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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MYRTLE GANNON, Appellant, v. JOHN CUCKLER, M.D.; ALABAMA MEDICAL CONSULTANTS, INC.; BIOMET, INC.; BIOMET ORTHOPEDICS, LLC; BIOMET U.S. RECONSTRUCTION, LLC; and BIOMET MANUFACTURING, LLC, Appellees.	)	Case No. 2D17-4888

Opinion filed October 16, 2019.

Appeal from the Circuit Court for Collier County; Lauren L. Brodie, Judge.

Jennifer Anne Gore Maglio of Maglio Christopher & Toale, P.A., Sarasota, for Appellant.

Jonathan S. Lawson of LaDue Curran & Kuehn, LLC, South Bend, Indiana; and Stacy D. Blank, Lee P. Teichner, and Patrick M. Chidnese of Holland & Knight LLP, Tampa, for Appellees.

SALARIO, Judge.

This is a technical opinion about provisions of a rule of civil procedure regulating the presentation of defenses to a complaint; it starts out a bit dry and dense

but picks up some steam at the end as we certify conflict with several other cases. Myrtle Gannon is appealing from a final order of dismissal, specifically that part of the final order that dismissed her claims against Biomet, Inc., Biomet Orthopedics, LLC, Biomet US Reconstruction, LLC, and Biomet Manufacturing, LLC—we refer to them collectively as Biomet—for lack of personal jurisdiction. The issue is whether Biomet waived that defense by failing to assert it at the time and in the manner required by subsections (b), (g), and (h) of Florida Rule of Civil Procedure 1.140. Ms. Gannon says it did because it filed a motion to dismiss that failed to assert personal jurisdiction under the rule. Biomet says that is not a problem because it denied personal jurisdiction in its answer and filed an amended motion before the dismissal hearing that did raise the defense. We hold the text of rule 1.140 is unambiguous and precludes Biomet's arguments. We affirm so much of the trial court's order as Ms. Gannon has not challenged and reverse to the extent the trial court dismissed on personal jurisdiction grounds. Recognizing that the Third, Fourth, and Fifth Districts have reached a different result on whether the filing of an amended motion to dismiss prior to a hearing cures a failure to raise personal jurisdiction in an earlier motion, we certify conflict as we describe below.

I.

The underlying litigation is, at bottom, a products liability case about an allegedly defective hip replacement. According to Ms. Gannon, the hip replacement was manufactured by Biomet. Dr. Cuckler and his business, Alabama Medical Consultants, were involved in the development and promotion of the product. We refer to those two parties collectively, for convenience, simply as Dr. Cuckler.

Ms. Gannon filed her complaint against Biomet and Dr. Cuckler on April 8, 2016 in circuit court in Collier County, Florida. Speculation about why she chose that forum is fair game.[1] Ms. Gannon does not herself live in Florida, and her hip replacement surgery was not performed here. Biomet is organized under Indiana law and has its head offices there. It looks like Biomet's manufacture of the hip replacement has no connection whatever to the Sunshine State. And at the time of the conduct that matters in this case, Dr. Cuckler was resident in Alabama. As it happens, though, Dr. Cuckler later retired to Naples, Florida. The complaint alleged that jurisdiction was proper in Florida because that is where Dr. Cuckler now resides.

On May 4, 2016, Biomet and Dr. Cuckler filed a joint motion to dismiss the complaint based on forum non conveniens (i.e., the idea that Florida is an inconvenient forum for resolution of the case) under rule 1.061 and to dismiss certain counts of the complaint for failure to state a claim upon which relief can be granted under rule 1.140(b). This motion did not assert that the court lacked personal jurisdiction over any defendant. At about the same time, Biomet and Dr. Cuckler each filed separate answers. Those answers did not assert lack of personal jurisdiction as a defense either. With respect to Ms. Gannon's allegation that the court had jurisdiction, however, the answers asserted that the allegation "contains legal conclusions to which no response is

[1]Biomet makes a convincing case that she chose Florida to avoid removal to federal court based on diversity jurisdiction on the basis that, as we describe above, she has named one Florida resident as a defendant. See 28 U.S.C. § 1441(b)(2) (2016). Avoiding federal court enables Ms. Gannon to avoid having her case transferred to the United States District Court for the Northern District of Indiana, where a federal multidistrict litigation proceeding concerning the hip replacement at issue here is currently pending. See 28 U.S.C. § 1407(a).

required." They also stated that "to the extent a response is required," the allegation is denied.

At this point, the procedure in the trial court gets a little complex. The same law firm that represented Ms. Gannon had also filed several other complaints against Biomet and Dr. Cuckler in Collier County on behalf of other plaintiffs. The defendants and Ms. Gannon agreed that a hearing on the motion to dismiss in this case would be delayed pending a hearing on a motion to dismiss in another one of these cases called Eanes v. Cuckler. Biomet and Dr. Cuckler had also raised forum non conveniens in their motion in Eanes, and the parties thought that a decision in Eanes would inform the decision in this case. The trial court granted the defendants' motion to dismiss in Eanes in October 2016, and this court affirmed that order without opinion in April 2017. See Eanes v. Cuckler, 225 So. 3d 811 (Fla. 2d DCA 2017) (table decision).

Three months later, on July 3, 2017, the defendants filed an amended motion to dismiss in this case. Like the original motion, the amended motion urged dismissal based on forum non conveniens. It differed from the original, however, in that it jettisoned the argument that the complaint failed to state a claim and introduced a new argument that the claims against Biomet should be dismissed for lack of personal jurisdiction.

The personal jurisdiction argument was based on the factual assertions—which Biomet later supported with affidavits—that Biomet was not organized under Florida law, did not maintain operations in Florida, and did not do anything related to the hip replacement in Florida and that neither Ms. Gannon nor anything about her hip replacement bore any connection to Florida. As legal support, the amended motion relied on the recent decision in Bristol-Myers Squibb Co. v. Superior Court of California,

San Francisco County, 137 S.Ct. 1773 (2017), in which the United States Supreme Court held that the due process clause did not permit a court to exercise specific personal jurisdiction over the manufacturer of an allegedly dangerous drug in materially similar circumstances. Biomet further asserted that its failure to argue personal jurisdiction in its original motion did not result in a waiver because the filing of an amended motion asserting the defense prior to a hearing timely preserved it.

With the agreement of the parties, the trial court considered the motion without a hearing on the basis of legal memoranda and affidavits related to jurisdictional facts. It then rendered an order granting the motion. It dismissed the claims against Biomet "with prejudice" based on a lack of personal jurisdiction. It further held that Biomet and Dr. Cuckler, to the extent not dismissed based on a lack of personal jurisdiction, were dismissed based on forum non conveniens. After the trial court denied a motion for rehearing on the waiver issue, Ms. Gannon took this timely appeal.

II.

Ms. Gannon's sole argument on appeal is that Biomet's failure to include personal jurisdiction in its original motion to dismiss resulted in a waiver of that defense under rule 1.140.[2] The facts are undisputed. Resolution of the issue requires no more

[2]Because the trial court also dismissed on the basis of forum non conveniens, one might wonder "why bother?" Ms. Gannon is concerned that the personal jurisdiction dismissal will be argued to expose her to the running of the statute of limitations when she refiles in an alternate forum, and she believes that the forum non conveniens dismissal will not. See Fla. R. Civ. P. 1.061(c) (providing that a party seeking dismissal on the basis of forum non conveniens stipulates that when the action is filed in the new forum, it will be treated as filed on the date it was filed in Florida). We further note that the trial court's order says that the personal jurisdiction dismissal is "with prejudice," while it does not say the same with respect to the forum non conveniens dismissal. See Fla. R. Civ. P. 1.420(b). Although we question the correctness of the trial court's "with prejudice" determination on the jurisdictional dismissal, Ms. Gannon has not raised that as an appellate issue here.

than that we interpret rule 1.140 and apply it to the undisputed facts. Our review is de novo. See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006); Tunison v. Bank of Am., N.A., 144 So. 3d 588, 590 (Fla. 2d DCA 2014).

