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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11500

D.C. Docket No. 5:15-cv-02325-AKK

SHEENA YARBROUGH,

Plaintiff - Appellant,

versus

DECATUR HOUSING AUTHORITY,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(August 2, 2019)

Before ED CARNES, Chief Judge, TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, BRANCH, and GRANT, Circuit Judges.[*]

MARTIN, Circuit Judge:

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[*] Judge Newsom, having recused himself, did not participate in this decision.

For years, this Court has allowed district courts to entertain 42 U.S.C. § 1983 suits alleging wrongful termination of housing benefits under the Housing Act of 1937, 42 U.S.C. § 1437 et seq., where the housing authority failed to prove its case for termination by a preponderance of the evidence. See Basco v. Machin, 514 F.3d 1177, 1183–84 (11th Cir. 2008). But today we recognize that neither Basco nor its progeny explained how a regulation establishing the preponderance of the evidence standard can give rise to a private cause of action under § 1983. With regard to agency regulations, the Supreme Court has been clear that although "[a]gencies may play the sorcerer's apprentice," they cannot usurp the role of "the sorcerer himself." Alexander v. Sandoval, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522 (2001). By this opinion, our Court restores the apprentice to its rightful place.

Our Court granted rehearing en banc to consider whether Basco was correct in granting a private right of action under § 1983 to people contesting the termination of their housing benefits, with the requirement that the termination decision be based on a preponderance of the evidence. The regulation establishing the authorities' burden of proof in termination proceedings neither defines nor fleshes out a right established by the Housing Act. We thus conclude Basco was wrongly decided in this regard. As a result, we overrule Basco and its progeny inasmuch as those cases held that the Housing Act or its implementing regulations

create a right enforceable by § 1983 to a termination decision made by the preponderance of the evidence.

I.

The Housing Act assists low-income families in getting a safe and affordable place to live. See 42 U.S.C. § 1437(a). To that end, one section of the Act provides relief through "what is known as the Section 8 housing program." Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 12, 113 S. Ct. 1898, 1900 (1993). The Section 8 program subsidizes private landlords who rent to low-income tenants by authorizing housing authorities to pay the difference between the tenant's contribution and the full cost of rent. Id.

Sheena Yarbrough, the plaintiff in this case, was a beneficiary of the Section 8 housing program. While she was living in Section 8 housing, during September of 2012, the police arrested Ms. Yarbrough on drug-related charges. The Decatur Housing Authority (the "Authority") learned about her arrest from a newspaper and notified Ms. Yarbrough it intended to terminate her Section 8 housing benefits. Ms. Yarbrough requested and received an informal hearing, and a hearing officer upheld the Authority's decision to terminate her benefits.

Despite the decision in its favor, counsel advised the Authority to continue to subsidize Ms. Yarbrough's rent until her criminal charges were resolved. Roughly six months after her arrest, Ms. Yarbrough was indicted on two charges of

unlawful distribution of a controlled substance, in violation of Ala. Code § 13A-12-211. These charges remained outstanding a little less than two years when the State agreed to dismiss them "upon payment of court costs." But Ms. Yarbrough was not out of the woods yet.

Around the same time as the State's agreement, the Authority received a tip accusing Ms. Yarbrough of new violations of the Section 8 housing program. And on October 8, 2015, the Authority sent Ms. Yarbrough a new notice advising her of its intent to terminate her Section 8 housing benefits. This time, the Authority sought to terminate Ms. Yarbrough's benefits based on her indictments as well as her alleged failures to notify the Authority of a change in family composition, to report her household income, and to make required payments.

Ms. Yarbrough again requested a hearing, and one was held on November 10, 2015. The Authority was represented by a caseworker named Kenyetta Gray, who introduced copies of Ms. Yarbrough's indictments into evidence. Ms. Gray also testified about the Authority's communications with Ms. Yarbrough. The Hearing Officer reviewed the testimony and the record, then affirmed the Authority's decision to terminate Ms. Yarbrough's benefits. The Hearing Officer rejected three of the four grounds offered by the Authority in support of termination. However, the Officer found that Ms. Yarbrough's indictments and arrest were enough to prove by a preponderance of the evidence that she "violated

her agreement with the Authority and her lease by engaging in drug-related criminal activity."

Less than a month later, Ms. Yarbrough filed the 42 U.S.C. § 1983 suit that resulted in this appeal. She asked the U.S. District Court to restore her benefits and enjoin the Authority from evicting her. She alleged that the Authority's decision to terminate her benefits violated both federal regulations as well as her due process rights because the decision was based on legally insufficient evidence and unreliable hearsay. The District Court allowed discovery, and once that was done, the parties filed cross-motions for summary judgment. The Court granted the Authority's motion for summary judgment and denied Ms. Yarbrough's motion for the same. The District Court rejected Ms. Yarbrough's argument that the indictments were unreliable hearsay and found that they were "legally sufficient to establish by a preponderance of the evidence . . . that Yarbrough engaged in the alleged drug-related criminal activity."

Ms. Yarbrough timely appealed the District Court's decision to our Court. Relying on Basco, a panel of this Court agreed with Ms. Yarbrough and reversed the District Court's grant of summary judgment. The panel opinion held that as a matter of law, "[t]hree probable-cause determinations [supporting one arrest and two indictments] do not add up to a finding that a person more likely than not

committed a drug-related crime."[1] Yarbrough v. Decatur Hous. Auth., 905 F.3d 1222, 1226 (11th Cir. 2018) (per curiam), reh'g en banc granted, op. vacated, 914 F.3d 1290 (11th Cir. 2019).

