the

entitlement to attorney fees is fixed through agreement, arbitration award, or court determination." Quality Engineered Installation, Inc. v. Higley S., Inc., 670 So. 2d 929, 930-31 (Fla. 1996) (citations omitted); see also Cox v. Great Am. Ins. Co., 203 So. 3d 204, 206 (Fla. 4th DCA 2016) ("[A]ppellee was also entitled to interest on the attorney's fees award from th[e] date entitlement was determined.") (citation omitted). Alternatively, if proof is adduced that fees were "incurred and *paid*" by a party "prior to the entry of judgment," prejudgment interest is proper. Boulis, 733 So. 2d at 962 (emphasis in original). The rationale supporting these general principles is that by awarding prejudgment interest as of the date of entitlement or demonstration of loss, "the burden of nonpayment is fairly placed on the party whose obligation to pay attorney fees has been fixed." Higley S., Inc., 670 So. 2d at 931.

Here, prejudgment interest was only awardable once there was an appropriate basis for awarding the interest. In the original final judgment, the trial court solely relied upon the Declaration in determining entitlement to attorney's fees. Thus, the trial court did not, at that time, adjudicate entitlement to fees on fees, as the Declaration did not allow for such recovery. Following remand, the trial court rendered the amended final judgment, finding entitlement to fees incurred litigating the amount of fees was justified under the Bylaws. It is indisputable that entitlement to fees on fees was not "fixed through agreement, arbitration award, or court determination" until the amended final judgment was rendered. Id. at 931.

Moreover, as there was no litigation as to the amount of attorney's fees until initial entitlement was determined by entry of the original judgment, it is evident that no fees on fees were earned, incurred, or invoiced until after entry of the final judgment. Finally, the record is devoid of evidence that appellee "incurred and *paid*" the fees on fees prior to the entry of the amended final judgment. Boulis, 733 So. 2d at 962 (emphasis in original).

Under these circumstances, we conclude that the event that fixed the date of loss for purposes of awarding prejudgment interest, on the fees on fees, was the entry of the amended final judgment. See Mason v. Reiter, 564 So. 2d 142, 147 (Fla. 3d DCA 1990) ("[I]t was the . . . adjudication of paternity which triggered the mother's entitlement to, and the father's liability for payment of her attorney's fees. This event fixed the date of the loss for purposes of awarding prejudgment interest . . .") (citations omitted). Consequently, the court erred in awarding prejudgment interest for fees on fees, calculated from the date of the original judgment.

CONCLUSION

As "an award of prejudgment interest is not an opportunity for the plaintiff to obtain a windfall or for the court to penalize the defendant," here, calculating prejudgment interest from a date earlier than the date entitlement was determined or appellee realized any loss or incurred any liability for the payment of fees on fees was error. Arizona Chem. Co. v. Mohawk Indus., Inc., 197 So. 3d 99, 102 (Fla. 1st

DCA 2016) (citations omitted). Accordingly, we affirm the trial court's determination of entitlement and ultimate fee award, but reverse and remand for the recalculation of prejudgment interest consistent with this opinion.

Affirmed in part; reversed in part; and remanded.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LUIS H. MORALES and **CECILIA MORALES,**
Appellants,

v.

FIFTH THIRD BANK,
Appellee.

No. 4D18-3145

[July 3, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; David A. Haimes, Judge; L.T. Case No. CACE11012434.

Paul Alexander Bravo, Ricardo R. Corona and Ricardo M. Corona of the Corona Law Firm, P.A., Miami, for appellants.

Shaib Y. Rios and Michael W. Smith of Brock & Scott, PLLC, Fort Lauderdale, for appellee.

WARNER, J.

Appellant borrowers appeal from a final judgment on a promissory note entered in favor of the lender regarding the borrowers' default on a loan to buy an empty lot. Appellants argue, among other things, that the trial court erred by denying their motion for involuntary dismissal because the Bank failed to plead breach of a loan modification agreement. We agree, reversing and remanding for entry of involuntary dismissal.

In 2005, appellants executed an adjustable rate note in the amount of $125,000 in favor of the appellee, Fifth Third Mortgage Company. The beginning interest rate under the note was 7.875%. Appellants defaulted on the loan. In 2008, they entered into a loan modification agreement that changed the terms of the loan to a fixed interest rate of 6.5% and lowered their monthly payments. The parties agreed that the unpaid principal balance on the note was $120,105.90.

Appellants defaulted again, and in 2011, Fifth Third Bank, a separate entity from appellee and servicer of the note, filed suit to accelerate payment under the note. The complaint was amended a few times, and in

the second amended complaint, appellee filed suit under its own name. Appellee attached a copy of the adjustable rate note to this complaint, but appellee neither mentioned the modification nor attached it to the complaint.

The borrowers answered, listing as an affirmative defense that appellee failed to properly credit the borrowers' account with the collected payments. In reply, appellee filed a copy of the payment history on the note, but appellee again did not mention the modification. The payment history reflects the 2008 modification and decreased monthly payments on the note.

