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Project Development Enterprise, LLC v. Elka Holdings, LLC, Case No. 3D18-356 (Fla. 3d DCA 2019).
The proceeds of a derivative action brought under Florida Statues section 605.0802 are required by Florida Statutes section 605.0805(1) to be paid to the limited liability company and not the plaintiff.

Varela v. OLA Condominium Association, Inc., Case Nos. 3D18-1135 & 3D18-1749 (Fla. 3d DCA 2019).
A trial court must conduct an *in-camera* inspection to decide attorney-client privilege objections.

Real State Golden Investments Inc. v. Larraín, Case No. 3D19-1369 (Fla. 3d DCA 2019).
A trial court's ruling on motions anticipated to be but not yet filed creates an objectively reasonable belief that the affected party will not receive a fair trial and is grounds for disqualification of the trial judge.

Guan v. Ellingsworth Residential Community Association, Inc., Case No. 5D18-3633 (Fla. 5th DCA 2019).
A community association and a homeowner are required to arbitrate a dispute when the community's declaration requires arbitration after mediation; Florida Statutes section section 720.311(2)(c) ("[after an unsuccessful mediation], the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration.") does not control over the declaration.

Third District Court of Appeal

State of Florida

Opinion filed August 21, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-356
Lower Tribunal No. 15-29334

Project Development Enterprise, LLC, etc., et al.,
Appellants,

vs.

Elka Holdings, LLC, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Samantha Ruiz Cohen, Judge.

Squire Patton Boggs and Alvin B. Davis and Beatriz E. Jaramillo, for appellants.

Nason, Yeager, Gerson, White & Lioce, P.A., and Michael H. Nullman and Jonelle M. Rainford (Palm Beach Gardens), for appellee.

Before SALTER, FERNANDEZ and LINDSEY, JJ.

SALTER, J.

Project Development Enterprise, LLC ("PDE"), as manager of Capital Tract, LLC ("Capital Tract"), and Tanios Khalil ("Khalil"), the principal of PDE, appeal a final circuit court judgment against them entered following a non-jury trial. We affirm in part and reverse in part.

The appellee, plaintiff below, is Elka Holdings, LLC ("Elka"). PDE and Elka were essentially 50%-50% partners[1] in Capital Tract, an entity formed to develop 475 homes in the "Whispering Oaks" development in St. Lucie County (the "Project"). The Project did not progress as intended. Elka filed a derivative suit in the Miami-Dade Circuit Court on behalf of Capital Tract and against PDE and Khalil, claiming a breach of the operating agreement, breach of statutory and common law fiduciary duty, and a demand for an accounting.[2]

The gist of these claims was an allegation that Elka was overcharged by PDE and Khalil for the operating expenses of the Project. On behalf of Capital Tract, PDE filed counterclaims against Elka for Elka's alleged wrongful retention of a Capital Tract computer and for some $10,000.00 in money damages.

[1] PDE's interest was 10%, but Khalil (through a non-party intermediary company) and PDE together controlled 50% of Capital Tract.

[2] An additional claim, seeking to pierce the corporate veil, was dropped before trial.

After a four-day bench trial, the court entered a detailed order finding PDE and Khalil jointly and severally liable to Elka for $217,369.00 in money damages, plus statutory interest, and finding for Elka on the counterclaims by PDE.

On appeal, PDE and Khalil point to numerous alleged errors in the final judgment. We address only one of those alleged errors, concluding that it turns on a legal issue and is reviewable de novo. We find no merit to the other points raised by PDE and Khalil.

"Under Florida law, '[w]hen reviewing a judgment rendered after a nonjury trial, the trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly erroneous.'" Emaminejad v. Ocwen Loan Servicing, LLC, 156 So. 3d 534, 535 (Fla. 3d DCA 2015) (alteration in original) (quoting Stone v. BankUnited, 115 So. 3d 411, 412 (Fla. 2d DCA 2013)). As to the interpretation of a contract, however, this Court's review is de novo. See Real Estate Value Co. v. Carnival Corp., 92 So. 3d 255, 260 (Fla. 3d DCA 2012).