The Authority soon filed a petition for rehearing en banc urging our Court to revisit Basco's holding. A majority of the voting judges on this Court granted the petition, and the panel opinion was vacated as a result. See Yarbrough v. Decatur Hous. Auth., 914 F.3d 1290 (11th Cir. 2019) (en banc). The only question now before this en banc Court is whether to overrule Basco's holding that there is an individual right under the Housing Act and its implementing regulations, enforceable through § 1983, to a decision based on a preponderance of the evidence when a local housing authority terminates housing benefits. Our survey of the applicable law convinces us that we must.

II.

We review de novo a District Court's grant of summary judgment. See Galvez v. Bruce, 552 F.3d 1238, 1241 (11th Cir. 2008).

III.

Section 1983 "provides a cause of action to a plaintiff who can prove that a defendant acting under color of state law deprived [her] of a right, privilege, or

[1] Because the panel concluded the evidence was legally insufficient, it did not reach Ms. Yarbrough alternative argument that "the hearing officer's decision to credit unreliable hearsay violated the Due Process Clause of the Fourteenth Amendment." Yarbrough, 905 F.3d at 1225.

immunity protected by the laws or Constitution of the United States." Lane v. Philbin, 835 F.3d 1302, 1307 (11th Cir. 2016). Here we address the argument that the Housing Act and its implementing regulations create a privately enforceable right to a preponderance standard. In doing so, we begin with the principle that congressional intent is the keystone of federal rights creation. Gonzaga Univ. v. Doe, 536 U.S. 273, 283–84, 122 S. Ct. 2268, 2275 (2002). Under this principle, regulations can join with a statute to give rise to a private cause of action under § 1983 so long as the regulations "define the content of a[] specific right conferred upon the plaintiffs by Congress." Harris v. James, 127 F.3d 993, 1010 (11th Cir. 1997). Thus, plaintiffs seeking to sue under § 1983 for violations of agency regulations must prove that the regulation in question "merely . . . fleshes out the content of" or further defines a right created by statute. Id. at 1009–10; see also Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 430–31, 107 S. Ct. 766, 773–75 (1987) (concluding plaintiffs had an enforceable right "within the meaning of § 1983" because the Department of Housing and Urban Development's regulation interpreted the meaning of "rent" as it was set forth in the statute). If the statute creates no federal rights or if the regulation is too far removed from a statute that does create federal rights, § 1983 does not provide a means of redress and the plaintiff's suit must fail.

With these principles in mind, we turn to Ms. Yarbrough's argument that the Housing Act and its implementing regulations create a privately enforceable right under § 1983 to a termination decision based on a preponderance of the evidence. No one disputes that the Housing Act is devoid of any references to a preponderance-of-the-evidence standard in termination proceedings. Ms. Yarbrough thus argues that the regulation establishing the preponderance standard, 24 C.F.R. § 982.555(e), merely fleshes out a federal right created by 42 U.S.C. § 1437d(k)(6). We are not persuaded.

Section 1437d(k) states that "the Secretary [of Housing and Urban Development] shall by regulation require each public housing agency receiving assistance . . . to establish and implement an administrative grievance procedure under which tenants will" be entitled to a number of procedural protections. One of these procedural protections is the right "to receive a written decision by the public housing agency on the proposed action." Id. § 1437d(k)(6). Ms. Yarbrough seizes upon this language to argue that 24 C.F.R. § 982.555(e)(6), which provides that "[f]actual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing," merely "clarifies what constitutes a proper written decision" under the statute. But this argument fails.

Even if we were to accept that § 1437d(k)(6) creates a federal right to a written decision in Section 8 termination proceedings, there is nothing in the statute for the preponderance standard to define.[2] As the Authority rightly notes, the statute addresses the means by which a decision should be communicated. It says nothing about the substance of the decision. Thus the regulation, which speaks to substance, cannot "flesh out" a statutory provision that addresses only the form of a decision.

The regulatory requirement that "[f]actual determinations . . . be based on a preponderance of the evidence," 24 C.F.R. § 982.555(e)(6), plainly imposes a "distinct obligation[]," Harris, 127 F.3d at 1009, from that of 42 U.S.C. § 1437d(k)(6), which requires public housing agencies to issue a "written decision" regarding any proposed adverse action. The rule in our Court says a regulation that "goes beyond explicating the specific content of the statutory provision" and speaks to an altogether different requirement cannot create a federal right cognizable through § 1983. Harris, 127 F.3d at 1009. Ms. Yarbrough's case was not a challenge to the Authority's failure to provide a written decision. To the contrary, she sued because the hearing officer issued a written decision that she

[2] We therefore do not address the Authority's alternative argument that § 1437d(k)'s grievance procedures are limited to public housing recipients as opposed to Section 8 voucher recipients like Ms. Yarbrough. For similar reasons, we decline to address the Authority's argument that § 1437d(k) does not create any privately enforceable federal rights.

says failed to meet the preponderance standard. Thus, even accepting her allegation as true, the hearing officer violated the regulation but not the statute. Her case fails as a result.