Appellee unsuccessfully moved for summary judgment, attaching an affidavit in support of the motion showing the 6.5% interest rate under the modification. In connection with the motion, appellee filed the original adjustable rate note, as well as the 2008 modification that is signed by appellants and shows the fixed interest rate.

After a continuance, the case proceeded to trial in 2017, where the court received into evidence a copy of the note, default letter, judgment figures, and payoff interest details. Final judgment was entered in favor of appellee, and the borrowers appealed. In *Morales v. Fifth Third Mortgage Co.*, 238 So. 3d 280 (Fla. 4th DCA 2018), we reversed and remanded for a new trial because the trial court violated the best evidence rule by admitting a copy of the note instead of the original.

In 2018, the case again proceeded to trial, which led to the instant appeal. The trial court noted that the original note was filed and that the modification was attached to it. Appellee presented only one witness, an employee of Fifth Third Bank who worked as a litigation portfolio analyst. The witness identified the original, adjustable rate note. However, when appellee moved to enter the modification into evidence, the borrowers objected, arguing that appellee was required to amend its complaint to plead a theory of recovery under the modification. The court disagreed and allowed the modification into evidence. Appellee then moved the demand letter and payment history into evidence.

The witness testified that the loan was in default, and no payments were made since 2009. During cross-examination by the borrowers, the witness stated that the amounts that appellee was seeking to recover were based on the modification.

After appellee rested, the borrowers moved for involuntary dismissal. They contended, among other things, that appellee did not conform the

pleadings to the evidence, that the modification upon which appellee relied was neither pled nor attached to the operative complaint, and that it would be error for the court to allow appellee to amend its complaint to conform to the evidence. Appellee responded that it was suing on the original note, and the modification was neither a negotiable instrument nor the operative document in the case. Appellee's counsel agreed with the court that it was not seeking to amend its complaint, but it was relying on the original note. The court denied appellants' motion for involuntary dismissal.

The borrowers then called appellee's witness to testify again. The witness stated that the original note was an adjustable rate note, but its terms were modified in 2008. The amounts sought under the payment history and the default letter were based on the terms of the modification. During cross-examination by appellee, she reiterated that the amounts due and owing were based on both the note and the modification.

In closing argument, defense counsel again sought involuntary dismissal because appellee had relied on the modification, but it had failed to plead it or attach it to the complaint. The court again noted that the appellee was not seeking to amend its complaint. The court denied dismissal.

The court entered judgment in favor of the appellee, finding that the parties entered into a contract, which terms were shown by the note and modification entered into evidence, and that the borrowers owed $195,685.84 in principal, interest, fees, and costs. This appeal followed.

This court reviews de novo the denial of a motion for involuntary dismissal, and we must view the evidence in the light most favorable to the nonmoving party. *Rattigan v. Cent. Mortg. Co.*, 199 So. 3d 966, 966-67 (Fla. 4th DCA 2016). If an issue is not raised by the pleadings, it may be tried by the parties' express or implied consent; however, if a party objects to evidence on an unpled issue, then the court may allow the pleadings to be amended to conform with the evidence only if there is no prejudice to the objecting party. Fla. R. Civ. P. 1.190(b). A final judgment is void and violates due process where it grants relief that was neither pled nor tried by the parties' consent. *See Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945-46 (Fla. 4th DCA 2015).

We agree with appellants that because the appellees based their case at trial on the note and the modification, and the operative complaint neither mentioned nor attached the modification, we must reverse and remand for entry of involuntary dismissal. *See* Fla. R. Civ. P. 1.130(a) ("All bonds, notes, bills of exchange, contracts, accounts, or documents on

which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading."); *cf. Johnson v. Deutsche Bank Nat'l Trust Co. Am.*, 248 So. 3d 1205, 1209-10 (Fla. 2d DCA 2018) (commenting that a plaintiff must reference the loan modification on which the foreclosure case is based and attach it to its pleading, but finding the issue was waived because the borrowers never objected to the pleading impropriety).

In *Tracey v. Wells Fargo, N.A., as Trustee for Certificateholders of Banc of America Mortgage Securities, Inc.*, 264 So. 3d 1152, 1154, 1157 (Fla. 2d DCA 2019), the Second District found that the trial court erred by allowing the lender in a foreclosure action to amend its complaint to conform with the evidence and to base its recovery on two unpled loan modification agreements. The modifications were not mentioned in nor attached to the operative, amended complaint, and the borrower failed to raise the modifications as a defense. *Id.* at 1154. Nevertheless, at trial, the Bank relied on the modifications, arguing that the borrower was not prejudiced because the modifications were attached to the Bank's original, abandoned pleading. *Id.* The borrower objected that she never prepared a defense based on the abandoned theory of recovery. *Id.* The trial court allowed the Bank to amend its pleadings, and it entered final judgment in favor of the Bank based on the original note and the modifications. *Id.* On appeal, the Second District reversed and remanded for involuntary dismissal in favor of the borrower. It held that the borrower clearly suffered prejudice when the trial court allowed the Bank, over objection, to amend its complaint to conform to the evidence, and the court noted that "pleadings function as a safeguard of due process by ensuring that the p[arties will have prior, meaningful notice of the claims, defenses, rights, and obligations that will be at issue when they come before a court." *Id.* at 1155-57, 1169.