A.

We approach the interpretation of a rule of civil procedure in much the same way as we approach the interpretation of a statute. See Koppel v. Ochoa, 243 So. 3d 886, 891 (Fla. 2018) (quoting Saia, 930 So. 2d at 599). We begin with the ordinary meaning of the text of the rule, and if that text is unambiguous, we end there as well. Koppel, 243 So. 3d at 891; see also Metcalfe v. Lee, 952 So. 2d 624, 628 (Fla. 4th DCA 2007) (holding that courts must interpret rules of civil procedure in accord with their "plain and ordinary meaning" (quoting Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993))). When a rule is unambiguous, we cannot add words we wish were there, remove words we wish were not, or do anything other than apply the rule as written. See Deutsche Bank Nat'l Tr. Co. v. Quinion, 198 So. 3d 701, 703 (Fla. 2d DCA 2016); cf. Kephart v. Hadi, 932 So. 2d 1086, 1091 (Fla. 2006) (explaining that when statutory language is unambiguous, its meaning comes exclusively "from the words used without involving rules of construction or speculating as to what the legislature intended." (quoting Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993))). A rule is ambiguous when it can reasonably be understood as meaning more than one thing. Koppel, 243 So. 3d at 891. If a rule fits that bill, we can select among those competing meanings with the help of other aids to construction. See id. (citing Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006)).

We turn, then, to the text of rule 1.140. The rule regulates the presentation of defenses in response to a civil complaint.[3] It provides that a defendant must raise all of its defenses to a complaint in an answer, which is a form of "responsive pleading" provided for in the civil rules. See Fla. R. Civ. P. 1.140(a)(1); see also Fla. R. Civ. P. 1.100(a). However, the rule also permits some defenses to be presented by a motion filed prior to the answer. See Fla. R. Civ. P. 1.140(a)(3), (b). Rule 1.140(b) provides in relevant part:

> Every defense in law or fact to a claim for relief in a pleading must be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties. A motion making any of these defenses must be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued must be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated must be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.

(Emphasis added.) With respect to the personal jurisdiction issue in this case, the rule has only one reasonable interpretation. Its text says (1) that a personal jurisdiction defense may be asserted in a pre-answer motion or the answer; (2) that either way, the

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[3]The rule also governs the presentation of defenses and objections to any pleading to which a responsive pleading is permitted and so covers things like defenses or objections to be asserted in response to a counterclaim, a third-party claim, or an affirmative defense. See Fla. R. Civ. P. 1.100(a) (defining pleadings to include a complaint, a petition, an answer, an answer to a counterclaim, an answer to a crossclaim, a third-party complaint, and a third-party answer); 1.140(b) (describing defenses to a claim asserted in a pleading and requiring that the defenses be asserted in a motion or responsive pleading). For simplicity's sake, we discuss the rule as it applies in the context of this case, involving a response to a complaint.

grounds for the defense and the matters of law intended to be argued must be stated specifically and with particularity; and (3) that any rule 1.140(b) defense not stated in the motion or the answer is waived, except for subject matter jurisdiction.

Rule 1.140 contains additional provisions specifying the circumstances under which a defense may be lost if not properly asserted. Rule 1.140(g) requires that all rule 1.140(b) defenses be raised in a single motion, stating that "[i]f a party makes a motion under this rule but omits from it any defenses or objections available to that party that this rule permits to be raised by motion, that party shall not thereafter make a motion based on any of the defenses or objections omitted, except as provided in subdivision (h)(2) of this rule." (Emphasis added.) And rule 1.140(h)(1) states that "[a] party waives all defenses and objections that the party does not present either by motion under subdivision[] (b) . . . of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2)."[4] (Emphasis added.) The only exceptions to these consolidation and waiver provisions available to the defendant in an action are the defenses of failure to state a cause of action or failure to join an indispensable party—which may be raised by motion for judgment on the pleadings or at trial—and subject matter jurisdiction—which can be raised at any time.[5] See Fla. R. Civ. P. 1.140(h)(2).

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[4]Rule 1.140 also contemplates motions for more definite statement and motions to strike, and the consolidation and waiver provisions of the rule are implicated by those motions as well. See Fla. R. Civ. P. 1.140(e)-(h). Again for simplicity's sake, we discuss the rule in the context presented here, a rule 1.140(b) motion to dismiss.

[5]There appears to be some potential tension between the text of rule 1.140(b), which provides that any defense except subject matter jurisdiction is waived unless asserted in a pre-answer motion or answer, and rule 1.140(h)(2), which considers the defenses of failure to state a claim and failure to join an indispensable party as additional exceptions to the rule of waiver. See Bruce J. Berman and Peter J.

Thus, as applied to any rule 1.140(b) defense other than failure to state a cause of action, failure to join an indispensable party, and lack of subject matter jurisdiction, subsections (g) and (h) of the rule unambiguously provide that (1) if made in a pre-answer motion, all such defenses must be joined together and those not joined in the motion may not be made in a subsequent motion and that (2) any defense not asserted in a pre-answer motion or the answer (if the party has not made a motion), is waived. And in general, Florida courts have interpreted and applied the rule in accord with the understanding its text clearly conveys. See, e.g., Crownover v. Masda Corp., 983 So. 2d 709, 712 n.2 (Fla. 2d DCA 2008) ("However, '[t]he first step which a party takes in a case, whether it be the filing of a preliminary motion or a responsive pleading, must raise the issue of personal jurisdiction or that issue is waived.' " (alteration in original) (quoting Cumberland Software, Inc. v. Great Am. Mortg. Corp., 507 So. 2d 794, 795 (Fla. 4th DCA 1987))); Straske v. McGillicuddy, 388 So. 2d 1334, 1336 (Fla. 2d DCA 1980) (holding that a rule 1.140(b) venue defense was waived when raised for the first time after the answer).

Applying that understanding to the facts, we know that Biomet made a motion under rule 1.140(b) that included the defense of failure to state a cause of action and that did not include the defense of lack of personal jurisdiction. The consequence is that under rule 1.140(g), Biomet was not free to make another pre-answer motion asserting personal jurisdiction and that under rule 1.140(h), the defense was waived.

