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Ford Motor Credit Company, LLC v. Arwine, Case No. 1D18-4772 (Fla. 1st DCA 2019).
A lender seeking a deficiency judgment upon private sale of personal property need not demonstrate the sale of collateral was commercially reasonable unless the debtor first disputes the reasonableness of the sale under Florida Statute section 679.626(1).

Harrell v. The Ryland Group, Case No. 1D18-3728 (Fla. 1st DCA 2019).
An attic stepladder constitutes an "improvement to real property" and thus is covered by the ten-year statute of repose for construction improvements under Florida Statute section 95.11(3)(c).

Pirate's Treasure, Inc. v. City fo Dunedin, Florida, Case No. 2D18-2774 (Fla. 2d DCA 2019).
A landowner locked in a development dispute with a municipality may transfer the affected land to a third party and not lose standing to prosecute the dispute so long as it retains a sufficient interest in the property.

Wishinsky v. Choufani, Case No. 5D18-2122 (Fla. 5th DCA 2019).
A member of a limited liability company may bring a constructive fraud and breach of fiduciary duty suit against the manager of the company without satisfying derivative action requirements if the claim is based on violation of statutory or contractual duties.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4772

FORD MOTOR CREDIT COMPANY LLC,

Appellant,

v.

THOMAS ARWINE,

Appellee.

On appeal from the Circuit Court for Baker County.
Stanley H. Griffis, III, Judge.

August 14, 2019

PER CURIAM.

Ford Motor Credit Company ("Ford") appeals a Final Judgment for Deficiency, arguing the trial court erred in finding it had failed to prove disposition of the collateral asset was done in a commercially reasonable manner and reducing the deficiency balance. We agree; thus, the order on appeal is reversed.

Disposition of collateral assets must be done in a commercially reasonable manner. § 679.610(2), Fla. Stat. Disposition of collateral is commercially reasonable if it is made in the usual manner in a recognized market, made at the price current in any recognized market at the time of the disposition, or otherwise in conformity with reasonable practices among dealers in the type of

property being disposed. § 679.627(2), Fla. Stat. However, a secured party need not prove disposition of the collateral was done in a commercially reasonable manner unless the debtor places the secured party's compliance in issue. *See* § 679.626(1), Fla. Stat.; *see also S. Developers & Earthmoving, Inc. v. Caterpillar Fin. Servs. Corp.*, 56 So. 3d 56, 60 (Fla. 2d DCA 2011) (holding deficiency balance appropriate where appellant did not prove disposition was commercially reasonable and debtor placed appellant's compliance in issue); *Textron Fin. Corp. v. Lentine Marine Inc.*, 630 F. Supp. 2d 1352, 1358 (S.D. Fla. 2009) (noting the defendants placed in issue the commercial reasonableness of the sell, "which would shift the burden to Plaintiff to prove that its sales were in fact commercially reasonable . . .").

Here, Appellee never placed Ford's compliance with section 679.627(2), Florida Statutes, in issue. In fact, Appellee did not appear at the hearing on the motion. Therefore, the burden of proving the sale of the collateral asset was commercially reasonable never shifted to Ford. As Ford was not required to prove disposition of the collateral was done in a commercially reasonable manner, the trial court erred when it reduced the deficiency amount based on this rational. On remand, the trial court is instructed to grant Ford the full deficiency balance, as well as appropriate prejudgment interest and court costs.

REVERSED and REMANDED.

LEWIS, OSTERHAUS, and M.K. THOMAS, JJ., concur.

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

Michael J. Ingino of Moody, Jones & Ingino, P.A., Plantation, for Appellant.

Thomas Arvine, pro se, Appellee.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3728

JAMES HARRELL,

Appellant,

v.

THE RYLAND GROUP, doing business as Ryland Homes, a foreign for-profit corporation,

Appellee.

On appeal from the Circuit Court for Duval County.
Karen K. Cole, Judge.

August 13, 2019

LEWIS, J.

Appellant, James Harrell, appeals the final summary judgment entered in favor of Appellee, The Ryland Group, Inc., d/b/a Ryland Homes, and raises two issues. Appellant argues that the trial court erred in ruling that the statute of repose of section 95.11(3)(c), Florida Statutes (2016), applies. In the alternative, he argues that Appellee failed to establish that the statute of repose had run. We affirm.

BACKGROUND

In June 2016, Appellant filed against Appellee an amended complaint for damages for injuries he allegedly sustained around

June 6, 2012, when an attic ladder he was climbing at a residential home ("the home") for purposes of repairing a leak collapsed underneath him.[1] Appellant alleged that Appellee constructed and sold the home prior to June 6, 2012, and was negligent "by failing to ensure that the attic ladder was installed in a secure manner with the appropriate hardware" and "by failing to verify that the ladder was secure before selling the home." Appellee filed a motion to dismiss, arguing in part that Appellant's claim was barred by the ten-year statute of repose of section 95.11(3)(c), Florida Statutes. The trial court found that the statute is applicable because an attic ladder is an improvement to real property, but denied the motion upon further finding that it was not clear from the face of the complaint whether the suit was filed before the expiration of the statute of repose.

Appellee then filed a motion for summary judgment, in which it alleged and argued as follows. In July 2003, Appellee entered into an agreement with the original owners, pursuant to which it was to construct and sell the home to them. On or around April 30, 2004, the construction of the home was completed and a certificate of occupancy was issued. By that date, final performance had occurred and final payment had become due for all the contracted-for services related to the construction of the home. On or around May 7, 2004, Appellee executed a warranty deed conveying title to the home to the original owners, who took actual possession of the home. As found by the trial court, the installation of the attic ladder was an improvement to real property; thus, section 95.11(3)(c) applies. The issuance of the certificate of occupancy, the conveyance of the home to the original owners, and the recording of the warranty deed confirm that "all construction activities on the Home were complete, and paid for, and that the Original Owners took actual possession of the Home on [May 7, 2004]." As such, any claims relating to the home

[1] Appellant filed the original complaint in September 2015 against Chandler's Trim, Inc., who he alleged negligently installed the attic ladder without "the proper hardware, including adequate-sized screws" and as to whom he subsequently dismissed the action with prejudice.

expired ten years later, on May 7, 2014, rendering Appellant's claim time barred.

