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Manuel Farach

Renfroe v. Nationstar Mortgage, LLC, Case No., 15-10582 (11th Cir. 2016).
A lender must respond to a borrower's notice of error under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e)(2) ("RESPA"), by conducting a reasonable investigation of the alleged error. Damages must be pled in order to state a claim under RESPA, but overcharges will satisfy this requirement.

Michel v. Bank of New York, Case No. 2D14-3022 (Fla. 2d DCA 2016).
The Business Records Exception to the Hearsay Rule does not require a witness to have personal knowledge of a prior servicer's business practices or to participate in the lender's "boarding" process in order to admit the prior lender's documents into evidence.

Underwater Engineering Services, Inc. v. Utility Board of the City of Key West, --- So. 3d ----, 2016 WL 2731438 (Fla. 3d DCA 2016).
A contractor breaches a contract if it fails to give notification of its work (and opportunity to inspect) to an owner during the contract process and as required by the contract.

Colonnade 101 SE, Inc. v. Cordero, --- So. 3d ----, 2016 WL 2744495 (Fla. 3d DCA 2016).
A party cannot appeal a trial court order which grants the relief it requested.

Goodman v. Rose Realty West, Inc., --- So. 3d ----, 2016 WL 2744975 (Fla. 4th DCA 2016).
A real estate broker is liable for the acts of his or her sales agent in failing to disclose defects in a home which materially affects the value of home, and the broker is not insulated from liability merely because the sales agent is also the seller of the home.

Rivera v. Bank of America, Case No. 5D13-1618 (Fla. 5th DCA 2016).
A debtor who "surrenders" their real property in their bankruptcy proceedings relinquishes the property to the lender in state court foreclosure proceedings.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10582

D.C. Docket No. 1:14-cv-00314-CG-M

MARGARET C. RENFROE,

Plaintiff-Appellant,

versus

NATIONSTAR MORTGAGE, LLC,

Defendant-Appellee.

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

(May 12, 2016)

Before WILSON and MARTIN, Circuit Judges, and RODGERS,[*] District Judge.

MARTIN, Circuit Judge:

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[*] Honorable Margaret C. Rodgers, United States District Chief Judge for the Northern District of Florida, sitting by designation.

Margaret Renfroe is a retired bank manager who claims that her mortgage payment incorrectly increased after Nationstar Mortgage, LLC ("Nationstar") began servicing her loan. She wrote Nationstar to ask why her payment had gone up, but Nationstar gave no explanation. Instead, it said her account was correct and attached some loan documents. Mrs. Renfroe sued Nationstar under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., a consumer-protection statute geared toward mortgagors. Nationstar succeeded in getting the suit dismissed, after which Mrs. Renfroe appealed to this Court. Because the District Court improperly elevated Nationstar's allegations over those of Mrs. Renfroe at the motion-to-dismiss stage, and because Mrs. Renfroe adequately pleaded damages, we REVERSE and REMAND for proceedings consistent with this opinion.

I. BACKGROUND

A. MORTGAGE SERVICING ERROR

In 2006, Mrs. Renfroe refinanced her mortgage with Wilmington Finance, Inc. at a fixed rate of 7.75 percent for a 30-year term, with monthly payments of $998.68. After several years, servicing of the loan was transferred to Nationstar. Mrs. Renfroe alleges that after this transfer, her monthly payments increased by about $100.

Mrs. Renfroe says she repeatedly called Nationstar seeking an explanation, but got none. She suspected that Nationstar was either mistakenly charging her for property taxes or had miscalculated her loan amortization schedule. In September 2013, Mrs. Renfroe refinanced her mortgage with Regions Bank, which ended Nationstar's servicing of the loan.

B. THE RESPA LETTERS

On June 17, 2014, Mrs. Renfroe sent Nationstar a letter pointing out the increase in payment, as well as her suspicions about its cause. She requested an investigation, a "detailed explanation," certain account information, and a refund if appropriate. She attached several loan documents in support of her letter. This "notice of error" letter triggered certain rights Mrs. Renfroe possesses under RESPA. See 12 U.S.C. § 2605(e).

On June 26, 2014, Nationstar responded to Mrs. Renfroe's letter. It denied any error, stating that the "loan and related documents were reviewed and found to comply with all state and federal guidelines that regulate them. As such, the above-mentioned loan account will continue to be serviced appropriate to its status."[1] Nationstar also represented that several loan documents were enclosed, but none of these enclosures are contained in the record. Mrs. Renfroe had not requested many of the documents that Nationstar listed, and some were even

[1] Of course, Nationstar had stopped servicing Mrs. Renfroe's mortgage nearly a year before it sent this response, so at least the latter part of Nationstar's statement was not accurate.

duplicates of the documents that she had sent to Nationstar. While Nationstar described the kind of information that generic documents of these types might contain, its letter said nothing about the substantive content of the documents and gave no explanation for Mrs. Renfroe's predicament.

C. PROCEDURAL HISTORY

A month later, Mrs. Renfroe filed this suit. For our purposes here, she claimed that Nationstar had violated RESPA by failing to reasonably investigate the error she pointed out in her account, by failing to adequately respond to her notice of error, and by failing to refund her overpayments. Nationstar moved to dismiss Mrs. Renfroe's amended complaint for failure to state a claim, arguing that it had satisfied its obligations under RESPA and that Mrs. Renfroe had not adequately pleaded damages. Mrs. Renfroe responded that Nationstar had not complied with RESPA, and this failure damaged her.

The Magistrate Judge recommended granting Nationstar's motion to dismiss. The judge reasoned that Nationstar complied with RESPA because it "explain[ed] that 'related documents [to the loan] were reviewed.'" Although those documents were nowhere in the record, the Magistrate Judge concluded that "[s]uch an explanation satisfies RESPA." Alternatively, the judge stated that Mrs. Renfroe had not pleaded damages under RESPA. First, because the overpayments occurred before Mrs. Renfroe wrote to Nationstar, the judge found that any such

damages "sound in breach of contract . . . and not in a RESPA violation." Second, the Magistrate Judge rejected the idea that Mrs. Renfroe could count the cost of sending her "notice of error" letter as damages. Finally, the judge stated that no statutory "pattern or practice" damages could accrue without actual damages.

The District Court overruled Mrs. Renfroe's objections to the Magistrate Judge's report, adopted it, and dismissed the complaint without prejudice. Mrs. Renfroe timely appealed to this Court.

II. STANDARD OF REVIEW

"We review de novo the district court's grant of a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Timson v. Sampson, 518 F.3d 870, 872 (11th Cir. 2008) (per curiam). To survive a motion to dismiss, a complaint need only present sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 570, 127 S. Ct. 1955, 1965, 1974 (2007). The complaint must "raise a right to relief above the speculative level," but it need not contain "detailed factual allegations." Id. at 555, 127 S. Ct. at 1964–65.