That Biomet responded to Ms. Gannon's jurisdictional allegation in its answer—first denying that it had any obligation to answer the allegation at all and, as a

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Webster, Berman's Fla, Civ. P., § 1.140:28 (2019). That potential tension is not implicated in this case, however, and we do not address it further.

backup, denying the allegation to the extent it had such an obligation—is of no legal consequence for two reasons. The first has to do with the waiver provision of rule 1.140(h)(1). That rule permits a rule 1.140(b) defense to be raised for the first time in the answer only "if the party has made no motion." The motion to which that phrase refers is identified earlier in rule 1.140(h)(1) as a "motion under subdivision (b) . . . of this rule." Thus, the rule permits the assertion of a rule 1.140(b) defense in the answer only if the party has not made a motion under rule 1.140(b). Here, Biomet made a motion under rule 1.140(b). Under the rule, then, it was not at liberty to assert the rule 1.140(b) defense of lack of personal jurisdiction in the answer.[6]

The second reason Biomet's denial of Ms. Gannon's jurisdictional allegation in its answer is unavailing has to do with rule 1.140(b). That rule requires a defendant asserting a listed defense, whether in a pre-answer motion or in the answer, to assert the grounds for the defense and the substantial matters of law to be argued with respect to the defense "specifically and with particularity." Biomet's response to Ms. Gannon's jurisdictional allegation, in contrast, is first and foremost a denial of any obligation to respond to a jurisdictional allegation, not a denial of personal jurisdiction itself. Furthermore, it does not state either the "grounds" for a personal jurisdiction

[6]Given the rule's expression "if the party has made no motion," we do not think that fact the motion and answer were filed simultaneously is of any consequence. In that regard, we have considered the supreme court's decision Florida Department of Children & Families v. Sun-Sentinel, Inc., 865 So. 2d 1278, 1284 (Fla. 2004), which held that "a motion to transfer venue, filed simultaneously with a timely asserted objection to personal jurisdiction, does not waive the jurisdictional objection," but do not think it applicable here. The question in Sun-Sentinel was whether a "motion to transfer venue was a request for affirmative relief" that operates to waive jurisdictional objections. Id. at 1281, 1289. This case presents a different question: whether the text of rule 1.140(h) creates a waiver when a motion to dismiss is filed that does not raise a jurisdictional objection, but such an objection is arguably raised in the answer.

defense or the "substantial matters of law" that defense entails—whether specifically, with particularity, or otherwise. See Fla. R. Civ. P. 1.140(b). Viewed as favorably to Biomet as possible, the response is at most an unadorned denial lacking any factual or legal support. We need not define the outer limits of the requirement that the "grounds and substantial matters of law" undergirding a rule 1.140(b) defense be "stated specifically and with particularity" to know that Biomet's response here does not come close. See Three Seas Corp. v. FFE Transp. Servs, Inc., 913 So. 2d 72, 74 (Fla. 3d DCA 2005) (holding that a party's argument that "a simple unexplained denial to the allegation that venue was proper" was sufficient under rule 1.140(b) was "without merit"); see also Roach v. Totalbank, 85 So. 3d 574, 578 (Fla. 4th DCA 2012) (holding service of process and personal jurisdiction defenses were insufficiently pleaded where they "merely recited the defenses without setting forth 'the substantial matters of law intended to be argued' and without stating 'with particularity' the basis for those defenses" (quoting Fla. R. Civ. P. 1.140(b))).

Biomet cites a number of federal decisions interpreting Federal Rule of Civil Procedure 12 that say that a defendant's denial of a complaint's jurisdictional allegations in the answer is enough to assert the defense. See, e.g., Fabara v. GoFit, LLC, 308 F.R.D. 380, 400 (D.N.M. 2015) (construing a defendant's "denial of [a] personal-jurisdiction allegation as effectively asserting a personal-jurisdiction defense"); McDermott v. FedEx Ground Sys., Inc., 520 F. Supp. 2d 254, 257 (D. Mass. 2007) (finding no waiver where defendant specifically denied plaintiff's allegation of personal jurisdiction and promptly moved to dismiss thereafter). But see Sergilles v. Waste Mgmt., Inc., Case No. 07-81213-CIV-RYSKAMP/VITUNAC, 2008 WL 11333170, at *3 (S.D. Fla. June 24, 2008) ("WMI did not preserve its affirmative defense of lack of

personal jurisdiction when it merely denied those allegations in the complaint."). Those cases are not useful here, however, because the federal rule differs from rule 1.140(b) in a crucial respect: It does not contain a requirement that the grounds and substantial matters of law supporting a defense be stated specifically and with particularity.

To rely on federal decisions interpreting the federal rule to hold that Biomet's answer sufficiently asserts a personal jurisdiction defense effectively reads the requirement that the grounds and substantial matters of law supporting a rule 1.140(b) defense be stated specifically and with particularity out of the rule. As an appellate court applying principles of statutory construction to interpret a rule of procedure, we must give meaning to the words that are there and are not at liberty to remove them. See Nat'l Auto Serv. Ctrs., Inc. v. F/R 550, LLC, 192 So. 3d 498, 505 (Fla. 2d DCA 2016) ("It is not within our authority, however, to rewrite an unambiguous statute."). Taking rule 1.140(b) as written, then, even if Biomet's response to Ms. Gannon's jurisdictional allegation qualifies as a bona fide denial, that denial is insufficient to save its personal jurisdiction defense from the waiver provisions of rules 1.140(b) and (h). See Roach, 85 So. 3d at 578 (holding that personal jurisdiction defense was waived where not pleaded "specifically and with particularity"); Three Seas, 913 So. 2d at 74-75 ("As the [rule 1.140(b)] defense of improper venue was not pled with particularity in this case, the point was waived."); cf. Schoeck v. Allstate Ins. Co., 235 So. 3d 953, 956 (Fla. 2d DCA 2017) (relying on the waiver provision of rule 1.140(h)(1) to hold that the defense of nonoccurrence of a condition precedent was waived by virtue of a failure to comply with the particularity requirement for pleading that defense contained in rule 1.120(c)).

Because Biomet's response to Ms. Gannon's jurisdictional allegation does not cure its failure to assert personal jurisdiction in its motion to dismiss, we can deem the defense preserved only if Biomet's assertion of personal jurisdiction in its amended motion to dismiss does cure that failure. It is to that question that we now turn.

B.

By way of framing the legal question concerning Biomet's assertion of a personal jurisdiction defense in its amended motion to dismiss, we note that although the amended motion relied on the United States Supreme Court's opinion in Bristol-Myers Squibb, which was rendered after Biomet filed its original motion, Biomet conceded at oral argument that the personal jurisdiction defense was nonetheless "available" to it when it filed its original motion.[7] Fla. R. Civ. P. 1.140(g) (requiring consolidation of all rule 1.140(b) defenses "available to that party"). Accordingly, the question before us is whether a party may file an amended motion before a hearing on an original motion and assert a rule 1.140(b) defense it could have but did not assert in its original motion without triggering the waiver and consolidation provisions of rules 1.140(g) and (h).

The answer to that question is no because a yes answer is demonstrably inconsistent with the text of those rules. Under rules 1.140(g) and (h), when a party "makes a motion" under rule 1.140(b) and fails to join all rule 1.140(b) defenses then available to it, it cannot "thereafter make a motion" asserting the omitted defense and is deemed to have waived that defense. Thus, once Biomet filed "a motion" under rule

[7]This concession was correct. Bristol-Myers Squibb itself states that it was merely engaged in the "straightforward application . . . of settled principles of personal jurisdiction." 137 S.Ct. at 1783. And the jurisdictional facts were the same when Biomet filed its original motion as they were when it filed its amended motion.

1.140(b) and omitted a personal jurisdiction defense, it waived that defense and could not "thereafter make" another motion advancing it. The fact that Biomet labeled its second motion an "amended motion" and filed it prior to a hearing on the original motion does not matter insofar as the rule as worded is concerned. Whatever Biomet called it and whenever Biomet filed it, the amended motion was, with respect to Biomet's original motion, a motion Biomet "thereafter ma[de]."