The present case is similar to *Tracey*, as appellee failed to plead its theory of recovery based on the modification. Notably, during trial, appellee's counsel agreed that appellee was not seeking to amend its complaint based on the modification, but it was relying on the original note. Nevertheless, appellee's witness testified repeatedly that the amount sought was based on the modification and its rate of interest.

Appellee counters that the court properly entered judgment in its favor because a modification is an affirmative defense that must be pled by a defendant borrower to avoid liability. It mainly relies on *Bank of New York Mellon for Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2005-BC5 v. Bloedel*, 236 So. 3d 1164 (Fla. 2d DCA 2018). There, the Bank appealed a final judgment denying foreclosure and granting the

borrower's motion for involuntary dismissal. *Id.* at 1165. At trial, the Bank's only witness, an employee of the servicer, testified that the servicer received a few payments on the loan that were reduced and that reflected a trial modification agreement. *Id.* at 1165-66. This was the first reference to the modification, and although the borrower did not raise the issue of the modification as an affirmative defense, he argued that the Bank's complaint should be involuntarily dismissed because the Bank failed to offer the modification into evidence, to mention it in its pleadings, and to attach it to its complaint. *Id.* at 1166. The trial court found that a copy of the modification should have been attached to the lender's complaint, and the Bank failed to allege and to prove a breach of the modification. *Id.* On appeal, the Second District reversed, finding that while the issue of the modification was not raised in the pleadings, "[t]he effect of a modification to a legal agreement, *to the extent it would constitute an avoidance of all or part of a defendant's liability under the agreement*, is an affirmative defense that must be pled and proved by the defendant" under Florida Rule of Civil Procedure 1.110(d). *Id.* at 1166-67 (emphasis added). Thus, because the borrower asserted the modification as an avoidance of liability, he had the burden to plead and prove the existence of the modification. *Id.* at 1169-70.

The present case is distinguishable from *Bloedel*. There, the borrower sought to avoid liability based upon the modification, but the bank did not rely on the modification in its case. In *Bloedel*, the court noted that "it would have been a very different matter had [the Bank] premised its claim or right of recovery on a modification to its note. In that instance, it would have fallen to [the Bank] to adequately plead the modification agreement within its complaint" under Florida Rule of Civil Procedure 1.130. *Id.* at 1168 n.5. This statement presents the exact circumstance of the present case. In this action, appellee certainly premised its recovery on the modification and the amounts due thereunder. The appellee was required to plead the loan modification and to attach a copy to the complaint.

The borrowers were prejudiced by the failure to plead the loan modification. The complaint sought recovery only under the original note, which had a higher initial rate but was adjustable. As noted by the borrowers, the adjusted loan rate of the original loan may have been significantly lower than the stated rate in the loan modification, given the low interest rates over the past decade. The appellee presented no proof consistent with the terms of the original loan, instead relying on both the total amount due and the rate of interest in the modification. The borrowers were thus on notice through the pleadings to defend on the original note but then required at trial to defend against an entirely different instrument.

The question is: What directive should be given on remand? In *Tracey* the court provided a thoughtful analysis of appellate remand. It held:

> We hold that when fashioning remand for a civil appeal where the party with the burden of proof fails to sufficiently plead the claim it presents at trial or to establish a basis in admissible evidence for a claim at trial, an appellate panel may exercise some level of equitable discretion to consider the circumstances of the particular case. This discretion is bounded both by the substantive relief sought within the appeal and the strong preference for finality of trial proceedings. The prohibition against proverbial multiple "bites at the apple" for trials remains firmly rooted as the leading, guiding principle to govern the scope of remand and should serve as the default direction when these kinds of decisions are being made. We agree with how the [court in *Morton's of Chicago, Inc. v. Lira*, 48 So. 3d 76, 79-80 (Fla. 1st DCA 2010)] put it: only "exceptional legal or factual" circumstances will justify a deviation from this general prohibition. 48 So. 3d at 80.

Tracey, 264 So. 3d at 1168. We agree with *Tracey's* holding.

Applying that to the present case, we conclude that we should direct involuntary dismissal of the complaint on remand. Without pleading the modification, the appellee failed to present evidence to support the case that it did plead on the original note. It affirmatively refused to amend its pleading to state the case it sought to prove. Because of the appellee's failures, the borrowers have been compelled to defend against two trials.

Accordingly, we reverse and remand with directions for the trial court to enter an involuntary dismissal in favor of appellants.

GERBER and CONNER, JJ., concur.

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Not final until disposition of timely filed motion for rehearing.