Ms. Yarbrough nonetheless contends that because a written decision must necessarily be reasoned, the regulation clarifies the standard of proof for a "reasoned" decision. Her argument is consistent with several district court decisions. See, e.g., Stevenson v. Willis, 579 F. Supp. 2d 913, 922–23 (N.D. Ohio 2008); Gammons v. Mass. Dep't of Hous. & Cmty. Dev., 523 F. Supp. 2d 76, 84 (D. Mass. 2007) ("The HUD regulations clarify what constitutes a proper written decision by specifying that . . . factual determinations shall be based on a preponderance of the evidence presented at the hearing." (quotation marks and alterations omitted)). But this theory relies on defining words Congress did not use. Section 1437d(k) does not entitle tenants to a "properly" written decision or a "well-reasoned" decision or even a "reasoned" decision—it entitles them to a "written decision." And the regulation's reference to a preponderance standard neither defines nor elaborates on the meaning of a "written" decision. Because 24 C.F.R. § 982.555(e)(6) is unmoored from any federal right, we conclude it cannot be the basis for a cause of action under 42 U.S.C. § 1983. We overrule Basco to the extent it held otherwise.

IV.

Ms. Yarbrough argues, in the alternative, that the Authority violated her procedural due process rights by relying on unreliable hearsay to terminate her housing benefits. Given the narrow question presented for en banc review and the fact that the panel never had the opportunity to address this argument, we will leave this issue and any other procedural due process arguments for the panel to resolve.

REMANDED TO THE PANEL WITH INSTRUCTIONS.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

EWELL MILLER,
Appellant,

v.

HOMELAND PROPERTY OWNERS ASSOCIATION, INC., MARK LLANO, TODD MINIKUS, AMANDA MINIKUS, MELINDA HUBER, EDWARD HUBER, DANNY CAGLE and **JOAN GAGLE,**
Appellees.

No. 4D18-1647

[July 31, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Peter D. Blanc, Judge; L.T. Case No. 502014CA012132AB.

Patrick Dervishi of the Shir Law Group, P.A., Boca Raton, for appellant.

Ryan H. Lehrer and Paul O. Lopez of Tripp Scott, P.A., Fort Lauderdale for appellee Mark Llano.

W. Todd Boyd, Craig J. Shankman, Jamie Mathew, Elaine D. Walter and Yvette Lavelle, of Boyd Richards Parker & Colonnelli, P.A., Miami, for appellee Homeland Property Owners Association, Inc.

WARNER, J.

Appellant homeowner, Ewell Miller, appeals from partial final summary judgment in favor of Mark Llano, another homeowner in the community regulated by Homeland Property Owners Association, Inc.[1] We affirm, addressing only the issue of whether disputed issues of material fact precluded the entry of summary judgment and the proper application of the business judgment rule.

Both appellant and Llano live in a community governed by Homeland

[1] Although the Association also filed an answer brief, the partial final summary judgment was entered as to only Llano. At oral argument, counsel for the Association conceded that this court does not have jurisdiction as to the Association.

Property Owners Association, Inc., whose powers and duties are set forth in the Association's governing documents. The Association's Declaration provides that its Board of Directors shall appoint an Architectural Review Board (ARB), which "shall provide for a systematic and uniform review of all proposed improvements and construction of any type or nature whatsoever" in the community. The homeowners were required to obtain approval of their plans by the ARB, including any proposed changes to the plans, prior to the homeowner commencing any work on his or her premises. The Declaration states that the Association "shall have the authority to enforce those restrictions imposed" under the section regarding the community's prohibited uses. These use restrictions include a maximum building height of thirty-two feet and a prohibition against flat roofs, which are allowed only for patio or pool coverings. Similarly, the Association's by-laws provide that the Association "shall" have various powers, including the power to enforce its Declaration through legal means.

In February 2012, Llano submitted plans to the Association's ARB for permission to alter his residence by adding a garage, and he was granted approval. The original plans for this addition did not include a request for a flat roof. During the months after these original plans were submitted and approved, the plans were revised multiple times. Llano testified that his completed garage differs from the original plans.

In late 2012, Llano's garage addition was completed. Over one year later, during unrelated legal proceedings between the Association and other community members, the Association learned that Llano's plans for his garage were revised without prior approval by the ARB.

In January 2014, the Association sent a letter to Llano, informing him that his revised plans were never submitted and that he violated the Declaration's requirement for the ARB to approve any changes to the plans. The primary concerns with Llano's garage were its height and whether it had a flat roof. Llano then submitted a new application and architectural drawings for his garage addition. The updated plans are not part of this record, and the parties do not point out the exact differences between the original and final versions of the plans. However, the record does contain illustrations of the garage roof, which indicate that the final shape of the roof is a modified, gambrel truss shape. Shortly after Llano submitted these revised plans, Llano retracted his updated application for approval because he felt that his garage, which had been completed for about eighteen months, was compliant with the use restrictions. Llano provided the Association with a letter from an engineering and construction firm, which opined that under Palm Beach County's Unified

Land Development Code's method for measuring building height, the garage's height was under the maximum height allowed in the Declaration. The construction firm also concluded that the garage's "roof resembles a gambrel roof similar to a barn roof with a small flat walkway at the top. [This is not considered] a flat roof which is typically flat from one end to the other." Additionally, Llano submitted an April 2014 email from a building official for Palm Beach County to Steve Annuziata, Llano's general contractor, in which the official confirmed the method used to measure the roof's height.

After reviewing these submissions, the Association's Board approved Llano's garage. In its letter to Llano, it noted that although he failed to timely submit his revised plans, the Association was required to strictly construe its restrictions in favor of allowing him the full use of his property. It specifically noted the opinion of the construction firm regarding the garage's compliance. The board informed Llano that he need not make any further applications for approval. A few days later at a Board meeting, the official minutes show that the Board discussed the above documents that were submitted by Llano, and the Association's own legal counsel also provided an opinion that Llano's garage should be approved. The record also contains an email from the Association's counsel, in which he recommends that the Association approve the garage. Notably, in both the attorney's email and the Association's letter of approval, they note that some sort of additional plans were submitted by Llano to the Association during the construction process, but the ARB apparently did not respond to the submission of these materials.