To make Biomet's argument make sense as a textual matter, we would need to say that an amended motion filed before a hearing is not, in the parlance of rule 1.140(g), "a motion" that a party "thereafter make[s]" when it has first made an initial motion—perhaps because the amended motion is just a modification to it that remains part and parcel of the original. But that is not a reasonable understanding of the ordinary meanings of the terms "a motion" and "thereafter make." Plainly, the use of the article "a" before the term "motion" in the rule denotes the filing of a singular motion. Just as in ordinary conversation "a pencil" denotes one pencil and "a meal" denotes one meal, the term "a motion" as used in rule 1.140(g) denotes one motion. See, e.g., Bautista v. State, 863 So. 2d 1180, 1182-83 (Fla. 2003) (discussing the legislature's use of the article "a" with respect to allowable units of prosecution under a criminal statute). And as used with reference to the singular "a motion," the phrase "thereafter make" in rule 1.140(g) equally plainly denotes a different, discrete motion made after an original. See *Thereafter*, Merriam-Webster, www.merriam-webster.com/dictionary/thereafter (last visited Aug. 16, 2019).

The amended motion to dismiss was quite plainly a different, discrete motion from the original. It was filed at a later time; it was docketed as a separate court filing; and it differed substantively from the original predecessor motion in multiple

respects—most significantly in that it abandoned its predecessor's failure to state a claim argument and included a new defense of personal jurisdiction. And that understanding of Biomet's amended motion is consistent with how we ordinarily understand the concept of amendment when applied to court filings. When a party in a civil lawsuit files an amended complaint or answer, for example, we regard the amended document as a new and separate filing that displaces its predecessor. See Thomas v. Hosp. Bd. of Dirs. of Lee Cty., 41 So. 3d 246, 254 (Fla. 2d DCA 2010) ("[I]t is a long established rule of law that an original pleading is superseded by an amended pleading which does not indicate an intention to preserve any portion of the original pleading." (quoting Arthur v. Hillsborough Cty. Bd. of Crim. Justice, 588 So. 2d 236, 237 (Fla. 2d DCA 1991))). So too when the State files an amended information in a criminal case. See, e.g., Bryant v. State, 757 So. 2d 617, 618 (Fla. 4th DCA 2000), receded from on other grounds by State v. Demars, 848 So. 2d 436 (Fla. 4th DCA 2003); State v. Calle, 560 So. 2d 355, 356 (Fla. 5th DCA 1990). When a party files an amended brief in this court, we regard the amended filing as a new and separate document and disregard the old one. As ordinarily understood, then, the amended motion filed by Biomet here is a new motion that Biomet "thereafter made" within the meaning of rule 1.140(g).

Because it is not possible to make textual sense of Biomet's amendment-before-hearing argument, we suspect that Biomet may really mean that when a party amends a rule 1.140(b) motion, we should treat the amended motion as relating back to the party's original motion. The concept of relation back—the idea that an amended filing is treated as having been filed together at the same time as the original—appears in rule 1.190 governing amended pleadings. See Fla. R. Civ. P. 1.190(c). And by the

terms of that rule, relation back is a concept that applies to amended pleadings, not amended motions. See id. A motion is not a pleading within the meaning of the civil rules. See Fla. R. Civ. P. 1.100 (itemizing pleadings and stating that no pleadings other than those itemized "will be allowed" and defining motions separately as "[a]n application to the court for an order"); Boca Burger, Inc. v. Forum, 912 So. 2d 561, 567 (Fla. 2005) ("Moreover, a motion to dismiss is not a 'responsive pleading' because it is not a 'pleading' under the rules."). Thus, to treat Biomet's amended motion as relating back to the original, we would need to do one of two things—either add a provision governing amendments and relation back to rule 1.140 or add a provision governing motions to rule 1.190. Those might be desirable edits to the rules. But they are not edits that we, as an intermediate appellate court reviewing a final order, enjoy the freedom to make. See, e.g., Quinion, 198 So. 3d at 703 (declining to read an exception into rule 1.120(c)'s requirement that conditions precedent be denied with particularity because "the rule's language does not brook exceptions for certain kinds of conditions precedent"); Three Seas, 913 So. 2d at 75 (rejecting a party's argument that rule 1.140(b)'s particularity requirement does not apply where a defense appears on the face of the pleadings because "[r]ule 1.140(b) contains no such exception. The defendant must follow the terms of the rule."); see also art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . .").

We acknowledge that the Third, Fourth, and Fifth Districts have held that when a party files an amended motion under rule 1.140(b) before a hearing on an original motion under the rule, it may assert a previously omitted rule 1.140(b) defense

in the amended motion and have it treated as timely.[8] See, e.g., Cepero v. Bank of N.Y. Mellon Tr. Co., N.A., 189 So. 3d 204, 206 (Fla. 4th DCA 2016); Snider v. Metcalfe, 157 So. 3d 422, 424-25 (Fla. 4th DCA 2015); Re-Emp. Servs, Ltd. v. Nat'l Loan Acquisitions Co., 969 So. 2d 467, 470 (Fla. 5th DCA 2007); Waxoyl, A.G. v. Taylor, Brion, Buker & Greene, 711 So. 2d 1251, 1254 (Fla. 3d DCA 1998). A review of these opinions and others cited in them or that cite to them shows that they do not state a basis for an amendment-before-hearing exception that is at all grounded in the text of rule 1.140. That is unsurprising: As we have shown, an amendment-before-hearing exception to the consolidation and waiver provisions of rule 1.140(g) and (h) finds no support in the text of the rules. The most these decisions assert as reasoning is (1) that not allowing an exception in such circumstances would be "hypertechnical," Astra v. Colt Indus. Operating Corp., 452 So. 2d 1031, 1032 (Fla. 4th DCA 1984), and (2) that the purpose of rule 1.140(g) and (h) is to discourage "dilatory tactics," a concern that is not present when a party amends before a hearing, Gross v. Franklin, 387 So. 2d 1046, 1049 (Fla. 3d DCA 1980).[9]

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[8]Biomet asserts that this court reached the same conclusion in Sunrise Assisted Living, Inc. v. Ward, 719 So. 2d 1218, 1219-20 (Fla. 2d DCA 1998), but it reads that decision too broadly. That case involved a third-party's motion to quash a postjudgment writ of garnishment from a judgment creditor, which the third-party later amended to assert a previously unasserted jurisdictional problem. Id. at 1219. Writs of garnishment are not pleadings to which rule 1.140 applies, but rather they are postjudgment proceedings governed by their own statutory procedure. See Fla. R. Civ. P. 1.140(b) (governing the assertion of defenses "to a claim for relief in a pleading"); 1.570(a) (stating that the enforcement of a money judgment shall be "by execution, writ of garnishment, or other appropriate process or proceedings"); see also §§ 77.04, .06, .061, Fla. Stat. (1997) (governing service of writ, answer to writ, and reply). Our decision in Sunrise Assisted Living does not purport to interpret rule 1.140 and is not applicable here.