Computation of Damages Recovered Derivatively for Capital Tract

Elka's claim was asserted derivatively on behalf of Capital Tract, a Florida limited liability company. Elka's evidence, particularly its accounting evidence, was controverted by the appellants but accepted by the trial court. That evidence determined that $217,369.00 in fees, expenses, and interest were improperly charged

by PDE as manager to Capital Tract for the operation and management of Capital Tract.

The recovery for certain allegedly-improper payments was required, as a matter of law, to be paid to Capital Tract, not to Elka. Section 605.0805(1)(a), Florida Statutes (2017), provides that the proceeds of a derivative action based, as here, on section 605.0802, "belong to the limited liability company and not to the plaintiff."

Elka's claims were asserted derivatively, not directly. See Dinuro Invs., LLC v. Camacho, 141 So. 3d 731, 738-40 (Fla. 3d DCA 2014). Elka's accountant's "Summary Estimate of Economic Damages" was admitted into evidence at trial as part of a more detailed report. Five categories of alleged overcharges were correctly reduced by 50% to reflect Elka's share of the amount overpaid by Capital Tract. But of these five categories, the fifth was designated "Interest on Invested Capital," with $70,238 (50% of the total) allegedly payable to Elka as damages.

In including this amount in the damages formulation, however, the accountant's report contravened a provision within section 2.2.4(a) of the Capital Tract Limited Liability Company Operating Agreement, specifying that "[n]o Member is entitled to interest on any Capital Contribution, except as provided in Article 4."[3] In response, Elka argues that section 2.2.3 applied to PDE as Elka was

[3] Article 4 does not apply to the claims asserted by Elka.

in effect required to make "Additional Capital Contribution[s]" to cover the defaults by PDE. The accountant's report on this point, the subject of specific objection by the appellants at trial, noted that this element of the damages was prepared at Elka's request and "I have been advised by [Elka's counsel]" to add the interest. This amount should not have been included in the damages awarded.

The trial court properly excluded $116,000.00 of the damages amount (as provided in the final judgment prepared by Elka's counsel) representing "[o]ut of pocket expenses,"[4] bringing the damages awarded to $217,369.00. However, the final judgment failed to exclude the "[i]nterest on invested capital" amount and another accrued interest amount, $5,800.00, in doing so. Elka's accountant recorded this amount as "Accrued Interest on Elka Loan Account," again in violation of the Operating Agreement.[5]

Excluding these two interest amounts in conformance with the Operating Agreement, the total awarded to Elka is $217,369.00 less $76,038.00, or $141,331.00. As the damage components of this adjusted award were established by competent, substantial evidence and rely as well on credibility determinations (as

[4] The Operating Agreement provides no basis for such a claim, and Elka did not cross-appeal the exclusion.

[5] The amount on which the accrual was computed was paid to a trust account on behalf of Elka, not to Capital Tract, "pending resolution of this dispute."

does the judgment in favor of Elka on the counterclaims), that resulting award is affirmed.

Affirmed in part, reversed in part, and remanded for the correction of the final judgment amount as detailed in this opinion.

Third District Court of Appeal

State of Florida

Opinion filed August 21, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1135 & 3D18-1749
Lower Tribunal No. 18-4924

Alba Varela, Esq.,
Appellant,

vs.

OLA Condominium Association, Inc.,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Alba Varela, P.A., and Alba Varela, for appellant.

Essig Law, P.A., and William G. Essig, for appellee.

Before EMAS, C.J., and SCALES and LINDSEY, JJ.

EMAS, C.J.