III. DISCUSSION

We consider two aspects of Mrs. Renfroe's claim: (1) whether she stated a RESPA violation, and (2) whether she stated damages related to that violation.

Guiding this analysis is the principle that RESPA, as a remedial consumer-protection statute, should be construed liberally in order to best serve Congress's intent. Cf. Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 707 (11th Cir. 1998).

A. RESPA VIOLATION

Nationstar argues that Mrs. Renfroe failed to allege a RESPA violation. RESPA requires mortgage servicers like Nationstar to reasonably respond to notices of error like the one Mrs. Renfroe sent. Basically, a servicer must respond by fixing the error, crediting the borrower's account, and notifying the borrower; or by concluding that there is no error based on an investigation and then explaining that conclusion in writing to the borrower. See 12 U.S.C. § 2605(e)(2); 12 C.F.R. § 1024.35(e)(1)(i). In 2013, the Consumer Financial Protection Bureau promulgated new regulations that clarified servicers' obligations after receiving a notice of error:

> [A] servicer must respond to a notice of error by either:
>
> > (A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or
> >
> > (B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a

> statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

12 C.F.R. § 1024.35(e)(1)(i) (emphasis added). Nationstar says it chose and complied with the second option. Thus, Nationstar purports to have: (1) conducted a reasonable investigation; (2) concluded that there was no error based on that investigation; (3) given Mrs. Renfroe a written statement of "the reason or reasons for this determination"; and (4) facilitated Mrs. Renfroe's access to further information.

In her amended complaint, Mrs. Renfroe alleged that Nationstar violated RESPA because it failed to provide "any explanation" for its conclusion; failed to provide "an explanation of whether it was charging . . . property taxes"; failed to provide "an explanation of how payments were calculated and which amortization schedule was used"; and failed to "conduct any reasonable investigation." Instead, Mrs. Renfroe asserts that Nationstar "provided boilerplate statements and objections which do not apply to Mrs. Renfroe's letter, provided information and documents not requested[,] and without explanation[] stated the general conclusion that it did nothing wrong in servicing the account." Her allegations are supported by Nationstar's response letter. In its letter, Nationstar simply concluded, "[T]he above-mentioned loan and related documents were reviewed and found to comply

with all state and federal guidelines that regulate them. . . . [W]e did review the account, and all transactions appear to be correct from our records review." Nationstar acknowledged at oral argument that its letter did not explain to Mrs. Renfroe why the two errors she suspected were not present, and did not explain why her payment had increased. It just said there was no error and pointed to attachments.

In sum, Mrs. Renfroe has plausibly alleged: (1) that Nationstar did not offer a "written explanation" stating the "reason or reasons for [its] determination," in violation of 12 U.S.C. § 2605(e)(2)(B) and 12 C.F.R. § 1024.35(e)(1)(i)(B); (2) that this failure indicated Nationstar's investigation was unreasonable, in violation of 12 U.S.C. § 2605(e)(2)(B) and 12 C.F.R. § 1024.35(e)(1)(i)(B); and (3) that Nationstar's unreasonable investigation prevented it from discovering and appropriately correcting the account error, in violation of 12 U.S.C. § 2605(e)(2)(A) and 12 C.F.R. § 1024.35(e)(1)(i)(A). For these reasons, we conclude that Mrs. Renfroe has stated a RESPA violation.

Nationstar resists this outcome by saying that we should elevate its own conclusions—taken from the response letter and its generic descriptions of documents that are not in the record—over Mrs. Renfroe's allegations. This dangerous argument turns the standard for considering a Federal Rule of Civil Procedure 12(b)(6) motion on its head. In reviewing Rule 12(b)(6) motions, courts

are bound to accept the plaintiff's allegations as true and to construe them in the light most favorable to her. Timson, 518 F.3d at 872. Nationstar asks us to do the opposite. Nationstar suggests we should accept its contrary allegations—that it conducted a reasonable investigation into Mrs. Renfroe's account and found no error—and then to grant its motion to dismiss on that basis. We decline to do that.

Nationstar wrongly relies on Griffin Industries, Inc. v. Irvin, 496 F.3d 1189 (11th Cir. 2007). That case says, "[W]hen the exhibits [attached to the complaint] contradict the general and conclusory allegations of the pleading, the exhibits govern." Id. at 1206. The Griffin principle applies if the exhibits "plainly show" that the complaint's allegations are untrue by providing "specific factual details" that "foreclose recovery as a matter of law." Id. at 1205–06 (quotation omitted). Nationstar's response letter does not contain specific factual details that foreclose Mrs. Renfroe's recovery as a matter of law. Rather, it contains concededly unexplained conclusions and generic descriptions of documents that are not in the record.[2] We cannot take Nationstar's word that these mystery documents support its conclusion and throw out Mrs. Renfroe's case on that basis. If servicers want to try to shelter behind their RESPA response letters, they must provide a more comprehensive, supported explanation of their findings, or else introduce the

[2] We are not aware of any precedent—and Nationstar has identified none—extending the Griffin principle from facts in an attachment itself to an attachment's generic descriptions of the contents of other, undisclosed documents. Such a rule would essentially allow the introduction of hearsay at the motion-to-dismiss stage, because it would force courts to accept secondhand descriptions of documents without any way of assessing the validity of those descriptions.

supporting attachments into the record and convert their motions to dismiss into motions for summary judgment.

B. DAMAGES

Nationstar argues in the alternative that Mrs. Renfroe failed to allege damages. RESPA makes violators liable to individual borrowers for "(A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section." 12 U.S.C. § 2605(f)(1). We join our sister Circuits in recognizing that damages are an essential element in pleading a RESPA claim. See, e.g., Toone v. Wells Fargo Bank, N.A., 716 F.3d 516, 523 (10th Cir. 2013); Hintz v. JPMorgan Chase Bank, N.A., 686 F.3d 505, 510–11 (8th Cir. 2012). And we conclude that Mrs. Renfroe has sufficiently pleaded damages at this stage.

1. Actual Damages

We begin by considering whether Mrs. Renfroe pleaded "actual damages." RESPA states that actual damages arise "as a result of" the servicer's alleged violation. 12 U.S.C. § 2605(f)(1)(A). This language suggests there must be a "causal link" between the alleged violation and the damages. Cf. Turner v. Beneficial Corp., 242 F.3d 1023, 1028 (11th Cir. 2001) (en banc) (interpreting a similarly phrased damages provision in a consumer-protection statute). Mrs.