[9]Although we cannot claim to have canvassed all of the federal reporters, the federal decisions addressing the same issue under Federal Rule of Civil Procedure

Under the supreme court precedents governing interpretation of the civil rules, we do not believe we have the latitude to permit a concern about hypertechnicality, even if we agreed with it, to override the clear meaning an unambiguous rule conveys. And similarly, assuming for argument's sake that the purpose of the waiver and consolidation provisions of rule 1.140 is solely to discourage dilatory tactics, an appeal to that purpose also would not be not a permissible basis to overlook or rewrite a rule's unambiguous language. See Nat'l Auto Serv., 192 So. 3d at 507 ("This appeal to the legislature's assumed purpose as an aid to statutory construction is irrelevant, however, because the text of section 726.110(1) is unambiguous."). In the end, the cases that recognize an amendment-before-hearing exception to the consolidation and waiver provisions of rule 1.140 effectively graft upon the rule an exception that its drafters did not choose to include. We respectfully disagree with the reasoning of those decisions and certify conflict with them.

III.

Biomet made a rule 1.140(b) motion to dismiss Ms. Gannon's complaint and omitted the defense of lack of personal jurisdiction from that motion. The result is

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12 appear to be somewhat of a mixed bag, with an amendment-by-waiver exception (founded in some dated cases) looking like the majority position. Compare MacNeil v. Whittemore, 254 F.2d 820, 821 (2d Cir. 1958) (holding that the waiver provision of Rule 12 does not "prevent a judge in his discretion from permitting a party to expand the grounds of motion well in advance of a hearing"), and Seal v. Riverside Fed. Sav. Bank, 825 F. Supp. 686, 692 n. 10 (E.D. Pa. 1993) ("Still, the waiver rules of Rule 12(h) do not preclude a defendant from adding new grounds to a previously-filed motion to dismiss before that motion is ruled upon."), with Heise v. Olympus Optical Co., 111 F.R.D. 1, 5 (N.D. Ind. 1986) ("The court concludes that no authority exists under the rules of procedure for such an amendment."), and Consol. Rail Corp. v. Grand Trunk W. R.R., 592 F. Supp. 562, 567 (E.D. Pa. 1984) (stating that the court was "unpersuaded" by the amendment approach because Rule 12's waiver provision "becomes effective upon the filing of any pre-answer motion to dismiss").

that Biomet waived that defense and was precluded from asserting it in a subsequent rule 1.140(b) motion. Under the unambiguous terms of rule 1.140, neither Biomet's response to Ms. Gannon's jurisdictional allegation in its answer nor its filing of an amended motion asserting the defense (a year and two months later) excuse or cure the omission. We therefore reverse the trial court's order to the extent it dismissed the complaint for lack of personal jurisdiction, affirm it in all other respects, and remand for the trial court to reenter a final judgment of dismissal solely on the basis of forum non conveniens. We also certify conflict with Cepero, Snider, Re-employment Services, Waxoyl, Astra, and Gross.

Affirmed in part; reversed in part; remanded; conflict certified.

SILBERMAN and BADALAMENTI, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

U.S. BANK, NATIONAL ASSOCIATION, as trustee for Harborview Mortgage Loan Trust 2005-10, Mortgage Loan Pass-Through Certificates, Series 2005-10, Appellant, v. EDWARD C. STURM, a/k/a EDWARD STURM; CATHERINE STURM; and BAY WEST RENTALS, LLC, Appellees.	)	Case No. 2D18-757

Opinion filed October 16, 2019.

Appeal from the Circuit Court for Sarasota County; George K. Brown, Jr., Senior Judge.

Nancy M. Wallace of Akerman LLP, Tallahassee; William P. Heller of Akerman LLP, Fort Lauderdale; and Celia C. Falzone of Akerman LLP, Jacksonville, for Appellant.

No appearance for Appellees.

CASANUEVA, Judge.

In this residential foreclosure case, U.S. Bank, National Association, as trustee for Harborview Mortgage Loan Trust 2005-10, Mortgage Loan Pass-Through

Certificates, Series 2005-10 (U.S. Bank), appeals a final judgment of dismissal entered in favor of borrowers Edward and Catherine Sturm. Because the trial court erred in entering final judgment for the Sturms, we reverse and remand for a new trial.[1]

The Sturms moved for an involuntary dismissal following U.S. Bank's presentation of its case-in-chief. The Sturms raised several arguments, including an argument that U.S. Bank failed to prove that it substantially complied with the notice requirements of paragraph twenty-two of the mortgage, a condition precedent to foreclosure. Specifically, the Sturms argued that the notice sent pursuant to paragraph twenty-two overstated the amount required to cure the default because it included amounts that accrued more than five years earlier, beyond the statute of limitations. The trial court asked the parties to file written briefs concentrating on the statute of limitations argument and subsequently entered a final judgment in favor of the Sturms.[2]

The Sturms relied on U.S. Bank, N.A. v. Diamond, 228 So. 3d 177 (Fla. 5th DCA 2017), as support for their statute of limitations argument. However, the Fifth District has since receded from Diamond and its progeny. See Grant v. Citizens Bank, N.A., 263 So. 3d 156, 157 & n.1 (Fla. 5th DCA 2018) (en banc) (receding from Diamond and Velden v. Nationstar Mortg., LLC, 234 So. 3d 850 (Fla. 5th DCA 2018)).

In Grant, the Fifth District rejected the argument that a foreclosing plaintiff could not recover damages for defaults that occurred more than five years prior to the filing of the action, adopting instead the view put forth by Justice Lawson in his

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[1]The Sturms did not file an answer brief.

[2]The trial court did not appear to base its dismissal on the Sturms' remaining arguments, and we decline to address them here.

concurring opinion in Bollettieri Resort Villas Condominium Ass'n v. Bank of New York Mellon, 228 So. 3d 72 (Fla. 2017). Grant, 263 So. 3d at 157-58 ("Justice Lawson observed that when the right to accelerate the debt for non-payment is optional with the holder of the note, the statute of limitations does not run until the note is due unless the lender or holder accelerates and declares the full balance due earlier." (citing Bollettieri, 228 So. 3d at 74 (Lawson, J., concurring))). This court and the Third and Fourth Districts have all done the same. See Grdic v. HSBC Bank USA, N.A., 267 So. 3d 473, 475-76 (Fla. 2d DCA 2019); Bank of Am., N.A. v. Graybush, 253 So. 3d 1188, 1193 (Fla. 4th DCA 2018); and Gonzalez v. Fed. Nat'l Mortg. Ass'n, 276 So. 3d 332, 336-37 (Fla. 3d DCA 2018).

Likewise, we reject the argument that the paragraph twenty-two notice of default can include only amounts that have accrued within five years. See Grdic, 267 So. 3d at 474-75. Accordingly, the Sturms' argument that their default notice did not substantially comply with paragraph twenty-two fails, and the trial court erred in entering a final judgment of dismissal. The final judgment is reversed, and this matter is remanded for a new trial.

Reversed and remanded.

VILLANTI and LUCAS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed October 16, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1924
Lower Tribunal No. 14-23895

Patrick Eskenazi,
Appellant,

vs.

Marina Bidault Eskenazi,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Marcia B. Caballero, Judge.

Yveline F. Paul (LaBelle), for appellant.

Graham Legal, P.A., H. Dillon Graham, III, and Marilyn Byrd, for appellee.

Before LOGUE, SCALES and GORDO, JJ.

PER CURIAM.