OLA Condominium Association subpoenaed nonparty attorney Alba Varela to appear for a deposition in the instant cause. The subpoena further commanded her to produce at that deposition a number of files, records and documents in her possession, custody or control relating to several professional associations or limited liability companies. Varela filed a motion for protective order asserting, *inter alia*, that the subpoena duces tecum sought documents protected by the attorney-client privilege. The Association filed a motion to compel her compliance with the subpoena duces tecum. On April 26, 2018, the trial court denied Varela's motion for protective order, and ordered Varela to appear at deposition within thirty days and to produce at that deposition all documents responsive to OLA Condominium's subpoena. Varela's appeal followed.[1]

We hold that the trial court abused its discretion in ordering Varela to produce the subpoenaed documents without first conducting an *in camera* hearing to address

[1] We note that Varela properly sought review through a notice of appeal rather than a petition for certiorari in this case because she is not a party to the litigation below. The order on appeal ended all judicial labor in the case as to Varela and constitutes a final appealable order. See United Servs. Auto. Ass'n v. Law Offices of Herssein and Herssein, P.A., 233 So. 3d 1224, 1230 n. 6 (Fla. 3d DCA 2017); Florida House of Representatives v. Expedia, Inc., 85 So. 3d 517 (Fla. 1st DCA 2012) (noting order compelling discovery which adjudicates the rights of nonparties and otherwise meets the general test of finality is a final appealable order).

Varela's claim of attorney-client privilege.[2] We reverse both trial court orders[3] and remand for the trial court to conduct an *in camera* hearing to determine whether the documents sought by the subpoena duces tecum are in fact protected by the attorney-client privilege, and for further proceedings thereafter.[4] See Del Carmen Calzon v. Capital Bank, 689 So. 2d 279 (Fla. 3d DCA 1994); Alliant Ins. Servs. Inc. v. Riemer Ins. Grp., 22 So. 3d 779, 781 (Fla. 4th DCA 2009) (holding: "If a party seeks to compel the disclosure of documents that the opposing party claims are protected by attorney-client privilege, the party claiming the privilege is entitled to an in camera review of the documents by the trial court prior to disclosure").

Reversed and remanded with directions.

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[2] To the extent the trial court relied for its ruling upon testimony from a prior hearing at which Varela was neither present nor given notice and an opportunity to be heard, this too was error. See Jade Winds Ass'n, Inc. v. Citibank, N.A., 63 So. 3d 819, 822 (Fla. 3d DCA 2011) (noting: "A basic element of procedural due process is notice and an opportunity to be heard.")

[3] Two months after Varela filed her notice of appeal from the trial court's April 26, 2018 order, the trial court rendered a second order, again directing Varela to appear for deposition within thirty days and to produce at that deposition the documents responsive to OLA Condominium's subpoena duces tecum. Varela filed a separate notice of appeal from that order, and we have consolidated these two appeals.

[4] We offer no opinion on the merits of Varela's asserted claim of privilege or whether any such privilege has been waived.

Third District Court of Appeal

State of Florida

Opinion filed August 21, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1369
Lower Tribunal No. 13-24744

Real State Golden Investments Inc., et al.,
Petitioners,

vs.

Manuel Antonio Ossandón Larraín,
Respondent.

A Case of Original Jurisdiction – Prohibition.

Akerman LLP, and Kristen M. Fiore (Tallahassee), and Luis A. Perez, Sandra J. Millor, and Jenny Torres, for petitioners.

O'Connor Hernández & Associates, P.A., and Patrick J. O'Connor, and Bryan Morera, for respondent.

Before SALTER, LOGUE, and LINDSEY, JJ.

PER CURIAM.