Appellee filed several exhibits in support of its motion. A rider to the agreement between Appellee and the original owners reflects a contract date of July 29, 2003, and an estimated closing date of March and that the contract included optional "[p]ull down attic stairs" for $249. A certificate of occupancy was issued on April 30, 2004, stating that the home "has been completed to the best of our knowledge in compliance with all Building Code and Zoning Regulations applicable therein." A warranty deed reflects that Appellee conveyed the home to the original owners on May 7, 2004. Appellee also filed the affidavit of William Berryhill, the vice-president of the successor corporation by merger to Appellee, in which Berryhill attested in part as follows:

> 5. . . . The issuance of the Certificate of Occupancy indicates that construction of the Home was completed as of April 30, 2004. I know this based on Ryland's standard building procedures and I can also attest to the fact that Ryland's standard building procedures regarding completion of construction and application for the Certificate of Occupancy are common to other production home builders.
>
> 6. To be even more specific, issuance of the Certificate of Occupancy on April 30, 2004 indicates that as of that date final performance of all of the contracted-for services provided by the professional engineer, registered architect, or licensed contractor with respect to the Home were complete. In other words, on April 30, 2004 all of the contract(s) . . . were complete with respect to the Home.
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> . . . .
>
> 8. Ryland's procedures and protocols would not have permitted the conveyance of the Home as signified by the Warranty Deed without final completion of the contract(s) . . . with respect to the Home and final payment (i.e. closing) delivered to Ryland by the Original Owners.

> 9. The recording of the Warranty Deed on or about May 7, 2004 provides final confirmation that all construction activities on the Home were complete, and paid for, and that the Original Owners took actual possession of the Home on that date.

In his response, Appellant argued that section 95.11(3)(c) does not apply because "the act of fastening a pre-assembled attic ladder does not constitute design, planning or construction of an improvement to real property" and even if the statute were applicable, Appellee failed to establish that the alleged negligent act occurred more than ten years before this action was filed because it has not shown when the ladder was installed. At the motion hearing, Appellant's counsel argued that although the summary judgment evidence indicates that the contract had been completed, it "ignores the fact that sometimes builders have to come back out and do things that they forgot to do as part of that contract. And so, without knowing when this attic ladder was installed, I don't think [Appellee] can carry its burden of establishing when the construction was abandoned or completed."

The trial court entered final summary judgment for Appellee. This appeal followed.

ANALYSIS

The party moving for summary judgment must establish the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. *Bradley v. Fort Walton Beach Med. Ctr., Inc.*, 260 So. 3d 1178, 1180 (Fla. 1st DCA 2018). When the movant satisfies this initial burden, the burden shifts to the opposing party to demonstrate the existence of disputed issues of fact by presenting evidence of countervailing facts or justifiable inferences from the facts presented. *Id.* A mere assertion that an issue exists does not suffice; "general allegations and legal argument do not constitute evidence of disputed issues of material fact." *Id.* The trial court must draw every possible inference in favor of the nonmoving party and may grant the motion only if the facts are so crystallized that nothing remains but questions of law. *Convergent Techs., Inc. v. Stone*, 257 So. 3d 161, 166 (Fla. 1st DCA 2018). An order granting summary judgment is reviewed *de novo*. *Id.*

Likewise, an issue of statutory interpretation is reviewed *de novo*. *Whitney Bank v. Grant*, 223 So. 3d 476, 479 (Fla. 1st DCA 2017). The polestar of statutory interpretation is legislative intent, which is to be determined by first looking at the actual language used in the statute. *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181, 1189 (Fla. 2017). Where the Legislature did not define the words in the statute, the language is to be given its plain and ordinary meaning, which may be derived from a dictionary. *Debaun v. State*, 213 So. 3d 747, 751 (Fla. 2017). If the statutory language is clear and unambiguous, the court may not resort to the rules of statutory construction and the statute must be given its plain and obvious meaning, unless it would lead to an unreasonable result or a result clearly contrary to legislative intent. *Searcy, Denney, Scarola, Barnhart & Shipley,* 209 So. 3d at 1189 (explaining that the court must give effect to all parts of the statute and avoid readings that would render a part thereof meaningless, and the court may not construe a statute in a way that would extend, modify, or limit its express terms or its reasonable or obvious implications).

Section 95.11(3)(c), Florida Statutes (2016), provides in pertinent part as follows:

> An action founded on the design, planning, or construction of an improvement to real property . . . must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.[2]

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[2] The current version of the statute has the following additional provisions:

> With respect to actions founded on the design, planning, or construction of an improvement to real property, if such construction is performed pursuant to a duly issued building permit and if a local enforcement agency, state enforcement agency, or special inspector, as those terms

The legislative intent behind section 95.11(3)(c) was to protect engineers, architects, and contractors from stale claims. *Snyder v. Wernecke*, 813 So. 2d 213, 216 (Fla. 4th DCA 2002).