Affirmed. A party who seeks affirmative relief from a court submits himself to that court's jurisdiction. See, e.g., Babcock v. Whatmore, 707 So. 2d 702, 704–05 (Fla. 1998) (holding that even a timely objection to personal jurisdiction is waived when affirmative relief is sought); Solmo v. Friedman, 909 So. 2d 560, 564 (Fla. 4th DCA 2005) ("Active participation in the proceedings in the trial court . . . constitutes a submission to the court's jurisdiction and a waiver of any objection." (citing Bush v. Schiavo, 871 So. 2d 1012, 1014 (Fla. 2d DCA 2004))); Leipuner v. FDIC, 860 So. 2d 1027, 1028 (Fla. 5th DCA 2003) ("Participation in the proceedings amounts to a general appearance, and thereby constitutes a waiver of any alleged defects in service or in jurisdiction." (citing Martin v. Ullman, 555 So. 2d 1232 (Fla. 3d DCA 1989))). Additionally, a trial court has subject matter jurisdiction over dissolution petitions of non-citizens who satisfy the residency requirements of Florida Statutes section 61.021. See, e.g., Nicolas v. Nicolas, 444 So. 2d 1118, 1120 (Fla. 3d DCA 1984) (finding that status as a foreign national was not a bar to maintaining a dissolution action where other facts established statutory residence); Perez v. Perez, 164 So. 2d 561, 563 (Fla. 3d DCA 1964) ("An alien who is a citizen of another country can acquire a domicile or 'residence' sufficient to satisfy the jurisdictional requirement for divorce." (citing Pawley v. Pawley, 46 So. 2d 464, 471 (Fla. 1950))).

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ZACARIAS CABRERA, on behalf of himself
and all others similarly situated,
Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, as trustee, successor in interest to **BANK OF AMERICA, N.A.,** as successor by merger to **LASALLE BANK, N.A.,** as trustee RAMP 2007-RS-1, and **SUNTRUST MORTGAGE, INC.**, a corporation,
Appellees.

No. 4D18-3537

[October 16, 2019]

Appeal of a nonfinal order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Howard K. Coates, Jr., Judge; L.T. Case No. 502017CA005864AN.

Jon Herskowitz of Baron & Herskowitz, Miami, Rachel Bentley of Legal Aid Society of Palm Beach County, West Palm Beach, Jeffrey M. Liggio and Geoff S. Stahl of Liggio Law, P.A., West Palm Beach, and Philip M. Burlington and Adam Richardson of Burlington & Rockenbach, P.A., West Palm Beach, for appellant.

Sara F. Holladay-Tobias, Emily Y. Rottmann and Brittney L. Difato of McGuire Woods LLP, Jacksonville, for appellee U.S. Bank, N.A., as trustee, successor in interest to Bank of America, N.A., as Successor by Merger to LaSalle Bank, N.A., as trustee Ramp 2007-RS-1.

WARNER, J.

Zacarias Cabrera (Borrower) timely appeals a nonfinal order of the Fifteenth Judicial Circuit Court that denied his motion for leave to file a class action counterclaim in a foreclosure case. Because the order functions as an order denying certification of a class action as to the compulsory count of the counterclaim, but fails to include findings upon which the ruling was based, contrary to Florida Rule of Civil Procedure 1.220(d)(1), we reverse. As to the remaining permissive count of the

counterclaim, we conclude that we lack jurisdiction of the order denying the motion to amend.

In 2017 the appellee, U.S. Bank National Association (Bank), sued Borrower to foreclose on a mortgage. This was the third attempt to foreclose on the same mortgage, the Bank or its predecessor having voluntarily dismissed the prior two complaints. Borrower answered, raising affirmative defenses. Borrower served a motion to amend to add a class action counterclaim against the Bank and SunTrust Mortgage, as the loan servicer, seeking declaratory judgment and injunctive relief. In his amended counterclaim, Borrower claimed that the Bank and SunTrust routinely added to the debt secured by the mortgage the attorney's fees and costs incurred in dismissed or unsuccessful prior foreclosure actions. Thus, Borrowers were being charged fees even though the Bank did not prevail in the prior actions, despite the fact that the provisions of the mortgage allowed the Bank to include attorney's fees only if it prevailed. The proposed counterclaim designated the class as consisting of homeowners who may have been serviced by SunTrust but whose mortgages were owned or held by the Bank or by other lenders. The counterclaim included the necessary allegations to support a class action: numerosity, typicality, representative status, predominance of common questions of law and fact. It sought a declaratory judgment against the Bank and SunTrust, as well as damages to compensate borrowers for this improper practice by the Bank as to borrowers. It also added a count against SunTrust for violation of the Florida Consumer Collection Practices Act, pursuant to section 559.72, Florida Statutes (2017), in connection with the unauthorized inclusion of attorney's fees in the amounts due. The counterclaim demanded damages incurred by the entire class for the statutory violations.

In response, the Bank filed a notice of voluntary dismissal of its foreclosure complaint. However, this did not deprive the court of jurisdiction, as the filing of a motion to amend to add a counterclaim is treated the same as a pending counterclaim for purposes of Florida Rule of Civil Procedure 1.420(a)(2). *See Our Gang, Inc. v. Commvest Sec., Inc.*, 608 So. 2d 542, 544 (Fla. 4th DCA 1992). Under that rule, "[i]f a *counterclaim* has been served by a defendant prior to the service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court." Fla. R. Civ. P. 1.420(a)(2) (emphasis added).

In response to the motion for leave to file class action counterclaim, the Bank argued that the counterclaim would unnecessarily complicate a

simple foreclosure, that it added a third party, and that the claims failed to state a viable claim for relief under Florida law.

After a short non-evidentiary hearing, the trial court entered an order granting Borrower's motion to amend insofar as it allowed him to amend to assert compulsory counterclaims, but it denied the motion to assert those claims as a class action. From that order, Borrower appeals.

We first address our jurisdiction. Although an order denying a motion to amend claims is ordinarily regarded as a nonfinal, non-appealable order, *see Hochstadt v. Sanctuary Homeowners Ass'n*, 882 So. 2d 1094, 1096 (Fla. 4th DCA 2004), where the order effectively denies class certification, it is appealable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi). That rule allows appeal of orders determining "whether to certify a class." While titled as a "motion for leave to file class counter-complaint," it appears that the motion was a request to certify a class to file a counterclaim. *See IndyMac Fed. Bank FSB v. Hagan*, 104 So. 3d 1232, 1236 (Fla. 3d DCA 2012) ("With respect to the characterization of motions, Florida courts place substance over form."). The trial court did not deny the motion to amend the counterclaim of Borrower to the extent that it was compulsory; it dismissed only the class action status of the counterclaim. Thus, this case is similar to *Key Club Associates, L.P. v. Mayer*, 718 So. 2d 346 (Fla. 2d DCA 1998), in which the Second District treated an order granting a motion to dismiss a class action counterclaim as appealable under rule 9.130 where the denial of the counterclaim was based upon the trial court's analysis of the class action rule in concluding that the counterclaim should be dismissed. So too in this case, the trial court denied the class action component only while leaving intact compulsory counterclaims. To the extent then that the class action claims involve a compulsory counterclaim, the order effectively denied class action certification as a matter of law. "We conclude that the function intended for rule 9.130(a)[(3)(c)(vi)], to permit review of class certification issues, justifies this court's acceptance of jurisdiction over this nonfinal appeal." *Id.* at 347 (footnote omitted).

Although the Bank contends that allowing a class action counterclaim would unfairly prejudice it by increasing the complexity of a common foreclosure complaint, that same concern would be true of almost any counterclaim asserting a class action. Furthermore, any class counterclaim would bring additional "parties" into a lawsuit. Yet Florida Rule of Civil Procedure 1.220(c) specifically includes a "counterclaim" within its terms. Therefore, these differences in and of themselves do not prevent the assertion of a class counterclaim.