Renfroe alleged she sustained actual damages when Nationstar failed to refund her mortgage overpayments. We conclude that this harm has a sufficient causal link to Nationstar's alleged violation.

Mrs. Renfroe alleged that Nationstar's failure to comply with RESPA—by not discovering and refunding her overpayments—resulted in actual damage to her. Accepting these allegations, if Nationstar had heeded its statutory duties, Mrs. Renfroe would've gotten a refund.[3] Nationstar argues that this damages theory fails because Mrs. Renfroe's damages occurred before she sent her notice of error. Nationstar's timing argument ignores the fact that a notice of error triggers present RESPA obligations with respect to past error. See 12 U.S.C. § 2605(e) (creating a "[d]uty of loan servicer to respond to borrower inquiries," including by crediting erroneous charges). This statutory mechanism makes past errors current by requiring servicers to fix errors they find upon reasonable investigation, including by issuing refunds as necessary. See id. § 2605(e)(2). Mrs. Renfroe alleged that Nationstar failed to comply with RESPA after she sent a notice of error, and that this failure harmed her.

Beyond that, accepting Nationstar's timing argument would mean gutting RESPA. Nationstar acknowledged at oral argument that borrowers can send

[3] This allegation implies that, had Nationstar conducted a reasonable investigation, it would have discovered loan overpayments. We take Nationstar's point that Mrs. Renfroe is not entitled to a refund if there was not in fact an account error. And Nationstar can certainly try to prove as much at a later stage of this case. But, as discussed earlier, the motion-to-dismiss standard prevents us from accepting Nationstar's unsupported assertion that there was no error.

notices of error only after an error has occurred. We can hardly ask borrowers to foretell errors that haven't happened yet. If RESPA reached only future harm, as Nationstar claims, § 2605(e)(2)(A)'s directive that servicers "make appropriate corrections in the account of the borrower [when there is an error], including the crediting of any late charges or penalties," would be meaningless because it could always be circumvented. That is, a servicer notified of an account error could always avoid RESPA liability just by claiming it thought there was no error and correcting the error going forward. According to Nationstar, a RESPA cause of action would not accrue in this situation—despite the abusiveness of the tactic. We reject such a cramped reading of RESPA. When a plaintiff plausibly alleges that a servicer violated its statutory obligations and as a result the plaintiff did not receive a refund of erroneous charges, she has been cognizably harmed.

2. Pattern-or-Practice Damages

The District Court concluded that Mrs. Renfroe could not recover statutory pattern-or-practice damages because she had not pleaded actual damages.[4] In light of our holding that Mrs. Renfroe did plead actual damages, this conclusion cannot stand.

[4] The District Court apparently relied on the statutory language, which describes pattern-or-practice damages as "additional." 12 U.S.C. § 2605(f)(1)(B). This Court has not addressed in a published opinion whether RESPA pattern-or-practice damages are available in the absence of actual damages, and our unpublished opinions have used conflicting language. The question is not now before us, but we observe without ruling on the question, that the use of "additional" seems to indicate that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages.

The District Court also stated that "submitting one additional allegedly deficient [servicer]response [letter] is insufficient to establish a pattern or practice warranting statutory damages." RESPA pattern-or-practice damages are not clearly defined by this Court's precedent. In another context, a "pattern or practice" has been defined as a "standard operating procedure—the regular rather than the unusual practice." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855 (1977). Thus, the Tenth Circuit has held that a plaintiff must allege some RESPA violations "with respect to other borrowers." Toone, 716 F.3d at 523. "Though there is no magic number of violations that create a 'pattern or practice of noncompliance,' courts have held that two violations of RESPA are insufficient to support a claim for statutory damages." Kapsis v. Am. Home Mortg. Servicing Inc., 923 F. Supp. 2d 430, 445 (E.D.N.Y. 2013). On the other hand, allegations of five RESPA violations have been deemed adequate to plead statutory damages. Ploog v. HomeSide Lending, Inc., 209 F. Supp. 2d 863, 868–69 (N.D. Ill. 2002).

Here, Mrs. Renfroe alleged four other RESPA violations, for a total of five. Mrs. Renfroe specifically alleged that: (1) "Nationstar's practice is to provide . . . readily available documents in response to a [notice of error], regardless of the individual requests made"; (2) "[Nationstar's] practice is to use the standardize[d] form-based response letter, like the one used to respond to Renfroe's request,

which contains boilerplate objections that are not tailored to the . . . individual request"; (3) "On at least five separate occasions, including Mrs. Renfroe's case, Nationstar has used the same generic form letters to respond to [notices of error]. These form letter[s] were sent [to] borrowers in Birmingham, Alabama; Mobile[,] Alabama[;] and Lexington, Maryland. In each situation, Nationstar's form and generic response failed to address the specific issues addressed in the borrower's letter and violated RESPA Section 2605(e)"; and (4) Nationstar's patently incorrect statement that Mrs. Renfroe's loan would continue to be serviced showed that a form letter was used.

Nationstar attacks Mrs. Renfroe's allegations regarding the other borrowers. It criticizes her for "not disclos[ing] the identity of [these borrowers], the date of the letters, or whether [these borrowers'] requests were similar to hers." Here again, Nationstar jumps ahead to a later stage of this case, ignoring the motion-to-dismiss standard. "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. at 1974. Disclosing the identities of other borrowers, the dates of the letters, and the specifics of their inquiries is not a prerequisite to pleading statutory damages, and Nationstar cites no case saying otherwise. It is enough, as Mrs. Renfroe did here, to plausibly allege "a pattern or practice of noncompliance with the requirements of [RESPA]." 12 U.S.C. § 2605(f)(1)(B).

IV. CONCLUSION

Nationstar seeks the benefits of a motion to dismiss without abiding by the rules governing that motion. Nationstar asks this Court to allow its allegations about documents that are not in the record to "trump" Mrs. Renfroe's allegations. It asks this Court to require Mrs. Renfroe to plead specifics about every time that Nationstar allegedly violated another borrower's RESPA rights. These requests are not compatible with a motion to dismiss. Because we conclude that Mrs. Renfroe adequately pleaded a RESPA violation as well as actual and statutory damages, we reverse and remand to the District Court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JIMMY MICHEL,

Appellant,

v.

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK as trustee for holders of Structured Asset Mortgage Investments II Trust 2006-ARS, Mortgage Pass-Through Certificates, Series 2006-ARS; JOSEPH M. FERON; QUAIL HOLLOW PROPERTY OWNERS ASSOCIATION, INC.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for Countrywide Bank, N.A.,

Appellees.

Case No. 2D14-3022

Opinion filed May 13, 2016.