Petitioners, defendants below, seek a writ of prohibition disqualifying the trial court judge based upon comments he made at a hearing on a motion to intervene. After denying the motion to intervene, the trial court judge denied a non-existent motion to stay the proceedings. Petitioners had neither filed a motion to stay the proceedings nor suggested that they intended on filing one. Yet, the trial court judge stated that he expected a motion to stay because the defendants appeal everything in this case and that he would deny such a motion if the defendants were to file one:

> THE COURT: So, it's denied and Motion to Stay, denied.
>
> MS. MILLOR: There was no Motion for Stay.
>
> THE COURT: There will be. You're going to appeal this, right?
>
> MS. MILLOR: Probably.
>
> THE COURT: Okay. So, I mean, I expect it because everything gets appealed.
>
> MS. MILLOR: Correct.
>
> THE COURT: For this case, anyway.
>
> MS. MILLOR: You know, Your Honor, there has only been one appeal so far in this six-year case.
>
> THE COURT: Okay. Maybe I'm thinking of other cases.
>
> MS. MILLOR: I think so.

> THE COURT: Again, I get a lot of appeals. But then again, this is a very litigious world. Okay. If there is an appeal, I don't think there's a reasonable chance of success on appeal now that we have conducted this full analysis and identified the different issues and different claims and claims for a positive relief, not just defenses. So, draft up an order and we'll see what happens.

"[A] judge's announced policy or predisposition to rule in a particular manner is grounds for disqualification." State v. Dixon, 217 So. 3d 1115, 1123 (Fla 3d DCA 2017). "A trial judge's announced intention before a scheduled hearing to make a specific ruling, regardless of any evidence or argument to the contrary, is the paradigm of judicial bias and prejudice." Id. at 1122 (quoting Gonzalez v. Goldstein, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994)). See also Great Am. Ins. Co. of N.Y. v. 2000 Island Blvd. Condo. Ass'n, 153 So. 3d 384, 386 (Fla. 3d DCA 2014) ("While a trial judge may form mental impressions and opinions during the course of the case, the judge is not permitted to pre-judge the case." (quoting Kates v. Seidenman, 881 So. 2d 56, 58 (Fla. 4th DCA 2004))).

We agree with Petitioners that these remarks, made in the absence of any motion or evidence, are sufficient to leave Petitioners with an objectively reasonable fear they will not receive a fair trial. Williams v. Balch, 897 So. 2d 498 (Fla. 4th DCA 2005) (holding disqualification is required when judicial comments signal a predisposition against a party before consideration of the evidence).

We therefore grant the petition but withhold issuance of the writ as we are confident the trial judge will recuse himself.

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

ALICE GUAN,

Appellant,

v. Case No. 5D18-3633

ELLINGSWORTH RESIDENTIAL COMMUNITY ASSOCIATION, INC.,

Appellee.

_____/

Opinion filed August 23, 2019

Nonfinal Appeal from the Circuit Court for Seminole County, Debra S. Nelson, Judge.

Dorothy F. Easley, of Easley Appellate Practice PLLC, Miami, and John W. Zielinski, of NeJame Law, P.A., Orlando, for Appellant.

Matthew B. Bernstein and Timothy S. Kazee, of Vernis & Bowling of Central Florida, P.A., Deland, and Carlos R. Arias, and Laura M. Ballard, of Arias Bosinger, Altamonte Springs, for Appellee.

PER CURIAM.

Appellant, Alice Guan, timely appeals the trial court's order that Appellee, Ellingsworth Residential Community Association, Inc., is entitled to proceed with its claim

against Appellant despite the binding arbitration requirement contained in the Declaration of Covenants, Conditions and Restrictions for Ellingsworth.[1] We reverse.

Appellant modified the landscaping surrounding her home without authorization from Appellee, the homeowners' association for the Ellingsworth neighborhood in which Appellant resides. Appellee demanded by letter that Appellant restore her landscaping.