As such, the applicability of section 95.11(3)(c) turns on whether Appellant's action is founded on the "construction of an improvement to real property." We refer to the dictionary to ascertain the plain and ordinary meaning of the words "construction" and "improvement" because the Legislature did not define them. "Construction" is defined as "[t]he act of building by combining or arranging parts or elements; the thing so built." *Construction*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Improvement" is defined as "[a]n addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance." *Improvement*, BLACK'S LAW DICTIONARY (11th ed. 2019).[3] *Cf. Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach*, 263 So. 2d 209, 213 (Fla. 1972) (finding that beach erosion projects were "capital improvements" for the purpose of the town charter and relying on the fourth edition of Black's Law Dictionary defining "improvement" as "[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more

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> are defined in s. 553.71, has issued a final certificate of occupancy or certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction of defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced. Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made.

§ 95.11(3)(c), Fla. Stat. (2018).

[3] These terms were defined in the same manner in the previous edition. *See Construction*; *Improvement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes").

Under the current definition of "improvement," the attic ladder need not be permanent and is not required to increase the value and/or utility of the property. *See Improvement*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance."). The attic ladder is unquestionably an addition to real property, and it provides added utility. While the attic could be accessed absent the pull-down stairs with a household ladder, the pull-down stairs provide convenience as they obliviate the need to have a standalone ladder tall enough for attic access that one then has to carry to and properly place under the attic opening. Nothing in the statutory language or dictionary definition requires the addition to significantly increase the value or utility of the property or to be essential to the property. Given such, the attic ladder meets the current definition of improvement.

We note that the attic ladder also meets the prior definition of improvement because it is an addition to property, it amounts to more than mere repair or replacement of waste, it cost labor and capital given that it required installation and cost $249, and we cannot conceive of a reason why the original owners would have opted to pay for it other than to intend to enhance the value or utility of the property. *See Improvement*, BLACK'S LAW DICTIONARY (4th ed. 1969) ("A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.").

Case law supports our conclusion that the attic ladder constitutes improvement to real property. For example, in *Plaza v. Fisher Development, Inc.*, 971 So. 2d 918, 924 (Fla. 3d DCA 2007), the Third District concluded that the store's conveyor system was a structural improvement to real property, not a product to which strict liability would apply. The court noted that the conveyor system was installed when the store was being built

and reasoned that the conveyor is "'an integral part of' Pottery Barn's operation, in that the subject conveyor allowed items sold to customers to travel easily from the second floor storage area to the first floor retail area, and the conveyor system is affixed to the real property, thereby adding value to the property." *Id.*; *see also Simmons v. Rave Motion Pictures Pensacola, L.L.C.*, 197 So. 3d 644, 645, 647 (Fla. 1st DCA 2016) (affirming the judgment against the appellant, who was injured when a movie theater seat broke underneath him due to a failure in the welding in its bottom, upon concluding that the seating system was a structural improvement to real property, not a product, because "[the appellees] are not the manufacturer of the theater seating system. There is also evidence that the seating system is an integral part of the movie theatre's operation, as it was installed as part of the construction of the theater, and the entire seating system was bolted to the floor. Moreover, . . . there is no evidence that either the seat bottom or, more importantly, the seating system could be disassembled and resold."); *Bernard Schoninger Shopping Ctrs., Ltd. v. J.P.S. Elastomerics, Corp.*, 102 F.3d 1173, 1175 (11th Cir. 1997) (finding section 95.11(3)(c) applicable to the appellant's claims stemming from a leaky roof the appellee had installed because "[t]he installation of over 100,000 square feet of membrane and fiberboard [on top of the existing roof] at a cost of tens of thousands of dollars is a 'valuable addition' to the Kmart building, and it therefore qualifies as an 'improvement'" (citation omitted)). *Cf. Dominguez v. Hayward Indus., Inc.*, 201 So. 3d 100 (Fla. 3d DCA 2015) (concluding that a pool filter, which is a component part of the swimming pool, does not constitute an improvement to real property under section 95.031(2)(b), Florida Statutes, which sets forth a statute of repose for products liability claims and exempts "improvements to real property, including elevators and escalators").

In *Collins v. Trinity Industries, Inc.*, 861 F.2d 1364, 1364-65 (5th Cir. 1988), the Fifth Circuit determined that the appellant's claims were barred by the applicable statute of limitations, which applied to claims "arising out of the deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property," because the caged ladder from which he fell at the electrical generating facility where he worked was an improvement to real property. The court

noted that the ladder was field-bolted or welded to the structure, and it "was designed as part of the overall project and was used like a stair or elevator for ordinary movement around the plant." *Id.* at 1365. The court reasoned:

> [T]he term improvement must be given its customary meaning. Common definitions of the term generally refer to a permanent addition that increases the value of the property and makes it more useful. . . . The caged ladder in issue was an integral part of the building, providing a means of moving from one level to another. The ladder was permanent affixed although, as the Mississippi Supreme Court held, that feature is not required. The ladder also added value to the refinery.

Id.; *see also Tr. Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1152 (5th Cir. 1992) (finding that "'asbestos-containing' fireproofing materials applied to the steel support structure and structural ceiling of the bank building" are improvements to real property because "[t]here is little doubt that the fireproofing materials in this case increased the value of the bank building and made it more useful").

Similarly, in *Diana v. Russo Development Corporation*, 799 A.2d 689, 691 (N.J. Super. Ct. App. Div. 2002), the court held that "a fixed vertical steel ladder attached to a concrete block wall leading to a [] roof hatch" constituted an improvement to real property for the purposes of the statute of repose. After noting that the hatch and ladder constituted a single system, were incorporated into the building, and served no purpose other than to provide access to the building's roof and that the fact that it was a mass-produced item did not render the statute of repose inapplicable because "[m]uch construction in a home involves so called 'mass-produced items,'" the court explained:

> The hatch and ladder system appears to have been installed during the construction of the building and was not added later. The system provides a means of moving from the leased space to the roof where the air conditioning and heating equipment had been installed. . . .