The trial court allowed Borrower to amend to state compulsory counterclaims without defining which of the two counts of the proposed counterclaim it deemed compulsory. In *4040 Ibis Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 960 (Fla. 4th DCA 2016), a foreclosure proceeding, we explained that a compulsory counterclaim was one that bears a "'logical relationship' to the plaintiff's claims in that they arise out of the 'same aggregate of operative facts as the original claim.'" (quoting *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 20 (Fla. 1992)). "By definition, a permissive counterclaim does not arise out of the transaction or occurrence that is the subject matter of the main claim." *Id.* The claims held to be compulsory in *4040 Ibis Circle* included claims for breach of contract in the application of the borrower's principal and interest payments to the paydown of an escrow account for force-placed insurance. But the court also ruled that the counts of the counterclaim based upon violation of the Florida Unfair Insurance Trade Practices Act were permissive. They were based upon the participation in a force-placed insurance scheme of "undisclosed commissions, illegal kickbacks." These claims did not arise out of the same operative facts as the foreclosure complaint.

In Count I of the counterclaim attached to the motion to amend here, the class representative seeks a declaration that the practice of adding attorney's fees and costs from unsuccessful foreclosure actions against borrowers to the balance of their mortgages violates Florida law and requires that the Bank and SunTrust compensate borrowers to whom this occurred. These claims relate to the operative facts of the foreclosure, because Borrower alleges that his mortgage was increased by adding attorney's fees from the prior unsuccessful actions to his balance. The complaint is against the Bank and SunTrust, its servicer. They all relate to the inclusion of attorney's fees from unsuccessful attempts to foreclose on the mortgage in the amount due on the mortgage and promissory note. The counterclaim is compulsory, because it involves the same aggregate operative facts of the main claim and defense, i.e., whether the attorney's fees from unsuccessful suits had been included inappropriately in the amount claimed due under the mortgages.

Count II is asserted against SunTrust only and as a class action. Thus it is not a true counterclaim but a third party claim. The class action rule does not include third party claims within its provisions. Even if this may be loosely determined to be a counterclaim asserted against the loan servicer as an agent of the Bank, it is not a compulsory counterclaim. The counterclaim seeks damages for breach of the Florida Consumer Collection Practices Act by adding attorney's fees to the balance of mortgages, similar to Count I. However, Count II is also filed on behalf of borrowers on any

mortgage SunTrust serviced, thus involving lenders other than the Bank in this suit. Such a claim would require review of mortgages held by other lenders. It further alleges that SunTrust used various means of communication and attempted to collect debts involving interstate commerce, which is a different element than the foreclosure proceeding. It would require proof that the debts were "consumer debts" within the meaning of section 559.55(6), Florida Statutes (2006). These elements are all beyond the operative facts of the foreclosure complaint. Generally, "actions to collect debts are not compulsory counterclaims to actions predicated on the violation of consumer protection type laws." *See Equity Residential Props. Tr. v. Yates*, 910 So. 2d 401, 404 (Fla. 4th DCA 2005). Logically, the opposite should also be true, that actions for violations of consumer protection laws would not constitute compulsory counterclaims to actions to collect a debt. We conclude that this claim is permissive, and thus the trial court's order allowing compulsory claims only to proceed effectively denied the motion to amend to assert the permissive counterclaim. It did not deny it based upon the denial of class certification as a matter of law. Therefore, as to Count II, the order is not an appealable final order. This appeal is dismissed as to the denial of the motion to amend to include Count II of the counterclaim.

As the Count I counterclaim is compulsory, and the trial court allowed Borrower to file his compulsory counterclaim, the issue remains as to whether it could be asserted as a class action for all borrowers similarly situated. Since rule 1.220 permits the assertion of class actions by way of counterclaims, as a matter of law, this claim may be asserted. Motions to amend should be liberally granted. *See* Fla. R. Civ. P. 1.190(a) ("Leave of court shall be given freely when justice so requires."). Once filed, whether this should proceed as a class claim depends upon an analysis of the factors for maintaining a class action set forth in Florida Rule of Civil Procedure 1.220. The rule requires a trial court to make findings of fact and conclusions of law supporting its ruling to either certify a class or deny certification. *See* Fla. R. Civ. P. 1.220(d)(1). The trial court truncated this review by denying the motion to amend. Yet to determine whether the court has abused its discretion, the appellate court must have the benefit of the findings of fact and conclusions of law by the trial court. *Fidelity Nat'l Title Ins. Co. v. Grosso*, 110 So. 3d 521, 522 (Fla. 4th DCA 2013).

We therefore reverse and remand for the trial court to grant the amendment to assert Count I as a class action and then to consider whether the counterclaim can and should be asserted as a class action. As to Count II, the appeal is dismissed because it is a nonappealable order.

Reversed in part; dismissed in part; and remanded for further proceedings.

DAMOORGIAN and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARGARET HURCHALLA, JAMES HURCHALLA, LAKE POINT PHASE I, LLC, a Florida limited liability company, and **LAKE POINT PHASE II, LLC,** a Florida limited liability company
Appellants,

v.

HOMEOWNERS CHOICE PROPERTY & CASUALTY INSURANCE COMPANY, INC., a Florida corporation,
Appellee.

Nos. 4D18-2740 and 4D18-2935

[October 16, 2019]

Consolidated appeals from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Barbara W. Bronis, Judge; L.T. Case No. 14000054CAAXMX.

Virginia P. Sherlock and Howard K. Heims of Littman, Sherlock & Heims, P.A., Stuart, for appellants Margaret Hurchalla and James Hurchalla.

Ethan J. Loeb, Jon P. Tasso and Michael J. Labbee of Smolker, Bartlett, Loeb, Hinds & Thompson, P.A., Tampa, for appellants Lake Point Phase I, LLC, and Lake Point Phase II, LLC.

Robert Alden Swift of Cole, Scott & Kissane, P.A., Orlando, for appellee.

WARNER, J.

Appellants challenge a final summary judgment in favor of appellee insurance company which summarily determined that the company had no duty to defend or indemnify appellants Hurchalla against a civil action. Because the appellee failed to conclusively negate appellants' affirmative defenses to the complaint filed by the insurance company, the court erred in granting summary judgment. We reverse.

Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively "Lake Point") brought a civil action against Margaret Hurchalla and her husband (collectively "Hurchalla") alleging she tortiously interfered with agreements

which Lake Point had with South Florida Water Management District and Martin County ("the tort litigation").[1] Initially, appellee Homeowners Choice Property & Casualty Insurance Company, Hurchalla's homeowner's insurer, provided Hurchalla with a defense. Homeowners Choice defended Hurchalla for more than a year in the tort litigation. After a year of litigation, Homeowners Choice filed a complaint for declaratory judgment against Hurchalla, Lake Point, SFWMD and Martin County, seeking a determination that Hurchalla's policy does not provide coverage for the claims asserted against her for "intentional acts," but covered only bodily injury or property damage. Hurchalla filed an answer and denied the allegations regarding lack of coverage and also raised affirmative defenses of laches, estoppel, waiver, failure to state a cause of action and breach of the duty of good faith and fair dealing.