Later that same year, appellant sued the Association, bringing multiple claims for breach of contract and injunctive relief against the Association for its alleged failure to enforce its restrictions against various property owners. Although appellant listed these homeowners as defendants, all of the claims are directed against the Association. Claims III and IV deal with the Association's failure to act regarding Llano's property, and Llano was joined as a party to these counts. Under count III, appellant alleged that Llano altered his residence without the required approval by the ARB, and the garage violated the Association's height restriction and prohibition against flat roofs. He claimed that the Association avoided its obligations under its governing documents by making a "business judgment" decision not to proceed against Llano. Under count IV, appellant sought injunctive relief to compel the Association to enforce its covenants and restrictions against Llano.

After lengthy discovery, the Association filed a motion for final summary judgment, which Llano joined. The Association argued that the

enforcement of its governing documents was discretionary, not mandatory, and that the Association reasonably exercised its business judgment when deciding to take enforcement action against any homeowners. For the claims against Llano, the Association admitted that Llano's revised plans were not submitted prior to the completion of his garage, but it noted that it later approved the garage based on the opinion of the construction firm. The approval then was discussed at a board meeting and condoned by the Association's own attorney. The Association contended that the decisions of its Board were protected by the business judgment rule, as corporate directors have broad discretion in performing their duties absent a showing of mismanagement, fraud, or breach of trust. In determining that Llano's garage did not violate the Declaration, the Board used reasonable discretion in implementing its restrictions and determining that the height and shape of Llano's garage roof complied with them. The Association further argued that, given its 2014 approval of the garage, any enforcement action against Llano would be futile. Although appellant disagreed with the method used to measure the roof height, the Board's business judgment governed.

Following a hearing, the court agreed that the Association's enforcement decisions were protected by the business judgment rule, and it issued an order granting summary judgment in favor of both the Association and Llano as to counts III and IV. Because other counts were pending against the Association, the court entered partial final summary judgment on counts III and IV in favor of only Llano and not the Association. This appeal followed.

This court reviews de novo the grant of summary judgment. *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.").

While the business judgment rule traditionally applied to protect corporate directors from personal liability in their business dealings, courts may use the rule to evaluate the management decisions of property associations and to avoid second-guessing those decisions. *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 787 (Fla. 4th DCA 2010). When applying the business judgment rule to the decisions of a property association, the test is: 1) whether the association had the contractual or statutory authority to perform the relevant acts; and 2) if so, whether the board acted reasonably. *Id.* "[C]ourts must give deference to a[n] . . . association's decision if that decision is within the scope of the association's authority and is reasonable—that is, not arbitrary, capricious, or in bad faith." *Id.* The question of reasonableness is an issue

of fact, and for an appellate court to affirm a final summary judgment in favor of an association, the record on appeal must clearly show that the association's actions were reasonable. *See Garcia v. Crescent Plaza Condo. Ass'n, Inc.*, 813 So. 2d 975, 978 (Fla. 2d DCA 2002).

There is no question that the Association had the authority to enforce its use restrictions and did so. The pertinent issue is whether the Association reasonably exercised its business judgment when it approved Llano's garage.[2] The Association took enforcement action by sending a notice of violation to Llano when it learned of the possible issues with his garage. When the Association received the documents from Llano that showed that his garage complied with the Declaration's restrictions, in its business judgment it determined that there were no violations, ceased enforcement proceedings, and approved the structure.

Appellant argues that the trial court could not enter summary judgment based on the business judgment rule because there remained genuine issues of material fact, such as whether Llano's garage had a flat roof or violated the community's height restrictions. In opposition to the motion for summary judgment, appellant submitted an affidavit by another engineer. This engineer concluded that the garage roof was a mansard shape, with two distinct roof planes and an upper roof slope that was "nearly horizontal," and exceeded the maximum height.[3] Appellant further implies that Annuziata improperly influenced the Association to approve the garage based on Llano's "self-serving documents," i.e., the opinion of the construction firm and the email from the county building director. Appellant claims that Annuziata "cut[] deals" to get the garage approved, even though it was not in compliance, and the Association arbitrarily or in bad faith refused to take enforcement action against Llano. Despite appellant's arguments, he offered no evidence of improper influence. *See LeMaster v. Glock, Inc.*, 610 So. 2d 1336, 1338-39 (Fla. 1st DCA 1992) (noting testimony consisting of guesses is inadmissible and proves nothing in the summary judgment context).

We agree with Llano that the business judgment rule applied. And we must look to the circumstances surrounding the Association's exercise of that judgment as they existed when the action was taken, not five years

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[2] Although the parties debate whether the Association's enforcement of its use restrictions is mandatory or discretionary, we need not resolve this issue because the Association did take enforcement actions against Llano.