> Hatch covers have also been found to be improvements to real property where they were designed to make the property more useful . . . .
>
> While the ladder and hatch system could be removed from the wall and roof relatively easily, there was no indication that the structure was not designed to be a permanent feature of the leased warehouse space. Today, very few structures can be considered permanent, in the sense that the structure cannot be removed. . . .
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> Plaintiff argues that there was no proof that the hatch and ladder would increase the property's tax assessment value . . . . However, value is not an exact science but rather relative. Here, the claimed improvement must create value to someone utilizing the particular improvement. It need not in all cases affect the tax assessment value. To us, it is not significant that a ladder could easily reach the roof from outside this two-story structure. For anyone who must be able to ascend the roof in all types of weather conditions, the inside ladder and hatch would constitute some value and enhance the property from the user's perspective.
>
> Clearly, labor and money were needed to install this feature, which was neither a repair nor a replacement. The record reflects that the roof hatch cost $350 in 1985 and after the accident to correct the backward roof hatch alignment the cost was $250.
>
> Thus, we conclude that the ladder and hatch system enhanced the use of the property and cost labor and money to build. This feature was part of the original property and did not constitute a repair or replacement. It also appears to be a permanent feature of the building and adds some value to the property.

Id. at 693-96; *see also Cherilus v. Fed. Exp.*, 87 A.3d 269, 278 (N.J. Super. Ct. App. Div. 2014) (finding that a torklift that "facilitated movement of cargo containers and enhanced the functioning of the warehouse facility," "was designed to be installed as an integral feature of the property," and "was intended to be a permanent

fixture of the building" constituted an improvement to real property); *Garrett v. J.D. Specialties, Inc.*, 2:09-CV-195, 2010 WL 4791885, at *4 (E.D. Tenn. Nov. 18, 2010) (concluding that the ladder that was attached to the outside of the building and provided access to the roof was an improvement to real property); *Homrighausen by Homrighausen v. Westinghouse Elec. Corp.*, 832 F. Supp. 903, 906 (E.D. Pa. 1993) (finding that escalators are improvements to real property because other forms of vertical transportation, such as elevators and ski lifts, have been deemed improvements and "[l]ike an elevator, an escalator's purpose is to provide effortless access between floors of the building. As such, it is a valuable addition to the building in which it is attached.").

Like the items in the foregoing cases, the attic ladder at issue here was installed as part of the construction of the home, required labor and money, made the property more useful/valuable in that it provides a more convenient means of access to another level, was not mere repair or replacement, and was affixed to the attic, making it an integral part of the home. Having concluded that the attic ladder constitutes an improvement to real property, the question remains whether Appellant's claim arises from the construction of that improvement.

It is undisputed that the attic ladder was pre-assembled and Appellee's only involvement with the ladder was its installation. Although Appellee did not construct the ladder itself, we find that the action is founded on the construction of improvement to real property because Appellant's claim is that Appellee negligently failed to ensure the secure installation of the ladder with the proper hardware (not that the ladder itself was defective). That is, the action is based on Appellee's act of building by combining the attic ladder with the attic, which it undisputedly constructed. *See Construction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act of building by combining or arranging parts or elements; the thing so built."). Therefore, we conclude that Appellant's action is founded on the construction of improvement to real property, rendering section 95.11(3)(c) applicable.

Lastly, we must determine whether the ten-year statute of repose of section 95.11(3)(c) had run. The statute requires the action to be commenced within ten years after the date of: (1)

actual possession by the owner, (2) issuance of a certificate of occupancy, (3) abandonment of the construction if not completed, or (4) completion or termination of the contract, whichever is latest. § 95.11(3)(c), Fla. Stat. Appellant does not dispute that the original owners took possession of the home on May 7, 2004, as reflected by the warranty deed, that the certificate of occupancy was issued on April 30, 2004, and that the construction was not abandoned. The record evidence shows that the attic ladder was a selected option for the construction of the home and the certificate of occupancy was issued and the home was conveyed by May 7, 2004. Appellant conceded that the summary judgment evidence indicated that the contract had been completed, and his attorney's mere assertion that "sometimes builders have to come back out and do things that they forgot to do as part of that contract" was insufficient to demonstrate the existence of a disputed issue of fact. As such, the record establishes that the contract was completed by May 7, 2004. Thus, the ten-year statute of repose ran on May 7, 2014, rendering Appellant's amended complaint time barred.

CONCLUSION

For the foregoing reasons, we hold that the statute of repose of section 95.11(3)(c) applies and bars Appellant's claim. Therefore, we affirm the final summary judgment.

AFFIRMED.

OSTERHAUS and M.K. THOMAS, JJ., concur.

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

Christopher W. Hewett of Law Office of Nooney & Roberts, Jacksonville, for Appellant.

J. Logan Murphy, Marie A. Borland, and J. Rocco Cafaro of Hill, Ward & Henderson, P.A., Tampa, for Appellee.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PIRATE'S TREASURE, INC., Appellant, v. CITY OF DUNEDIN, FLORIDA, a municipal corporation, and MATTHEW CAMPBELL, an individual, Appellees.	)	Case No. 2D18-2774

Opinion filed August 16, 2019.

Appeal from the Circuit Court for Pinellas County; Cynthia Newton, Judge.

David J. Melvin and Keathel Chauncey of Fresh Legal Perspective, PL, Tampa, for Appellant.

Jay Daigneault and Randol D. Mora of Trask Daigneault, LLP, Clearwater, for Appellee City of Dunedin.

Bennett C. Lofaro of Boyd Richards Parker & Colonnelli, P.L., Tampa, for Appellee Matthew Campbell.

SALARIO, Judge.