The Declaration required disputes between the parties to be subject to negotiation in good faith, mediation, and then a demand for arbitration within thirty days after termination of the mediation proceeding, otherwise the dispute is waived.[2] Appellant

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[1] This court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

[2] Specifically, the Declaration provides:

> ARTICLE XII
> CLAIM AND DISPUTE RESOLUTION/LEGAL ACTIONS
>
> It is intended that all disputes and claims regarding alleged defects ("Alleged Defects") in any Improvements on any Lot or Common Area will be resolved amicably, without the necessity of time-consuming and costly litigation. Accordingly, all Developers (including Declarant), the Association, the Board, and all Owners shall be bound by the following claim resolution procedures.
>
> . . . .
>
> Section 12.3. Legal Actions. All legal actions initiated by a Claimant shall be brought in accordance with and subject to Section 11.4 [re: Approval of Litigation] and Section 12.4 of this Declaration. . . .
>
> Section 12.4. Alternative Dispute Resolution. Any dispute or claim between or among . . . (c) the Association and any Owner, regarding any controversy or claim between the parties, including any claim based on contract, tort, or statute, arising out of or relating to (i) the rights or duties of the parties under this Declaration . . . (collectively a "Dispute"), shall be

declined to restore her landscaping, and the parties proceeded to negotiation and mediation. The mediator declared an impasse, and Appellee sought to resolve the

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> subject first to negotiation, then mediation, and then arbitration as set forth in this Section 12.4 prior to any party to the Dispute instituting litigation with regard to the Dispute.
>
> Section 12.4.1. Negotiation. Each party to a Dispute shall make every reasonable effort to meet in person and confer for the purpose of resolving a Dispute by good faith negotiation. . . .
>
> Section 12.4.2. Mediation. If the parties cannot resolve their Dispute pursuant to the procedures described in Subsection 12.4.1 above within such time period as may be agreed upon by such parties . . . , the party instituting the Dispute (the "Disputing Party") shall have thirty (30) days after the termination of negotiations within which to submit the Dispute to mediation . . . .
>
> . . . .
>
> Section 12.4.3. Final and Binding Arbitration. If the parties cannot resolve their Dispute pursuant to the procedures described in Subsection 12.4.2 above, the Disputing Party shall have thirty (30) days following termination of mediation proceedings (as determined by the mediator) to submit the Dispute to final and binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as modified or as otherwise provided in this Section 12.4. If the Disputing Party does not submit the Dispute to arbitration within thirty days after termination of mediation proceedings, the Disputing Party shall be deemed to have waived any claims related to the Dispute and all other parties to the Dispute shall be released and discharged from any and all liability to the Disputing Party on account of such Dispute; provided, nothing herein shall release or discharge such party or parties from any liability to a person or entity not a party to the foregoing proceedings. . . . Subject to the limitations imposed in this Section 12.4, the arbitrator shall have the authority to try all issues, whether of fact or law.

dispute in court, rather than submitting the dispute to binding arbitration as required by the Declaration.

Appellant argues that the Declaration required Appellee to submit the dispute to binding arbitration, and that Appellee's claim is now waived because it failed to do so within thirty days. Based upon the clear terms of the Declaration, we agree that Appellee was required to arbitrate the dispute within thirty days after termination of mediation.

Despite the clear terms of the Declaration, Appellee argues that it was nevertheless entitled to pursue its remedy in court pursuant to section 720.311, Florida Statutes (2015). The plain language of section 720.311(2)(c), however, does not support Appellee's position.

Section 720.311(2)(c) provides that if a dispute is not resolved at mediation, "the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration." Thus, section 720.311 does not prohibit the parties from agreeing to arbitration. Rather, that statute expressly authorizes the parties to arbitrate, and the parties agreed to do so in the Declaration here.

Given the clear language in both the Declaration and section 720.311, we conclude that Appellee waived its claims against Appellant when it failed to submit the dispute to arbitration within thirty days after termination of mediation. We therefore reverse the trial court's order, and remand with directions that Appellee's claim against Appellant be dismissed with prejudice and that judgment be entered in favor of Appellant.

REVERSED and REMANDED.

EDWARDS and EISNAUGLE, JJ., and JACOBUS, B.W., Senior Judge, concur.