Appeal from the Circuit Court for Collier County; Daniel R. Monaco, Senior Judge.

Thomas Erskine Ice of Ice Appellate, Royal Palm Beach, for Appellant.

Nancy M. Wallace and Diane G. DeWolf of Akerman LLP, Tallahassee; William P. Heller of Akerman LLP, Fort Lauderdale; and Scott R. Stengle of Akerman LLP, Orlando, for Appellee The Bank of New York Mellon.

No appearance for remaining Appellees.

SILBERMAN, Judge.

Jimmy Michel appeals a final judgment of foreclosure[1] entered after a trial in favor of the Bank of New York Mellon, as successor trustee to Countrywide Bank, N.A. (the bank). Michel raises two issues on appeal. We reject his first argument regarding the admission of business records. However, we agree that the trial court erred in determining the amount of interest and in awarding attorney's fees. Accordingly, we affirm the judgment of foreclosure in favor of the bank except as to the awards of interest and attorney's fees. We remand for entry of an amended judgment reflecting the amount of interest that is supported by the evidence.

In October 2009, the bank filed a one-count complaint to foreclose on a residential property subject to a mortgage executed by Michel, Michel's mother, and her husband and an adjustable rate note executed by Michel's mother. The bank alleged that no payments had been made on the note since August 1, 2008. Michel represented himself for most of the proceedings below. A trial was held on April 30, 2014.

At trial, the bank's main witness was Jose Perez, a "default case specialist" for Nationstar, the loan servicer at the time of trial. Over Michel's hearsay objections, the trial court ruled that Perez had properly laid a foundation for the business records exception, and the court allowed the bank to admit into evidence the original note and mortgage, the payment history, and the bank's notice of default. Counsel for

[1]The notice of appeal named both Michel and his mother as appellants. However, Michel's mother passed away after the notice of appeal was filed, and because no estate was opened for the mother, this court issued an order for the appeal to proceed with Michel as the sole appellant.

the bank then attempted to hand Perez a proposed final judgment so Perez could testify to the outstanding amounts of principal and interest. Michel objected because the final judgment was not a business record. The trial court sustained the objection, and Perez then explained that he had the outstanding amounts on his cell phone. By referring to his cell phone, he testified that the total amount owed on the note and mortgage was $399,953.71, which, among other items, included principal in the amount of $298,155.99 and interest in the amount of $69,776.33. Perez did not provide any testimony explaining how that interest figure had been calculated or what the applicable interest rate or rates were on the variable note from the time of default. Michel objected to Perez's use of the cell phone after Perez testified to the amounts due and owing, and the trial court overruled the objection as untimely.

The bank also called both Michel and his mother. They did not dispute the default, although Michel's mother said she did not recall the last time she had made a payment. Michel testified that he did not remember signing the mortgage.

The trial court entered the final judgment provided by the bank. The final judgment included awards of principal in the amount of $298.155.99; interest of $68,187.36 that accrued from August 1, 2008, to February 12, 2014; interest of $2279.97 computed at the rate of 6.625% that accrued from February 13, 2014, to April 30, 2014; and attorney's fees totaling $4140.

Michel raises two issues on appeal. First, he argues that Perez was not qualified to lay a foundation for the business records exception under section 90.803(6), Florida Statutes (2013), because Perez had no knowledge of the regular business practices of the prior loan servicer and did not personally participate in or supervise

Nationstar's boarding process. We find no merit to this argument. Perez testified that Nationstar independently verified the loan documents it received from the prior servicer through a boarding process that he described. It was not necessary for Perez to have personal knowledge of the prior servicer's business practices or to participate in Nationstar's boarding process, and the trial court did not abuse its discretion in admitting the records as business records. See OneWest Bank, FSB v. Jasinski, 173 So. 3d 1009, 1012-13 (Fla. 2d DCA 2015); WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc., 903 So. 2d 230, 233 (Fla. 2d DCA 2005); Le v. U.S. Bank, 165 So. 3d 776, 777-78 (Fla. 5th DCA 2015); Bank of N.Y. v. Calloway, 157 So. 3d 1064, 1072 (Fla. 4th DCA 2015).

In his second issue, Michel makes several challenges to the sufficiency of the evidence. We reject without discussion his arguments that the bank failed to present sufficient evidence that it complied with the notice requirement in paragraph 22 of the mortgage. We discuss but also reject his argument as to the sufficiency of the bank's evidence concerning the principal balance owed on the mortgage. However, we agree that the trial court erred in determining the amount of interest and in awarding attorney's fees.

Michel contends that the $298,155.99 award of principal is not supported by the evidence at trial because the amount is greater than the original amount of the loan. This argument has no merit. It is true that Perez did not explain at trial how the principal amount increased after the origination of the loan. But, as the bank points out, the payment history admitted into evidence demonstrates that the increase in principal is due to negative amortization, that is, an increase from the accrual of unpaid interest. See Doyle v. CitiMortgage, Inc., 162 So. 3d 340, 341-42 (Fla. 2d DCA 2015)

(concluding that the payment history supported the principal awarded in the final judgment).

Michel is correct in his next argument that the amount of interest awarded in the final judgment is not supported by the evidence. By the terms of the adjustable rate note, the interest rate was subject to change based on a "Twelve-Month Average" index beginning on November 1, 2006, and on every month thereafter. However, "[b]eginning with the first" interest rate change on November 1, 2006, the interest rate would "never be lower" than 3.525%. As explained above, at trial Perez testified only to a total amount of outstanding interest, which was about $700 less than the amount of interest awarded in the final judgment. Perez did not explain how that total amount had been calculated, and after he was precluded from relying on the bank's proposed final judgment, he was able to testify to the amount by referring to his cell phone. The bank did not introduce records in support of the claimed interest or the actual amount contained in the final judgment, and it did not present any other evidence that demonstrates what the applicable interest rate was from the time of default or how much interest accrued from that point forward.

Thus, while the bank presented evidence sufficient to support an award of interest based on the minimum rate of 3.525%, the amount awarded in the final judgment is not supported by competent substantial evidence, and this portion of the damages must be reversed. See Doyle, 162 So. 3d at 341-42; Peuguero v. Bank of Am., N.A., 169 So. 3d 1198, 1203-04 (Fla. 4th DCA 2015). On remand, the trial court must calculate interest using the minimum rate of 3.525%. See Salauddin v. Bank of Am., N.A., 150 So. 3d 1189, 1190-91 (Fla. 4th DCA 2014); see also Boyette v. BAC

Home Loans Servicing, LP, 164 So. 3d 9, 10-11, 10 n.1 (Fla. 2d DCA 2015) (explaining that this court did not remand with directions to calculate the interest based on the minimum rate because the court was already remanding for a determination of other damages (citing Salauddin, 150 So. 3d at 1190-91)).[2]

Finally, Michel is also correct that the award of attorney's fees cannot stand. The final judgment awarded attorney's fees to the bank for 18.4 hours of time at an hourly rate of $225, totaling $4140. But the bank presented no evidence of the number of hours spent on the case, the hourly rate, or the total fee. At trial, Perez merely agreed on direct examination that counsel had been retained to represent the bank and the servicer and that they were "obligated" to pay counsel a "reasonable fee" for those services.