Pirate's Treasure, Inc. sued the City of Dunedin and its employee, Matthew Campbell, over their handling of Pirate's Treasure's request for City approval

to redevelop real property. While the case was pending, Pirate's Treasure transferred the property to Pirate's Cove Holdings, LLC. The City filed a motion for summary judgment in which Mr. Campbell joined, arguing that upon the transfer to Pirate's Cove, Pirate's Treasure lost any interest in the property and, as a consequence, lost standing to maintain the suit. The trial court granted the motion and rendered a final judgment accordingly. Because there are genuine issues of material fact about whether Pirate's Treasure has an interest in the outcome of the controversy sufficient to support its continued standing, we reverse and remand for further proceedings.

I.

The course of dealings between Pirate's Treasure and the City that led to this dispute and the zoning and land use regulations applicable to those dealings, as presented by the pleadings in the circuit court, are a pretty complex affair. In layman's terms, here is what the reader needs to know. Pirate's Treasure used to own upland and submerged property in the City upon which it operated a marina. In 2006, it began having discussions with the City about the zoning and land use approvals it would need to expand the marina and to build a restaurant on the upland property. On the City's end, Mr. Campbell played a key role in those discussions.

In Pirate's Treasure's telling, the City's approval of the proposed redevelopment looked like a sure thing. Mr. Campbell and other City employees told it that the marina expansion and the restaurant construction would both be approved. Buoyed by those assurances, Pirate's Treasure hired an engineering firm to prepare a site plan for the City's approval. Throughout 2008 and early 2009, the approval process moved smoothly, and—again, we stress, in Pirate's Treasure's telling—the City assured it that the redevelopment was approved subject to a couple of minor issues. Pirate's

Treasure demolished an existing structure on the property to prepare for the redevelopment that it believed was a lock in terms of City approval.

Things hit a snag in mid-2009, however, precipitated in part by objections raised by an owner of property next to Pirate's Treasure's. Although the City officially approved the marina expansion in 2010, it told Pirate's Treasure in 2011 that it viewed the application for approval of the restaurant construction as having been terminated and that it would have to submit a new application for that part of the proposed redevelopment. Pirate's Treasure considered this a big problem because, among other reasons, the City also took the position that revisions to the City's zoning and land use regulations that went into effect while the original application was pending would be deemed to apply to any new application.

In September 2011, Pirate's Treasure filed a complaint against the City in the circuit court seeking a declaratory judgment that its application for approval of the restaurant construction was never lawfully terminated and that the zoning and land use regulations in effect at the time its original application was filed governed the approval process. It also sought a writ of mandamus compelling the City to complete its review of the application for approval for the restaurant construction within a reasonable time. The case was scheduled for a trial in April 2013 but was taken off calendar with the agreement of the parties. Things remained dormant for quite some time after that.

On December 3, 2014, Pirate's Treasure executed a warranty deed conveying the property at issue to Pirate's Cove, a limited liability company that appears to be related in some way to Pirate's Treasure. Two weeks later, on December 17, 2014, Pirate's Treasure filed an amended complaint in which it continued to allege that it was the owner of the property. The amended complaint repleaded the claims for

declaratory relief and a writ of mandamus asserted in the original and also included new claims for negligent misrepresentation and fraud against both the City and Mr. Campbell, which alleged that Pirate's Treasure suffered damages by taking actions such as the commencement of construction in reliance on the City's and Mr. Campbell's alleged representations about the approval of the redevelopment.

The new tort claims sparked litigation between Pirate's Treasure and the City over sovereign immunity. The circuit court dismissed the fraud claim against the City on that basis but declined to dismiss the negligent misrepresentation claim. On July 11, 2017, Pirate's Treasure filed a second amended complaint that, in accord with the trial court's dismissal order, deleted the fraud claim against the City but that was identical to its predecessor in all other important respects—including the allegation that Pirate's Treasure owned the property at issue. The City responded with a motion for summary judgment arguing that Pirate's Treasure lost standing to maintain this action because it no longer owns the property—having transferred it to Pirate's Cove back in 2014. Mr. Campbell joined in the City's motion.

The City supported its motion with a copy of the warranty deed by which Pirate's Treasure conveyed the property to Pirate's Cove and a set of requests for admission it served on Pirate's Treasure—to which Pirate's Treasure failed to respond and thus technically admitted—establishing that Pirate's Treasure did not own the property any longer. Pirate's Treasure responded with an affidavit from Mark Swick, a representative of Pirate's Cove, in which Mr. Swick swore that Pirate's Treasure had "at all times been authorized to act on behalf of [Pirate's Cove] in connection with the renovation of the property" and that since the transfer of the property in 2014, Pirate's Treasure "has been an authorized representative of [Pirate's Cove] for the purpose of

submitting, managing, and obtaining building permits, inspections, applications, site plans, and proposed construction in connection with the renovation." Pirate's Treasure argued that through "excusable neglect and oversight" it failed to update the complaint to reflect the change in ownership and argued (1) that the law did not require it to have a present interest in the property for it to sustain its tort claims and (2) that it had an interest sufficient to support its standing to maintain the declaratory judgment and mandamus claims because it was Pirate's Cove's authorized agent. While the motion for summary judgment was pending, Pirate's Treasure filed a motion for leave to file a third amended complaint to correct its allegations as to the ownership of the property.

The trial court rendered an unelaborated order granting the City's motion for summary judgment and, subsequently, a final judgment in favor of the City and Mr. Campbell. It never passed on Pirate's Treasure's motion for leave to file a third amended complaint. This is Pirate's Treasure's timely appeal. While this appeal was pending, this court rendered an opinion that reversed the circuit court's decision not to dismiss the negligent misrepresentation claim against the City, holding that the City did not owe Pirate's Treasure any duty of care. See City of Dunedin v. Pirate's Treasure, Inc., 255 So. 3d 902, 905-06 (Fla. 2d DCA 2018). As a result, the two tort claims involved in this appeal are relevant only as to Mr. Campbell.