[3] Notably, appellant's expert did not specifically conclude that the garage roof was flat.

later. At the time that Llano submitted the information to the board regarding his building's compliance, both from the engineering firm as well as from the Palm Beach County Building Department, the materials showed that the as-built garage was in accordance with the Declaration's restrictions. The Association's own attorney advised the Board to approve the addition. In short, the issues of the garage's height and roof shape were nonmaterial, as the Association acted reasonably by accepting the opinion of the construction firm, the county official, and its own attorney. *See Farrington v. Casa Solana Condo. Ass'n, Inc.*, 517 So. 2d 70, 71-72 (Fla. 3d DCA 1987) ("The 'business judgment rule' will protect a corporation's board of directors' business judgment as long as the board acted in a 'reasonable' manner[.]"); *see Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000) (noting nonmaterial issues of fact are irrelevant to the summary judgment determination and are not essential to resolving the pertinent legal questions).

Once the Association and Llano presented evidence which showed that there were no genuine issues of material fact as to the Board's exercise of its business judgment, appellant was required to submit sufficient counter evidence to show such an issue, rather than relying on suppositions. *See Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). Appellant's long after-the-fact challenge to the garage's compliance with the restrictions, through the use of an expert who simply expressed a different opinion, cannot upend the Board's decision to approve Llano's garage.

We therefore affirm the partial final summary judgment in favor of Llano.

Affirmed.

CIKLIN, J., and SINGHAL, RAAG, Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

RANDY POSTMA and **CARY, LLC,**
Appellants,

v.

CHRISTOPHER BAKER, PATRICIA BAKER
and **TRICIA'S PLACE, LLC,**
Appellees.

No. 4D18-3232

[July 31, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos A. Rodriguez, Judge; L.T. Case No. 062017CA008716AXXXCE.

John J. Shahady of Shahady & Wurtenberger P.A., Fort Lauderdale, for appellants.

Eric J. Horbey of Lazer, Aptheker, Rosella & Yedid, P.C., West Palm Beach, for appellees.

KUNTZ, J.

In this appeal, we must interpret language in a settlement agreement allowing a party to inspect a vehicle to "make sure the vehicle is to his satisfaction." The appellant, who had the right to inspect, argues the provision allowed him to inspect the vehicle and determine whether he was satisfied before purchasing the vehicle. The circuit court disagreed. We reverse.

Background

In 2014, Christopher Baker, Patricia Baker, and Tricia's Place LLC bought a 2003 Marathon Prevost, a motorcoach, from Randy Postma and Cary LLC for $365,000.[1] The Bakers allege that when they purchased the motorcoach, Postma stated that it had never been "wrecked."

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[1] We call the appellants Postma, and the appellees the Bakers.

Later, the Bakers learned that the motorcoach had been in an accident and had been issued a salvage title. As a result, the Bakers filed a lawsuit, alleging that Postma knew of the accident and misrepresented the motorcoach's condition.

At mediation, the parties signed a confidential settlement agreement. The handwritten agreement stated that Postma would pay $315,000 to repurchase the motorcoach. It also included a provision allowing Postma to inspect the motorcoach:

> Prior to purchase, Postma has the right to inspect the vehicle and make sure the vehicle is to his satisfaction. Inspection will take place within 30 days.

Weeks later, the Bakers moved to enforce the agreement, arguing that Postma inspected the motorcoach after the mediation and told them it "was in very good condition." They also explained that they understood the settlement agreement to mean that Postma was "to come out and see the conditions of [the motorcoach] and make sure it wasn't damaged or wrecked or dented."

Postma explained that he sold the motorcoach to the Bakers in 2014, when it had 76,000 miles on it. At mediation, he learned that the Bakers had driven the motorcoach 40,000 additional miles since they bought it from him. So he agreed to purchase the motorcoach subject to his right to inspect it. At the inspection, Postma allegedly found many issues and declined to complete the purchase.

The circuit court granted the Bakers' motion to enforce settlement. The court noted that the parties entered into a voluntary settlement early in the litigation. The court found that Postma "ask[ed] the Court to interpret 'to his satisfaction' as completely discretionary with [Postma]. Such an interpretation," the court found, "would render the settlement agreement completely illusory." The court held the Bakers complied with the settlement agreement and granted their motion to enforce it.

Analysis

Postma argues the court erred in concluding the inspection clause in the settlement agreement was not a condition precedent to enforcing the agreement. The Bakers respond that the inspection clause was limited to confirming the representations the Bakers made about the motorcoach at mediation. We agree with Postma and reverse.

The Bakers state that "[n]owhere do Appellants present any evidence that demonstrates that the trial court's determination as to the meaning of the inspection clause was clearly erroneous," and argue that we should affirm unless the circuit court's ruling was clearly erroneous. But "settlement agreements are contractual in nature, [and] are interpreted and governed by contract law." *Barone v. Rogers*, 930 So. 2d 761, 763–64 (Fla. 4th DCA 2006) (citation omitted). So, as with contracts, our review is de novo. *Renny v. Bertoloti*, 252 So. 3d 761, 765 (Fla. 4th DCA 2018) (citation omitted).

If the language of a settlement agreement is clear and unambiguous, "courts may not indulge in construction or modification and the express terms of the settlement agreement control." *Commercial Capital Res., LLC v. Giovannetti*, 955 So. 2d 1151, 1153 (Fla. 3d DCA 2007) (quoting *Sec. Ins. Co. of Hartford v. Puig*, 728 So. 2d 292, 294 (Fla. 3d DCA 1999)).

The Bakers argue that the language allowing Postma to inspect the vehicle to "make sure the vehicle is to his satisfaction" did not allow him to reject the vehicle based on his "dissatisfaction."