Homeowners Choice subsequently moved for summary judgment on grounds that the policy provided coverage for only bodily injury or property damage, not intentional acts. The motion was initially denied on grounds there were disputed issues of fact regarding waiver, estoppel and laches. After the tort litigation resulted in a substantial verdict against Hurchalla, Homeowners Choice filed a renewed motion for summary final judgment, arguing that because the jury found against Hurchalla on an intentional tort, there were no disputed issues of material fact. Homeowners argued that under the policy, coverage was excluded for intentional torts. Hurchalla opposed the motion, arguing both that Homeowners Choice had not negated her affirmative defenses and that she had not received a reservation of rights letter required by section 627.426(2), Florida Statutes (2013), which fact was supported by both deposition testimony and affidavit. Despite the conflicting evidence, the court granted the motion, determining that the claim and verdict were based on an intentional tort, for which coverage was excluded under the policy. In rejecting Hurchalla's estoppel defense the court relied on *Doe v. Allstate Insurance Co.*, 653 So. 2d 371 (Fla. 1995). The court interpreted *Doe* as holding that the fact that an insurance company assumes representation of an insured does not mean that an event, that was not covered under the policy, is covered. Coverage under a policy could not be extended by the doctrine of estoppel. The court then entered final summary judgment.[2] This appeal follows.

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[1] The agreements are described in detail in *Hurchalla v. Lake Point Phase I, LLC and Lake Point Phase II, LLC*, 2019 WL 2518748 (Fla. 4th DCA June 9, 2019).

[2] Because the final judgment did not refer to Lake Point, which was a named defendant in the declaratory judgment action, the parties were uncertain as to whether it disposed of all judicial labor. Homeowners Choice filed another motion for summary judgment against Lake Point. Lake Point opposed the motion and

The standard of review of an order granting summary judgment is de novo. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009). When reviewing a ruling on summary judgment, an appellate court must examine the record in the light most favorable to the non-moving party. Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and the admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See also State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006) (assuming there is no disputed issue of fact, the correctness of a summary judgment is a matter of law which is subject to the de novo standard of review). Where the defendant has raised affirmative defenses, the plaintiff must factually refute them or establish that they are legally insufficient before being entitled to summary judgment in its favor. *See Corya v. Sanders*, 76 So. 3d 31, 34 (Fla. 4th DCA 2011) (quoting *Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 788 (Fla. 4th DCA 1995)).

Under Florida Rule of Civil Procedure 1.510(c), a motion for summary judgment must state with particularity the grounds upon which it is based. This is intended to prevent trial by "ambush" by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing. *City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So. 2d 283, 284 (Fla. 4th DCA 1995). It is reversible error to enter summary judgment on a ground not raised with particularity in the motion for summary judgment. *See Ambrogio v. McGuire*, 247 So. 3d 73, 75 (Fla. 2d DCA 2018).

Hurchalla raised five affirmative defenses, including estoppel. Homeowners Choice's renewed motion for summary judgment failed to address any of them, and the trial court granted summary judgment without addressing those defenses. This was error. *See Corya*.

Homeowners Choice's contention, that it was not obligated to negate Hurchalla's affirmative defenses until Hurchalla raised them in response

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moved for rehearing of the final summary judgment to the extent that it did dispose of the entire case. The trial court denied Lake Point's motion for rehearing. Subsequently, the trial court entered separate final summary judgments against Lake Point I and Lake Point II, determining that Hurchalla had no coverage under the Homeowners Choice policy. These were separately and timely appealed by Lake Point in case number 4D18-2935. The two appeals (4D18-2740 and 4D18-2935) have been consolidated.

to its motion for summary judgment, is clearly wrong. "Where the movant merely denies the affirmative defenses and the affidavit in support of summary judgment only supports the allegations of the complaint and does not address the affirmative defenses, the burden of disproving the affirmative defenses has not been met." *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784, 786 (Fla. 5th DCA 2003); *Elkins v. Barbella*, 603 So. 2d 726, 727 (Fla. 4th DCA 1992).

The trial court may have presumed that the affirmative defense was legally insufficient by citing to *Doe.* However, *Doe* does not support summary judgment in this case. In *Doe*, an insured was sued for an intentional tort. Allstate initially provided the insured a defense but did not send a written reservation of rights to the insured regarding coverage, as required by section 627.426(2), Florida Statutes. Subsequently, Allstate filed an action for declaratory relief in federal court asking the court to determine that the policy did not afford coverage to the insured. The district court agreed that there was no coverage and granted summary judgment to Allstate. Upon an appeal to the Eleventh Circuit, the court certified an issue to the Florida Supreme Court. The minor's parents argued summary judgment should not have been granted because Allstate was estopped to deny coverage because it had not complied with section 627.426(2). In resolving the issue, the court harmonized *Cigarette Racing Team, Inc. v. Parliament Insurance Co.*, 395 So. 2d 1238 (Fla. 4th DCA 1981), with *AIU Insurance Co. v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989), and held:

> [W]hen the insurer undertakes the defense of a claim on behalf of one claiming to be an insured, we have recognized substantial duties on the part of both the insurer and the insured. If an insurer erroneously begins to carry out these duties, and the insured, as required, relies upon the insurer to the insured's detriment, then the insurer should not be able to deny the coverage which it earlier acknowledged. However, we clearly state that the insured must demonstrate that the insurer's assumption of the insured's defense has prejudiced the insured. It is the fact that the insured has been prejudiced which estops the insurer from denying the indemnity obligation of the insurance policy.

Doe, 653 So. 2d at 374. Thus, under *Doe* an insurance company may be estopped from denying coverage, even where the policy does not cover the claim, where the insured has been prejudiced by the insurer's assumption of the insured's defense.

Here, Hurchalla alleged equitable estoppel as an affirmative defense. Her claim was legally sufficient, and Homeowners Choice did not negate it factually. Therefore, the court erred by granting summary judgment.

As to the remaining affirmative defenses, none were addressed in the motion for summary judgment nor in anything filed with the court. Nor did the court address these. Whether they are legally sufficient may be addressed in further proceedings.

For the foregoing reasons, we reverse the final summary judgments entered in both consolidated appeals and remand for further proceedings.

Reversed and remanded.

GROSS and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ALI MAHINBAKHT,
Appellant,

v.

KAZEM MAHINBAKHT,
Appellee.

No. 4D18-3614

[October 16, 2019]

Appeal of a nonfinal order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Judge; L.T. Case No. CACE17-019608 (18).

Manuel Farach of McGlinchey Stafford, PLLC, Fort Lauderdale, for appellant.

Andrew M. Kassier of Andrew M. Kassier, P.A., Coral Gables, for appellee.

PER CURIAM.

Ali Mahinbakht timely appeals that portion of an order that denied his motion to dismiss a lawsuit filed against him by appellee on the grounds of *forum non conveniens*.

From the record, it appears that the sole basis for the circuit court's order was Ali Mahinbakht's residency in Florida at the time of service. The court did not conduct the analysis required by Florida Rule of Civil Procedure 1.061 and *Kinney System, Inc. v. Continental Insurance Co.*, 674 So. 2d 86 (Fla. 1996). A trial court abuses its discretion in denying a motion to dismiss for *forum non conveniens* when the order and record fail to show that the *Kinney* factors were considered. *Sybac Solar AG, Co. v. Falz*, 174 So. 3d 383, 385-86 (Fla. 2d DCA 2015).

We reverse and remand to the circuit court for the court to perform the *Kinney* analysis. *See Celebration Cruise Line, LLC v. Dobrianskiy*, 225 So. 3d 284, 285 (Fla. 4th DCA 2017); *Wood v. Bluestone*, 9 So. 3d 671,673-74 (Fla. 4th DCA 2009).

GROSS, TAYLOR and DAMOORGIAN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.