Because the bank did not present any evidence of attorney's fees at trial, we reverse the fee award without remand on that issue. See Colson v. State Farm Bank, F.S.B., 183 So. 3d 1038, 1040 (Fla. 2d DCA 2015) (explaining that "when the record on appeal is devoid of competent substantial evidence to support the attorney's fee award, the appellate court will reverse the award without remand for additional evidentiary findings" (quoting Diwakar v. Montecito Palm Beach Condo. Ass'n, 143 So. 3d 958, 961 (Fla. 4th DCA 2014))); cf. Wagner v. Bank of Am., N.A., 143 So. 3d 447, 448 (Fla. 2d DCA 2014) (remanding for an evidentiary hearing on attorney's fees when

[2]We reject the bank's argument that the interest award should be affirmed because the award is close to the amount of interest calculated with the minimum rate. We agree with the bank's alternative argument that an award of interest calculated at the minimum rate, consistent with Salauddin, is supported by the evidence.

the bank had filed an affidavit of attorney's fees and the parties had agreed at trial that live testimony to prove fees was required).

In summary, the trial court erred in awarding interest in an amount that was unsupported by the evidence and in awarding attorney's fees when there was no competent substantial evidence to support the fee award. We reverse the award of interest and remand for the trial court to determine the amount of interest from the date of default using the minimum interest rate of 3.525%. We reverse the award of attorney's fees. We affirm the final judgment in all other respects.

Affirmed in part, reversed in part, and remanded.

CASANUEVA and SALARIO, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed May 11, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D14-2011
Lower Tribunal No. 07-536-K

Underwater Engineering Services, Inc., etc.,
Appellant,

vs.

Utility Board of the City of Key West,
Appellee.

An Appeal from the Circuit Court for Monroe County, Tegan Slaton, Judge.

Palmer Law Group and Andrew J. Palmer (Fort Lauderdale); Burlington and Rockenbach, Philip M. Burlington and Adam J. Richardson (West Palm Beach), for appellant.

Robert C. Tilghman and Nathan Eden, for appellee.

Before EMAS, LOGUE and SCALES, JJ.

EMAS, J.

Appellant/Plaintiff, Underwater Engineering Services, Inc. ("Underwater"), appeals from a final judgment, entered after a nonjury trial, in favor of Appellee Utility Board of the City of Key West ("the Utility Board") on Underwater's breach of contract claim, as well as the Utility Board's counterclaim. We hold that there is competent substantial evidence in the record to support the trial court's determination in favor of the Utility Board on Underwater's breach of contract claim and affirm that portion of the final judgment. We further hold that the trial court erred in entering judgment in favor of the Utility Board on its counterclaim, as the evidence establishes that Underwater was not provided the contractually-required notice and opportunity to cure the alleged defects before the Utility Board hired a different contractor to correct and repair Underwater's work. We therefore reverse that portion of the final judgment and remand for entry of final judgment in favor of

Underwater on the Utility Board's counterclaim.

FACTS AND BACKGROUND

This action arises from a construction contract ("the Contract") between Underwater and the Utility Board. The Utility Board hires contractors as needed to inspect over-the-water concrete and steel poles, and to perform necessary maintenance and repairs. The inspections may reveal issues affecting or compromising the structural integrity of the poles; they may require the pouring of

a concrete collar around the base of the pole for additional support, or the application of a particular coating to areas needing repair or to areas where a prior coating application may have deteriorated.

In May 2004, the Utility Board issued a call for bids on a project entitled "Repair Over the Water Transmission Pole Foundations." The project involved, among other things, structural concrete repairs, coating repair and new coating placement. Specifically, the successful bidder was to repair approximately fiftyseven concrete pole structures supporting electric transmission lines running from Key West to the Seven Mile Bridge. Pursuant to the bid schedule, the Contract was a unit-price contract—the bid price was not a lump sum, but was instead broken down into subparts for each item of work or material to be used—and the bidders proposed a price per unit. Following the bidding process, Underwater was awarded the Contract, which was executed in October of 2004, and a Notice to Proceed was issued in January 2005. The final contract price (based on the unit prices bid by

Underwater) was $767,585.50.

The Contract contained the following relevant provisions:

Pursuant to "Section 01010-Summary of Work":

1.8 Construction Sequence

A. Prior to commencement of Work, complete a detailed Pre-

Construction Inspection of all structures. This inspection shall identify repairs on each structure….

B. Required Observation and Review

1. Notify the Resident Engineering Representative 24 hours prior to completing the following work:…

d) Completion of surface preparation and prior to application of any coatings, sealers, or miscellaneous patching material in accordance with the applicable sections.

Pursuant to "Section 01019: Contract Considerations":

1.4 Change Procedures…

C. The Contractor may propose changes by submitting a Request for Change Order to the Engineer, describing the proposed change and its full effect on the Work. Include a statement describing the reason for the change and the effect on the Contract Price and Construction Time with full documentation. Document any requested substitutions in accordance with Section 01600.

D. Unit Price Change Order: For pre-determined unit prices and quantities, the Change Order will be executed on a fixed unit price basis. Changes in Contract Price or Construction Time will be computed as specified for Time and Material Change Order.

E. Engineer may issue a directive signed by the Owner, instructing the Contractor to proceed with a change in the Work for subsequent inclusion in a Change Order. Document will describe changes in the work and designate method of determining any change in Contract Price or Construction Time. Promptly execute the change….

1.5 Measurement and Payment – Unit Prices….

C. Estimated Quantities: Quantities and measurements indicated in the Unit Price Bid are scheduled for bidding purposes only. Actual quantities and measurements supplied or placed in the Work shall determine payment.

E. Defect Assessment: The Work, or portions of the Work, not conforming to specified requirements, shall be replaced by the Contractor at Contractor's expense.

Pursuant to "Section 01025: Measurement and Payment":

1.5 DEFECT ASSESSMENT

A. Replace the Work, or portions of the Work, not conforming to specified requirements.

B. If, at the request of the Contractor and in the opinion of the Engineer, it is not Practical to remove and replace the Work, the Engineer will direct one of the following remedies:

1. The defective Work may remain, but the Unit Price will be adjusted to a new price as agreed to by the Owner and Engineer.