But their argument is contrary to the clear and unambiguous language. The settlement agreement allowed Postma the right to inspect the motorcoach to "make sure the vehicle is to his satisfaction." This provision created a condition precedent to Postma's obligation to repurchase the motorcoach. *See, e.g.*, *Land Co. of Osceola Cty., LLC v. Genesis Concepts, Inc.*, 169 So. 3d 243, 247 (Fla. 4th DCA 2015) (citations omitted).

Alternatively, the Bakers argue that even if Postma could reject the motorcoach based on dissatisfaction, the rejection needed to be "'genuine' and in 'good faith.'" *See, e.g.*, *Burger King Corp. v. Austin*, 805 F. Supp. 1007, 1014 (S.D. Fla. 1992) ("Florida would conclude . . . that 'a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.'" (quoting *Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 972 (Ill. App. Ct. 1984))).

But we need not decide that issue, as the circuit court did not conclude Postma failed to act in good faith. Instead, the court found the inspection was limited to confirming the Bakers accurately described the condition of the motorcoach at mediation.

Postma exercised his right to inspect and determined the motorcoach was not to his satisfaction. Because he determined it was not to his

satisfaction, he did not breach the agreement and the court erred in granting the motion to enforce.

Conclusion

The court's order enforcing the settlement agreement is reversed, and the case is remanded for further proceedings.

Reversed and remanded.

LEVINE, C.J., and DAMOORGIAN, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ALINE NORMAN,
Appellant,

v.

JANNE JAIMES,
Appellee.

No. 4D19-83

[July 31, 2019]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Okeechobee County; Laurie E. Buchanan, Judge; L.T. Case No. 472013CA000447.

Colin M. Cameron of Colin M. Cameron, P.A., Okeechobee, for appellant.

No appearance for appellee.

GERBER, J.

A home property seller appeals from the circuit court's final judgment, which effectively awarded the seller's property to the buyer on the basis that the seller failed to disclose a recorded lien encumbering the property. The seller argues that the buyer was on constructive notice of the recorded lien, and that the circuit court's final judgment improperly modified the parties' contract by allowing the buyer to pay only a small portion of the property's purchase price, while depriving the seller of the property's full value and the agreed-upon interest to be paid over time.

We agree with the seller's arguments. While we respect the circuit court's described motivation "to do equity between the parties," the only legally proper result of this action was to enter final judgment in the seller's favor on both the buyer's complaint and the seller's counterclaim.

We present this opinion in three parts:
1. the circuit court's findings of fact;
2. the circuit court's conclusions of law; and
3. our review.

1. <u>The Circuit Court's Findings of Fact</u>

We present the circuit court's findings of fact in the final judgment to the extent such findings are supported by competent, substantial evidence. *See Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) ("When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence."). Other record facts are included below where necessary to provide a complete picture of the material facts.

The parties entered into an agreement for deed ("the contract"). The contract provided that the buyer would purchase the property from the seller for $85,000 plus 10% interest (later adjusted to 9%), to be paid with a $5,000 down payment and monthly payments of $650 per month. The contract further provided that upon the buyer making the payments set forth above, the seller would deliver clear title to the buyer. The contract required the buyer to pay all taxes, assessments, or impositions levied on the property beginning with the calendar year after the contract was executed.

The parties executed the contract at a title company's office, but the title company did not conduct a title search of the property and did not issue title insurance thereon.

Some years after the parties executed the contract and the buyer was living on the property, county code enforcement personnel arrived on the property. The code enforcement personnel advised the buyer that, sometime before the parties executed the contract, the county had recorded a lien on the property due to an unapproved structure which the seller had placed on the property. Since the lien's imposition, the lien had been accruing a $25 per day fine, and ballooned to $83,000 in total. The buyer demolished the structure, and the county ceased imposing the fine.

The buyer received legal advice to stop making her monthly payments to the seller. Although the buyer had paid significant sums to the seller, primarily towards the interest owed on the purchase, the remaining principal balance which the buyer owed on the purchase was $83,910.41.

The buyer sued the seller in five counts, which appear to have been pled in the alternative: (1) declaratory relief to require the seller to convey clear title to the buyer; (2) damages for breach of contract for not conveying clear title to the buyer; (3) damages for fraudulent misrepresentation for not disclosing the lien; (4) damages for negligent misrepresentation for not

disclosing the lien; and (5) rescission of the contract for not disclosing the lien.

The seller counterclaimed to foreclose on the contract, which was being treated as a mortgage.

At trial, the seller testified that she notified the buyer of the lien's existence before the parties executed the contract. The buyer testified she did not know about the lien's existence, and when she confronted the seller about the lien's existence, the seller responded that the lien would be taken care of. The circuit court found that the buyer's testimony was credible on this topic, and the seller's testimony was not credible.

The seller conceded that it was her obligation to clear the lien, and that the county had an amnesty program by which the county could forgive all or part of the fine supporting the lien. However, the seller conceded that she had taken no action to apply for amnesty, and did not have the financial ability to pay the fine and convey clear title to the buyer.

The buyer ultimately argued that the seller, by failing to pay the lien, anticipatorily breached the contract, thereby justifying the buyer ceasing the monthly payments.

The seller argued that until the buyer made all of the payments under the contract, the seller was not required to convey title free and clear of the lien. The seller also argued that because the lien had been recorded, the buyer had been on constructive notice of the lien, and the buyer's ceasing of the monthly payments was unjustified.