II.

We review an order granting summary judgment de novo. Fields v. Devereux Found., Inc., 244 So. 3d 1193, 1195 (Fla. 2d DCA 2018). A party is entitled to summary judgment when "the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The procedure is

well settled. Initially, a movant seeking summary judgment must prove through evidence—affidavits, depositions, interrogatory answers, and the like, see Fla. R. Civ. P. 1.510(c)—that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See Fields, 244 So. 3d at 1195-96 (explaining that the movant's burden cannot be satisfied by pointing to an absence of evidence to support the nonmovant's case (quoting Derogatis v. Fawcett Mem'l Hosp., 892 So. 2d 1079, 1083 (Fla. 2d DCA 2004))). If it does so, the burden shifts to the nonmovant to present evidence showing that a genuine issue of material fact remains to be tried. See McNabb v. Taylor Elevator Corp., 203 So. 3d 184, 185 (Fla. 2d DCA 2016) (citing First N. Am. Nat'l Bank v. Hummel, 825 So. 2d 502, 503 (Fla. 2d DCA 2002)). The nonmovant's summary judgment evidence need not, however, be sufficient to sustain a verdict in its favor at a trial. 4 Corners Ins., Inc. v. Sun Publ'ns of Fla., Inc., 5 So. 3d 780, 784 (Fla. 2d DCA 2009).

Here, the legal question that defines whether there is a genuine issue of material fact is whether Pirate's Treasure's transfer of the property at issue to Pirate's Cove divested Pirate's Treasure of standing to maintain this action. In Florida, a party has standing when it has "a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." Jamlynn Invs. Corp. v. San Marco Residences of Marco Condo. Ass'n, 544 So. 2d 1080, 1082 (Fla. 2d DCA 1989); see also Gen. Dev. Corp. v. Kirk, 251 So. 2d 284, 286 (Fla. 2d DCA 1971) ("Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it."). Although this conception of standing is less demanding than the conception of standing that prevails in the federal courts, see Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 720 (Fla. 1994), it has been understood to mean that a

party must "demonstrate a direct and articulable stake in the outcome of a controversy" to open the courthouse doors, Brown v. Firestone, 382 So. 2d 654, 662 (Fla. 1980). See also Whitburn, LLC v. Wells Fargo Bank, N.A., 190 So. 3d 1087, 1091 (Fla. 2d DCA 2015) ("[T]o have standing, a party must demonstrate a direct and articulable interest in the controversy, which will be affected by the outcome of the litigation." (quoting Centerstate Bank Cent. Fla., N.A. v. Krause, 87 So. 3d 25, 28 (Fla. 5th DCA 2012))). In determining whether a party has such an interest in the judicial resolution of a dispute, it is helpful to ask whether a decision in the case will actually resolve the rights and obligations of the parties, in which case standing likely exists, or simply will produce an advisory opinion, in which case it does not. See Kuhnlein, 646 So. 2d at 721; Warren Tech., Inc. v. Carrier Corp., 937 So. 2d 1141, 1142 (Fla. 3d DCA 2006).

In the trial court and here, the City and Mr. Campbell have argued that any interest Pirate's Treasure had in the dispute over the City's approval of the proposed redevelopment vanished when it transferred the property to Pirate's Cove because distinct legal entities like Pirate's Treasure and Pirate's Cove, even if related, are not entitled to assert each other's rights in litigation. That is true, as far as it goes. See, e.g., Cellco P'ship v. Kimbler, 68 So. 3d 914, 918 (Fla. 2d DCA 2011) ("Further, Cellco and Alltel are separate legal entities, and as such, Cellco—the parent corporation—cannot 'exercise the rights of its subsidiary.' " (quoting Am. Int'l Grp., Inc. v. Cornerstone Bus., Inc., 872 So. 2d 333, 336 (Fla. 2d DCA 2004))). But saying that Pirate's Treasure no longer has any interest in the property sought to be redeveloped is not the same as saying that Pirate's Treasure no longer has any interest in the outcome of this lawsuit. To assess whether the latter is true and susceptible of being decided by way of a motion for summary judgment, we need to look at each claim Pirate's Treasure has

alleged and ask whether the record "conclusively shows" that Pirate's Treasure lacks standing to assert that claim "as a matter of law." See Hervey v. Alfonso, 650 So. 2d 644, 646 (Fla. 2d DCA 1995) (discussing summary judgment standards).

With respect to the claims for fraud and negligent misrepresentation, it is clear that Mr. Campbell—the only defendant against whom these claims remain pending—has not carried his initial burden of demonstrating the absence of any genuine issue of material fact. Simply put, Mr. Campbell has failed to demonstrate that the legal or factual basis for Pirate's Treasure's assertion of these claims is in any way contingent on its continued ownership of the property. On the contrary, as pleaded, these are claims to recover damages that Pirate's Treasure (not Pirate's Cove) suffered because Pirate's Treasure (not Pirate's Cove) relied upon alleged misstatements Mr. Campbell made to Pirate's Treasure (not Pirate's Cove). On their face, the legal elements of the causes of action for fraud and negligent misrepresentation do not require that Pirate's Treasure continue to own the property in order to recover for economic losses incurred in these circumstances. See Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2d DCA 2010) (stating that the elements of fraud are (1) a false statement of material fact, (2) the defendant's knowledge that the statement is false, (3) the defendant's intention that the statement induce reliance, and (4) consequent injury by the party acting in reliance on the representation); Baggett v. Electricians Local 915 Credit Union, 620 So. 2d 784, 786 (Fla. 2d DCA 1993) (stating substantially identical elements for negligent misrepresentation except that the defendant's state of mind must be either intentional or negligent and the plaintiff must have acted in justifiable reliance). And Mr. Campbell has not pointed to anything in the summary judgment record to show that the facts of

this case are such as to require continued ownership of the property by Pirate's Treasure in order to pursue these kinds of claims for historical damages.