2. The defective Work will be partially repaired to the instructions of the Engineer, and the Unit Price will be adjusted to a new price.

C. The authority of the Engineer to assess the defect and identify payment adjustment is final.

Ed Giesler was the project engineer and Underwater's primary contact with the Utility Board. Tom Fettig was Underwater's project manager. Pursuant to the Contract, the preconstruction inspection of the Seven Mile Bridge area occurred on June 22 and 23, 2005. The inspection was conducted by the Utility Board's resident engineering representative, Anchor Structural, represented by Wayne Fey and Mark

Demarest.

Underwater's Claim: Breach of Contract (Coating Work)

Underwater's primary claim against the Utility Board concerns an item designated as "MIS4" and described as "Concrete Coating Repair." In the blank bid schedule, the Utility Board estimated the quantity of MIS4 units to be 200 square feet. Underwater's bid stated it would perform MIS4 at a unit price of $110, so the total price of the concrete coating repair (based on the estimated 200 square feet x $110/square feet) was $22,000.

On June 23, 2005, a consultant on the project sent an email to Giesler and Dale Finigan, also with the Utility Board, explaining he was trying to get the Utility Board a revised estimate. The consultant indicated that based on the inspections performed on June 22, 2005, they had a "rough handle on the amount that the units will change on the upper portion of the project." In response to a question from the consultant, Finigan advised he was okay with building a contingency amount into the numbers, but noted it should be "a reasonable amount." Though the emails contained no dollar amounts or quantities, no one from the Utility Board followed up or requested clarification or additional specificity.

The final Preconstruction Inspection Report for the fifty-seven poles in the Seven Mile Bridge area was sent by Underwater to the Utility Board on June 29,

2005. In the cover letter, Fettig wrote: "Please review this submittal as soon as possible. We are planning on starting the work and procuring the material needed to complete this work this week." The report details the repair work, including the MIS4 coating work on fifty-seven poles, but it contains no numbers or costs, either estimated or actual. Though Underwater's CEO testified that calculating the amount of coating to be applied to the poles is a matter of "basic math," the detailed formula he provided at trial was contained nowhere in the Preconstruction Inspection Report, and the parties disagree as to who was responsible for making these calculations.

At some point during July 2005, Fettig, Underwater's project manager and the person responsible for making this project profitable for Underwater, prepared two spreadsheets. These spreadsheets compared the revenue anticipated by the project as originally estimated and agreed to by the Utility Board with the revenue it could realize if the coating was increased from 200 square feet to 5,006 square feet. Using the original estimate for coating, Underwater faced a loss of approximately $168,891.71. However, by increasing the amount of coating from 200 square feet to 5,006 square feet, Fettig's spreadsheet showed Underwater's revenue on the project would increase by $528,660.00 and yield a profit of $433,579.29. Though

Fettig and other members of Underwater thought it prudent to advise the Utility

Board of this significant change in the total footage and resulting increase in cost, Dean Reynolds, Underwater's branch manager, told Fettig not to do so. Even though Fettig testified that he personally believed this overrun should have been revealed to the Utility Board, he also indicated that this overrun did not technically require a change order because the parties were operating under a unit-price contract. The differential in the cost did not relate to the unit price of the coating (which remained the same), but instead related to the total square footage of the poles to be coated. Fey, on the other hand, as president of Anchor Structural, testified that an increase in the amount of coating, which consequently increased the contract price by more than $500,000.00 would "absolutely" and "without a doubt" require a change order.[1] However, no change order was ever submitted to the Utility Board, nor was any authorization sought from the Utility Board before Underwater proceeded to apply 5,006 square feet of coating (instead of 200 square feet).

One of the primary points at issue in the appeal (and directly related to this increase in square footage of coating) is whether Underwater gave proper notice to the Utility Board in between two critical steps of the project: the surface

[1] Fey further testified that when Anchor Structural was involved in similar construction projects utilizing unit-pricing contract, if the estimated quantities were going to be increased such that the contract price is exceeded, the contractor would request a change order and, if the owner approved the change order, the work would then proceed.

preparation of the fifty-seven poles and the application of the coating to those poles.

Pursuant to section 01010, 1.8B.1.d of the Contract, the resident engineering representative was to be notified twenty-four hours prior to completing the surface preparation and before coatings were applied to the poles. The obvious purpose of such notice was to permit the Utility Board an opportunity to inspect the structures and determine whether the poles were properly prepared before the actual coating was applied (and, if not properly prepared, to ensure that the necessary additional preparation work was undertaken before the coating was applied). To that end, on Wednesday, August 10, 2005, Fettig sent the Utility Board and Anchor Structural a "3-Week Look Ahead Schedule" purportedly to establish that Underwater would be coating the poles in the Seven Mile Bridge area roughly for a few days sometime between the dates of August 11 and August 22.[2] Underwater contends that this schedule satisfied the twenty-four hours' notice requirement and was enough to advise the Utility Board and Anchor Structural when the surface preparation would be complete and the coating would begin.

On August 16, 2005, Giesler was advised (for the first time) that the poles had been coated and the contract price was well over $1,000,000.00. At this point, Giesler immediately told Underwater personnel to stop working on that portion of

[2] Witnesses testified, however, that it was not possible to coat fifty-seven poles in a span of two to three days.

the Contract. Though Underwater contended that the onsite inspector/resident engineer, Demarest from Anchor Structural, knew the coating work was being performed, Demarest testified he first learned of it several days after it had been completed and that Underwater did not notify him after the poles were pressurewashed and prepared but before they were coated. Similarly, Wayne Fey also testified he did not learn that the coatings had been applied to the poles until "all

poles in question were supposedly done."

The second point on appeal is whether Underwater properly applied the coating to the fifty-seven poles. Underwater represents that it properly applied the coating pursuant to the contract specifications. However, Demarest had the following observations upon his inspection on August 30, 2005, two to three weeks after the poles had been coated:

> I went to measure coating applied on the Seven Mile Bridge Structures. 41 out of the 57 were coated over the peeling remaining with no preparation. When we approached the bases anywhere the boat touched the coating peeled off. I took photographs relative to the peeling and the 1'-2' of exposed base which was not coated. It is apparent that the coating on all of the bases can be removed easily…Much of the coating was applied over areas that were not prepared properly.