2. <u>The Circuit Court's Conclusions of Law</u>

Based on the foregoing evidence and arguments, the circuit court made the following conclusions of law:

> [A] gross inequity would result if [the buyer] had to pay the entire . . . purchase price only to find out at the end that [the seller] does not have the financial ability to convey clear title.
>
> [T]he [seller's] stated inability to satisfy the code enforcement lien constituted anticipatory breach which justified [the buyer] stopping payments under the [contract] and that [the seller] is thereby precluded from recovery of the property by foreclosure thereunder.

[W]hile [the buyer] has paid [the seller] a substantial amount of money under the [contract], [the buyer] has paid far less than she agreed to pay, notwithstanding the fact that [the seller] does not have the financial ability to convey clear title, irrespective of the amount agreed to be paid by [the buyer].

[T]o do equity between the parties and permit each to have, at least partially, the benefit of their respective bargains, upon receipt of $910.41 from [the buyer], [the seller] should immediately convey the property to [the buyer] by Special Warranty Deed (excluding the warranty to pay the code enforcement lien) and that [the buyer] should be responsible for satisfying the lien which clouds her property . . . .

Based on the above, it is

ORDERED AND ADJUDGED as follows:

A. The [buyer's] request for declaratory relief as set forth in Count 1 of the Complaint is GRANTED.

B. The [buyer] . . . shall deliver to [the seller] the sum of $910.41, representing the difference between the remaining principal balance ($83,910.41) and the county lien upon the property ($83,000).

C. The [seller] . . . within 10 days from the date of delivery of the payment . . . shall execute a Special Warranty Deed in [f]avor of [the buyer] for the property set forth in the Contract . . . . Said Special Warranty Deed shall exclude only the [c]ode enforcement lien which clouds the property and [the buyer] shall take title subject to said lien and shall bear sole responsibility for clearing said cloud on her title.

D. [The buyer's] other counts shall be subsumed in the granting of the request for declaratory relief as set forth above.

E. [The seller's] Counterclaim is hereby DISMISSED. . . .

(paragraph numbers omitted).

3. Our Review

This appeal followed. The seller argues that the buyer was on constructive notice of the recorded lien, and that the circuit court's final judgment improperly modified the parties' contract by allowing the buyer to pay only a small portion of the property's purchase price, while depriving the seller of the property's full value and the agreed-upon interest to be paid over time.

We agree with the seller's arguments. Regardless of whether the seller informed the buyer of the lien's existence, the lien was recorded before the parties entered into the contract, and the buyer ultimately did not present any evidence that the seller made any misrepresentation regarding whether a lien existed or not, whether fraudulently or negligently. Thus, the buyer had constructive notice of the lien's existence. *Cf. M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 95 (Fla. 2002) ("Knowledge of clearly revealed information from recorded documents contained in the records constituting a parcel's chain of title is properly imputed to a purchasing party, based upon the fact that an examination of these documents prior to a transfer of the real property is entirely expected."); *Lafitte v. Gigliotti Pipeline, Inc.*, 624 So. 2d 844, 845 (Fla. 2d DCA 1993) ("Constructive notice is information or knowledge of a fact imputed by law to a person although he may not actually have it[], because [the person] could have discovered the fact by proper diligence, and [the person's] situation was such as to cast upon [that person] the duty of inquiring into it.") (citation and internal quotations marks omitted).

The circuit court's conclusion that the seller's *present* inability to satisfy the code enforcement lien constituted anticipatory breach, was error. Under the contract's plain language, the seller was not obligated to deliver clear title to the buyer until the buyer made the payments set forth in the contract, an event which remained years away and which may never have occurred if the buyer defaulted on the payments. *See Ryan v. Landsource Holdings Co.*, 127 So. 3d 764, 768 (Fla. 2d DCA 2013) ("To be entitled to damages based upon an anticipatory breach, the nonbreaching party must establish its ability to perform at the time of the breach. The rationale for this rule is that the holder of the duty based upon a condition precedent cannot profit from an anticipatory repudiation of a contract that he would have breached himself.") (internal citations, quotation marks, and brackets omitted); *Alvarez v. Rendon*, 953 So. 2d 702, 709 (Fla. 5th DCA 2007) ("An anticipatory breach of contract occurs before the time has come when there is a *present* duty to perform as the result of words or acts evincing an intention to refuse performance in the future.") (emphasis added).

The circuit court also erred in using its declaratory relief powers to modify the parties' contract into a contract of the court's own creation. That is, the court modified the contract from one in which the buyer was to purchase the property for $85,000 plus interest, into one in which the buyer was permitted to purchase the property for whatever amount the buyer had paid to the seller up until the point of the judgment, plus "$910.41, representing the difference between the remaining principal balance ($83,910.41) and the county lien upon the property ($83,000)." Although we can appreciate the court's motivation was "to do equity between the parties," there simply is no legal basis for the manner in which the court rewrote the parties' obligations under the contract. *See Prudential Ins. Co. of America v. Wynn*, 398 So. 2d 502, 503 (Fla. 3d DCA 1981) ("Notwithstanding that the trial court may have been benignly motivated, it was not empowered to violate the sanctity of [the parties'] contract.").

Although the buyer has not cross-appealed in this case, we note that the circuit court's modification of the contract also may have prejudiced the buyer. Under the contract's plain language, the buyer, upon making the payments set forth in the contract, was to receive clear title to the property. Instead, according to the circuit court's final judgment, the buyer was saddled with clouded title to the property, in the form of an $83,000 lien. Although the county may have had an amnesty program by which the county could forgive all or part of the fine supporting the lien, it is beyond our record whether the buyer would have received any amnesty from the lien as consideration for having demolished the structure which led to the fine's imposition.