Things might be different if, for example, there had been summary judgment evidence showing that Pirate's Treasure assigned or transferred its causes of action for damages related to the renovation of the property to Pirate's Cove when it transferred the property to Pirate's Cove. Then we might say that Pirate's Treasure lost the interest in the outcome of the litigation that it once had. But there was no such summary judgment evidence here. What the record in this case shows instead is that Pirate's Treasure is seeking to recover from Mr. Campbell for its own economic injuries under recognized tort theories that, if proved at trial, permit a court to redress those injuries. Mr. Campbell failed to prove that there was no genuine dispute that Pirate's Treasure lacks standing to do that, see Sun States Utils., Inc. v. Destin Water Users, Inc., 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997), and he was thus not entitled to the summary judgment on the tort claims that he received in the trial court.

The summary judgment on the claims for declaratory and mandamus relief against the City is likewise infirm because Mr. Swick's affidavit raises a fact issue as to whether Pirate's Treasure is Pirate's Cove's authorized representative agent for purposes of maintaining this litigation to secure the City's approval of the restaurant-related redevelopment. As a legal matter, a party may have standing to maintain a suit not only when the party itself has the required interest in the controversy but also where the party represents another person who has the required interest. Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC, 87 So. 3d 14, 17 (Fla. 4th DCA 2012) (quoting Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985)). Because Florida Rule of Civil Procedure 1.120(a) permits an action to be prosecuted by

someone representing the real party in interest in a dispute, the courts have held that "where a plaintiff . . . is maintaining the action on behalf of the real party in interest, its action cannot be terminated on the ground that it lacks standing." Kumar, 462 So. 2d at 1183; see also St. Martin's Episcopal Church v. Prudential-Bache Sec., Inc., 613 So. 2d 108, 109 (Fla. 4th DCA 1993) ("Issues of standing, as a prudential question anyway, are undoubtedly affected by Florida Rule of Civil Procedure 1.210(a) . . . ." (footnote omitted)).

Here, the declaratory judgment count seeks to resolve the questions of whether the application for approval of the restaurant portion of the redevelopment was terminated and whether new zoning regulations would apply to any new application. The mandamus count seeks to compel a ruling from the City with respect to the restaurant portion of the redevelopment. Mr. Swick, a representative of Pirate's Cove, has submitted an affidavit establishing that Pirate's Treasure is authorized to act on behalf of Pirate's Cove with respect to exactly these matters—the redevelopment of the property to include a restaurant, in general, and application and permitting matters, in particular. Under the summary judgment standard and in the absence of any evidence to the contrary from the City or Mr. Campbell, Mr. Swick's affidavit creates a genuine issue of material fact as to whether Pirate's Treasure is authorized to maintain this action on behalf of Pirate's Cove. See Sawyerr v. Se. Univ., Inc., 993 So. 2d 141, 142 (Fla. 2d DCA 2008) (stating that, on a motion for summary judgment, "[a]ll doubts and inferences shall be resolved in favor of the nonmoving party").

The City relies extensively on City of Winter Park v. Rich, 692 So. 2d 986, 986-87 (Fla. 5th DCA 1997), but that case is distinguishable (among other reasons) precisely because there was no evidence that the plaintiff was acting on behalf of a

property owner. In Rich, a property owner received a writ of certiorari from a circuit court with respect to a local government's denial of his application for a variance from a comprehensive plan. Id. at 986. Before the circuit court granted relief, the property owner announced that he sold the property. Id. On the local government's second-tier certiorari petition, the Fifth District held that the former property owner "lost standing . . . because he no longer owned the property at issue." Id. at 986-87. It emphasized that (1) the former property owner did attempt to amend his pleadings to address the question of ownership and (2) the former property owner did not attempt to assert that he sold the property for less than its value because of the local government's denial of the variance—a theory the Fifth District evidently thought would have given him a continuing interest in the outcome of the proceedings. Id. at 986.

In contrast to the former property owner in Rich, Pirate's Treasure both attempted to amend its complaint in the circuit court to clarify the question of ownership and offered summary judgment evidence to support a theory of standing that was not dependent on its continued ownership of the property—its acting as a representative of Pirate's Cove. It also bears emphasis that Rich was not a case to which the summary judgment standard applied.[1] The very most that Rich stands for is that a property owner who challenges a local government's land-use decision risks losing standing to obtain a

[1]Another case the City emphasizes, Ahearn v. Mayo Clinic, 180 So. 3d 165, 174 (Fla. 1st DCA 2015), did affirm a summary judgment finding that a class representative lost standing to maintain a class action challenging certain charges imposed by the defendant when the defendant waived the class representative's payment of the charges and offered to pay his attorneys' fees and costs. That decision has no bearing here because, unlike the facts presented on the summary judgment record in this case, there was no summary judgment evidence that the plaintiff in Ahearn continued to have standing on some basis other than his being indebted to the defendant for the disputed charge.

judicial resolution of the controversy if it sells the property while the dispute is pending and has no legally valid alternative theory of standing. For the reasons we have explained, that principle does not resolve this case on the summary judgment record developed in the circuit court.