Additionally, on August 26, Bill Williams of Power Engineers sent Giesler a letter informing the Utility Board of the coating of the fifty-seven poles:

> Last week, the Contractor coated approximately 57 poles in the Seven Mile Bridge area of the project. This coating was part of the MIS4 unit in the contract . . . . As is required in the specification, Section 010101.8.B.1.(d), we were to be notified after the surface preparation was completed and prior to the placement of the coating, to verify that the surface preparation was performed in accordance with the specifications. Our field inspector was not notified, until he received a call from the Contractor on last Friday, that the work was completed and was asked to verify the quantities for payment. The inspector received no requests to inspect the surface preparation on these structures.
>
> Upon inspection by our field inspector, it is evident that in many places the proper surface preparation, according to the specifications, was not done in those locations. This is evidenced by the fact that the structures show coating over the old peeling coating that was to be removed during the surface preparation process, and would have been removed if the surface had been prepared properly. Along with this, there are other factors that allow speculation that the surface preparation was not performed properly or at all.
>
> Based on these items, the field inspector cannot verify these units for payment. Further, Power Engineers, Inc. will not be able to certify that these units were performed in accordance with the specifications at the conclusion of this project.

Because the Utility Board did not believe the work was fulfilled pursuant to the terms of the contract, it did not pay Underwater for the work performed. Thereafter, Underwater filed a complaint against the Utility Board for breach of contract, alleging the Utility Board failed to pay for the work it completed in connection with the coating on the fifty-seven poles.[3] The Utility Board denied

[3] In addition to the breach of contract claim, Underwater contends it was owed damages due to a lost pour day and retainage. We find this argument unavailing, however, as there was competent substantial evidence that any delay in pouring the

Underwater's allegations, and asserted as affirmative defenses that Underwater failed to satisfy conditions precedent (i.e., notice and opportunity to inspect following preparation but prior to commencement of the coating), and that Underwater breached the

Contract as well as the implied covenant of good faith and fair dealing.

The Utility Board's Counterclaim: Breach of Contract (Structural Collars)

In addition to answering the complaint, the Utility Board asserted a counterclaim, alleging that Underwater defectively constructed the concrete structural collars on eight poles. The Utility Board sought damages for the cost incurred in repairing these allegedly defective collars.

The subject of the Utility Board's counterclaim is an item described in the Contract as a "Structural Collar for Transmission Pole." The Contract estimated that a total of thirty of such concrete collars would be poured. As of October 6, 2005, Underwater had poured and completed a total of twenty-five structural concrete collars. However, in 2009, less than four years later, while another contractor was conducting a pre-construction inspection prior to beginning a different job on the site, that contractor discovered that eight of the collars Underwater had poured in

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collars was not attributable to the Utility Board, but to Underwater.

August 2005 were already showing signs of premature and severe deterioration. The Utility Board retained Joseph Amon, an engineer, to perform testing and determine the cause of the deterioration. Amon testified that the compressive strength of the concrete exceeded the required strength specified in the Contract and that the concrete was not sufficiently mixed prior to placement which would "lead to areas of higher water cement rations and areas of lower water cement rations and lead to corresponding areas of higher porosity and lower porosity." These areas of higher porosity would allow for both accelerated water absorption and salt crystal deposition. Amon further testified that the technology used to form the collars specified in the Contract is an acceptable method of reinforcing piles with collars and has been used in recent years in other projects. Finally, the defects he found in the core samples demonstrated poor quality workmanship, likely by allowing water to enter that did not meet industry standards.

Underwater, on the other hand, relied on the opinion of expert engineer Dr. William Hartt. Dr. Hartt testified that the type of high-strength concrete required for the collars is inherently problematic, and that the higher the strength, the more brittle the material becomes. Dr. Hartt further explained that the manner in which Underwater sought to repair the collars reflected "technology from thirty years ago" rather than what the Department of Transportation has been doing for several

decades. Dr. Hartt thus characterized this manner of repair as "antiquated," opining that the Utility Board was "not incorporating present-day technology."

In defense to the counterclaim, Underwater asserted that despite the contract language, the Utility Board never provided Underwater with the opportunity to cure the defective collars as it was contractually bound to do.

In 2013, the case proceeded to a five-day nonjury trial. At the conclusion of the trial, the court rendered a judgment against Underwater, in effect awarding Underwater no damages on its breach of contract claim after determining that Underwater "failed to perform every condition precedent of the Contract." The court stated:

> The reasons [Underwater] failed to comply can be simply put as "shoddy work, unfamiliarity as to how to properly stabilize marine utility poles, a complete lack of understanding of who had authority over the entirety of the project at [the Utility Board] and many complaints and excuses, made by [Underwater] without the ability to cure their failings."

The court also awarded the Utility Board judgment on its counterclaim with respect to the concrete collars. Underwater appeals.

ANALYSIS

In reviewing a judgment rendered after a bench 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). Thus, they are

reviewed for competent, substantial evidence. Verneret v. Foreclosure Advisors, LLC, 45 So. 3d

889, 891 (Fla. 3d DCA 2010). Even if a trial court's judgment is insufficient in its findings of fact, the judgment "should be affirmed if the record as a whole discloses any reasonable basis, reason or ground on which the judgment can be supported." Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972).

To the extent the Contract must be interpreted, such interpretation is reviewed de novo. Fernandez v. Homestar at Miller Cove, Inc., 935 So. 2d 547, 550 (Fla. 3d DCA 2006). However, in reviewing the trial court's application of the terms of a contract, courts are "powerless to rewrite [a] contract to make it more reasonable or advantageous to one of the parties . . . or to substitute [their] judgments for that of the parties to the contract in order to relieve one of the parties from the apparent hardships of an improvident bargain." Id. at 551.

Underwater's Claim

Underwater's complaint sought damages against the Utility Board for breach of contract, alleging it remains unpaid nearly $697,000 dollars under the Contract. The trial court's factual findings with regard to this cause of action included the following: "Pursuant to the Contract, [Underwater] was to notify [the Utility Board] once the cleaning and surface preparation was completed." We find the trial

court correctly construed and applied Section 01010, 1.8 B.1.d of the Contract, which stated:

> B. Required Observation and Review
>
> 1. Notify the Resident Engineering Representative 24 hours prior to completing the following work:…
>
> > d) Completion of surface preparation and prior to application of any coatings, sealers, or miscellaneous patching material in accordance with the applicable sections.

There is competent and substantial evidence in the record that Underwater breached this provision of the Contract. The testimony and other evidence, in a light most favorable to sustaining the trial court's judgment, established that Underwater failed to notify the Utility Board that the surface preparation on the fifty-seven poles was complete and that the poles were ready for inspection twenty-four hours prior to the application of the coating. Both Demarest and Fey testified that they were not notified that the surface preparation was completed prior to the coating of the poles.