As for the seller's counterclaim to foreclose on the contract, the seller provided competent substantial evidence to support that action, as it was undisputed that the buyer ceased making the monthly payments. All of the buyer's affirmative defenses to that action lacked merit, as each defense relied upon the buyer's argument that the seller failed to disclose the recorded lien encumbering the property. Because the buyer was on constructive notice of the recorded lien's existence, the buyer's ceasing of the monthly payments was unjustified.

In sum, while we respect the circuit court's motivation "to do equity between the parties," the only legally proper result of this action was to enter final judgment in the seller's favor on both the buyer's complaint and the seller's counterclaim. Therefore, we reverse the circuit court's final judgment, and remand for entry of a legally proper final judgment.

Reversed and remanded.

LEVINE, C.J., and KUNTZ, J., 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

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE MASTR ASSET BACKED SECURITIES TRUST 2007-NCW MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-NCW,

Appellant,

v. Case No. 5D18-733

GRACE STEPHENSON AND TIMACUAN COMMUNITY SERVICES ASSOCIATION, INC.,

Appellees.
_____/

Opinion filed August 2, 2019

Appeal from the Circuit Court
for Seminole County,
Jessica J. Recksiedler, Judge.

David Rosenberg, Cynthia L. Comras, and Jarrett E. Cooper, of Robertson, Anschutz & Schneid, P.L., Boca Raton, for Appellant.

Nicholas A. Shannin, of Shannin Law Firm, P.A., Orlando, for Appellee, Grace Stephenson.

No Appearance for Appellee, Timacuan Community Services Association, Inc.

COHEN, J.

Wells Fargo Bank, N.A., as Trustee for the MASTR Asset Backed Securities Trust 2007-NCW Mortgage Pass-Through Certificates Series 2007-NCW ("Wells Fargo"),

appeals the order dismissing its amended foreclosure complaint against Grace Stephenson without leave to amend and the order denying its motion for rehearing. On appeal, Wells Fargo argues that the trial court erred in dismissing its action because it sufficiently alleged its standing as the holder of the blank-indorsed note. We agree and reverse.

In May 2014, Wells Fargo filed its initial foreclosure complaint against Stephenson and her husband, Gene (collectively, "the Stephensons"). It alleged that it was the holder of the operative note and mortgage via transfer and that the Stephensons defaulted on payments since September 2011. It attached several documents in support, including: a copy of the note Gene executed in February 2007 payable to New Century Mortgage Corporation ("New Century"); a copy of an undated, blank indorsement from New Century; a certification of possession of the original note; and an assignment of mortgage to "Wells Fargo Bank, N.A., as Trustee for the CertificateHolders of MASTR Asset-Backed Securities Trust 2007-NCW, Mortgage Pass Through Certificates, Series 2007-NCW." The Stephensons moved to dismiss the action based on the discrepancy between Wells Fargo's name as presented in the complaint versus the assignment of mortgage. The trial court granted the Stephensons' motion and dismissed the complaint with leave to amend.

With Stephenson's agreement,[1] Wells Fargo filed its amended foreclosure complaint in August 2017. It again alleged that it was a holder and possessed the blank-indorsed note at issue. It attached a copy of the note and the blank indorsement, as well as a certification of possession of the original note. It also attached a corrective

[1] Gene passed away during the pendency of the case below, such that Grace proceeded individually.

assignment of mortgage. Stephenson again moved to dismiss based upon the discrepancy between Wells Fargo's name in the complaint versus the mortgage assignment. Wells Fargo responded in opposition, contending that it sufficiently alleged its standing as the holder of the blank-indorsed note. The trial court granted Stephenson's motion and dismissed the amended complaint without leave to amend. It found that Wells Fargo lacked standing based on the mortgage assignment, and it believed the issue could not be cured.

Wells Fargo timely moved for rehearing. It argued that the court erred in granting Stephenson's motion to dismiss because it should have taken the allegations regarding its status as holder of the blank-indorsed note as true. It maintained that any minor discrepancy in its name between the complaint and mortgage assignment was not dispositive of its standing. The court denied the motion, and Wells Fargo timely appealed.

The operative complaint alleged that Wells Fargo, as a trustee, held the blank-indorsed note and included a certification of possession of the original note, as well as a copy of a blank indorsement. Taken as true, such was sufficient to illustrate standing as a holder to overcome Stephenson's motion to dismiss. See Bonafide Props., LLC v. E-Trade Bank, 208 So. 3d 1279, 1281 (Fla. 5th DCA 2017); Fox v. Prof'l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 178 (Fla. 5th DCA 2001). The assignment of mortgage, which Stephenson heavily relied upon below and on appeal, was not relevant to this allegation, nor were the slight variations in Wells Fargo's name. See Wilmington Sav. Fund Soc'y, FSB, v. Louissaint, 212 So. 3d 473, 475–46 (Fla. 5th DCA 2017); Bank of N.Y. Mellon Tr. Co., Nat'l Ass'n v. Ginsberg, 221 So. 3d 1196, 1197 (Fla. 4th DCA 2017).

We agree with our sister court that to prove standing, a plaintiff is not required to identify or prove the trust on whose behalf the plaintiff acts. Ginsberg, 221 So. 3d at 1197. The fact that the trust identified in the complaint is somewhat different from the trust identified in the mortgage assignment does not create a defect in standing as a holder of the note that can be resolved on a motion to dismiss.

REVERSED and REMANDED.

GROSSHANS, J., and ROBERSON, E.C., Associate Judge, concur.