The City further argues that the doctrine of collateral estoppel precludes Pirate's Treasure from litigating the question of standing because that question was decided adversely to it in another case it brought against the City. That is meritless. The City did not present any summary judgment evidence—nothing at all—about the other case that would have permitted the trial court, or this court reviewing the trial court's final judgment, to determine whether the elements of collateral estoppel are satisfied. See Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002) (setting forth the collateral estoppel requirements as follows: "(1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a crucial and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated."). Even if we accept—as Pirate's Treasure concedes—that the parties were identical in both actions, the summary judgment record tells us nothing, most critically, about whether the identical issue (standing to litigate a declaratory judgment and mandamus claim materially identical to the claims here) was actually litigated and decided in the earlier case. See Neapolitan Enters., LLC v. City of Naples, 185 So. 3d 585, 591 (Fla. 2d DCA 2016); Porter v. Saddlebrook Resorts, Inc., 679 So. 2d 1212, 1214-15 (Fla. 2d DCA 1996). All we think we know about the prior litigation, we have learned only from the arguments of the City's counsel at the summary judgment hearing, and argument of

counsel is not competent evidence. See Heller v. Bank of Am., NA, 209 So. 3d 641, 644 (Fla. 2d DCA 2017). Collateral estoppel provides no basis to affirm the circuit court's summary judgment.

III.

On the summary judgment record developed in the circuit court and the arguments briefed in this one, it is not possible to say as a matter of law that Pirate's Treasure lacks standing to continue to maintain this action.[2] Accordingly, we reverse the final summary judgment in favor of the City and Mr. Campbell and remand the case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

NORTHCUTT and SLEET, JJ., Concur.

[2]This case potentially presents other issues that were neither litigated in the circuit court nor argued here, including (1) whether and to what extent rule 1.260(c), which governs proceedings in the circuit court when there has been a transfer of interest, is applicable here, see Schmidt v. Mueller, 335 So. 2d 630, 631 (Fla. 2d DCA 1976), and (2) whether Pirate's Treasure might have standing to pursue the claims for declaratory and mandamus relief in its own right on some other theory, such as an economic benefit it has been denied by the absence of city approval for the restaurant part of the redevelopment, cf. Rich, 692 So. 2d at 986. We express no opinion on these matters. We simply note that our silence about them—or any other matter not explicitly addressed in this opinion—should not be understood to have decided them by implication.

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

DAVID WISHINSKY,

Appellant,

v. Case No. 5D18-2122

RASHID CHOUFANI,

Appellee.

_____/

Opinion filed August 16, 2019

Appeal from the Circuit Court
for Orange County,
Renee A. Roche, Judge.

David H. Simmons, Deborah I. Mitchell, and Andrew S. Ballentine, of de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Orlando, for Appellant.

Brian R. Gilchrist, of Allen, Dyer, Doppelt & Gilchrist, P.A., Orlando, for Appellee.

PER CURIAM.

Appellant, David Wishinsky, appeals the trial court's dismissal of his three count fifth amended complaint with prejudice alleging direct causes of action against Appellee, Rashid Choufani, for constructive fraud (count I), fraud (count II), and breach of contract (count III). We reverse the dismissal of count I because Appellant sufficiently alleged a

direct cause of action for constructive fraud premised on the breach of statutory fiduciary duties. We affirm the dismissal of counts II and III without further discussion.

Appellant and Appellee were both members of E-Brands Restaurants, LLC ("E-Brands"), and Appellee was also the Chairman, CEO and Chief Manager. While Appellee was still the Chairman, CEO and Chief Manager of E-Brands, he formed another entity named La Dolbe, LLC ("La Dolbe"), for the purpose of owning and operating a restaurant. In count I of Appellant's fifth amended complaint, Appellant alleged that Appellee committed constructive fraud by breaching the fiduciary duties of loyalty, care, and good faith and fair dealing through the diversion of E-Brands's corporate assets to fund La Dolbe's business venture, in which Appellee had an interest, without giving Appellant an opportunity to vote as required by E-Brands's operating agreement. Appellant further alleged that this self-dealing and denial of his right to vote on various transactions with La Dolbe caused his investment in E-Brands to lose its value.

Appellee argues that dismissal of count I was proper because Appellant alleged an injury only to E-Brands, and therefore Appellant's sole remedy is a derivative action on behalf of E-Brands.

Generally, "an action may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company **and** (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members." *Dinuro Invs., LLC v. Camacho*, 141 So. 3d 731, 739–40 (Fla. 3d DCA 2014) (citation omitted). While Appellant has not sufficiently alleged direct harm and a special injury, there is an exception to this rule. "A shareholder or member need not satisfy this

two-prong test when there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates." *Id.* at 740 (citation omitted).

Importantly, a manager owes the statutory duties of loyalty, care, and good faith and fair dealing to the members of an LLC. *See* §§ 608.4225(1)(a)-(c), 608.4226, 608.4228(1)(b)2, Fla. Stat. (2010).[1] Appellant's constructive fraud action sufficiently alleges the breach of these duties. *See Hirchert Family Tr. v. Hirchert*, 65 So. 3d 548, 552 (Fla. 5th DCA 2011) ("[A] breach of fiduciary duty is 'constructive fraud.'"); *accord White v. Consol. Planning, Inc.*, 603 S.E.2d 147, 156 (N.C. Ct. App. 2004) ("To survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured. . . . The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." (citations omitted)).

Therefore, based on the four corners of the fifth amended complaint, we conclude that count I sufficiently alleges a direct cause of action against Appellee pursuant to the special duty statutory exception. We therefore reverse and remand as to that claim, and otherwise affirm.

AFFIRMED in part; REVERSED in part; and REMANDED.

EISNAUGLE, GROSSHANS and SASSO, JJ., concur.

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[1] We observe that in 2013, the Legislature enacted the Florida Revised Limited Liability Company Act, creating Chapter 605 of the Florida Statutes, and providing for the future repeal of the Florida Limited Liability Company Act (which consists of sections 608.401–.705, Florida Statutes) on January 1, 2015. *See* Ch. 2013–180, §§ 1–2, 5, Laws of Fla.