Similarly, Bill Williams of Power Engineers sent Giesler a letter informing him that their field inspector was not notified that the surface preparation had been completed and had received no requests to inspect the structures prior to commencement of the coating process. Once the poles were actually inspected by the Utility Board (after application of the coating had already taken place), it was

evident to the Utility Board that the surface preparation was not performed in accordance with the project specifications.

Additionally, there is no question that the implied covenant of good faith and fair dealing attaches to the performance of these contractual obligations. See QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc., 94 So. 3d 541 (Fla. 2012) (stating "Florida contract law does recognize an implied covenant of good faith and fair dealing.") As the Florida Supreme Court noted in QBE Ins. Corp., the "covenant is intended to protect 'the reasonable expectations of the contracting parties in light of their express agreement.'" Id. at 548 (quoting Barnes v. Burger King Corp., 932 F. Supp. 1420 (S.D. Fla. 1996)).

Here, Underwater's failure to properly notify the Utility Board and permit a timely inspection of the surface preparations prior to the coating was directly linked to its decision to increase by more than twenty-five fold the number of square feet to be coated (leading to a dramatic increase in cost), without notifying the Utility Board of this change. Though Fettig testified he would have notified Underwater of this resulting dramatic increase in the contract price prior to applying the coating, he was advised by his superior, Reynolds, not to do so. Thereafter, Demarest was told by Underwater's onsite superintendent, Glenn Patterson, that Underwater had found a "loophole" in the Contract, and that the poles were coated without having first provided notice and an opportunity for the

Utility Board to inspect the preparation work. Patterson told Demarest he simply did what he "was told to do."

The competent substantial evidence supports the conclusion that Underwater purposefully avoided a post-preparation, pre-coating inspection (and the Contract's requirement for notice of same) because such an inspection surely would have led the Utility Board to discover the expanded scope of the coating project, and the resulting increase of nearly $528,660.00 in the contract price. The evidence supported a finding that Underwater breached the express terms of the Contract and the implied covenant of good faith and fair dealing, and that the Utility Board was thereby relieved of its contractual obligation to pay for this work.

The Utility Board's counterclaim

With regard to the Utility Board's counterclaim—namely, that Underwater breached the Contract for failing to properly pour eight concrete collars according to the Utility Board's specifications for poured concrete—Underwater raised two defenses at trial, one of which we determine to be meritorious.[4] Underwater

[4] Underwater alternatively contended that, pursuant to the Spearin doctrine (Spearin v. U.S., 248 U.S. 132 (1918)), known in Florida as the implied warranty of constructability, it is not responsible for the consequences of defects in the plans and specifications. Id. at 136. By raising this defense, Underwater had the burden to prove not only that there was a defect in the specifications, but that the defect in the specifications was the proximate cause of the failure of the eight collars. See Rick's Mushroom Serv., Inc. v. U.S., 521 F.3d 1338, 1345 (Fed. Cir. 2008) (holding contractor was required to prove that "defect in [design] specifications was the proximate cause" of the damages flowing from the breach of implied warranty created under Spearin). Because we resolve the Utility Board's

asserted that the Utility Board was required to notify Underwater that eight collars were defective, and to permit Underwater an opportunity to cure the defects, before engaging someone else to correct, repair or replace the collars.

At trial, the Utility Board presented evidence that it had been using the same specifications for pouring concrete collars since the late 1980's or early 1990's, and none of the nearly fifty collars poured previously, with the exception of the eight collars poured by Underwater, ever failed or deteriorated. The Utility Board introduced Amon's testimony, who opined that the defects he found in the core samples demonstrated poor quality workmanship, likely by allowing water to enter the mix, and did not meet industry standards.

The relevant portion of the Contract, entitled "Defect Assessment," provides in part:

> **1.5 DEFECT ASSESSMENT**
>
> A. Replace the Work, or portions of the Work, not conforming to specified requirements.
>
> B. If, at the request of the Contractor and in the opinion of the Engineer, it is not Practical to remove and replace the Work, the Engineer will direct one of the following remedies:
>
> 1. The defective Work may remain, but the Unit Price will be adjusted to a new price as agreed to by the Owner and Engineer.

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counterclaim on other grounds, it is unnecessary to reach the merits of this alternative defense.

> 2. The defective Work will be partially repaired to the instructions of the Engineer, and the Unit Price will be adjusted to a new price.

The uncontested evidence at trial established that the Utility Board did not give Underwater the opportunity to "[r]eplace the [w]ork, or portions of the [w]ork, not conforming to specified requirements." Given the evidence presented, and in light of the Defect Assessment provision, which explicitly provides that Underwater must be afforded the opportunity to replace any of the work that was "not conforming to specified requirements," the trial court erred in finding in favor of the Utility Board on its counterclaim and awarding damages.[5] We therefore reverse that portion of the final judgment, and remand for entry of final judgment in favor of Underwater on the Utility Board's counterclaim.

CONCLUSION

We affirm that portion of the final judgment which found for the Utility Board on Underwater's claim for breach of contract. We reverse that portion of the final judgment which found for the Utility Board on its counterclaim for breach of contract. We remand with directions to enter final judgment in favor of

[5] The final judgment makes no factual findings with regard to the counterclaim, nor does it engage in any discussion or analysis of the Defect Assessment provision of the Contract. The final judgment merely finds that the Utility Board shall recover on its counterclaim and awards damages in the amount paid by the Utility Board to assess the cause of the defective collars, together with the cost to replace the defective collars and prejudgment interest.

Underwater on the Utility Board's counterclaim and for further proceedings consistent with this opinion.

Third District Court of Appeal

State of Florida

Opinion filed May 11, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-721
Lower Tribunal No. 11-16201

Colonnade 101 SE, Inc., et al.,
Appellants,

vs.

Mireya Cristina Cambero Cordero,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Sarah I. Zabel, Judge.

Mesa & Associates and Manuel Arthur Mesa and Moises A. Saltiel, for appellants.

Diaz, Reus & Targ, Michael Diaz, Jr. and Elizabeth R. Cantu, for appellee.

Before WELLS, EMAS and LOGUE, JJ.

EMAS, J.

We affirm the nonfinal order below, which *granted* appellants the precise relief they sought in the trial court. Appellants' motion sought an order dissolving several notices of lis pendens, contending that the notices were both procedurally and substantively improper. The trial court held a non-evidentiary hearing on the motion, a procedure which appellants did not object to. Following arguments of counsel, the court granted the motion and entered an order dissolving the notices of lis pendens upon a determination that they were procedurally defective. The court further stated in its order that, having granted appellants the requested relief on the procedural grounds asserted, it was unnecessary to reach the merits of the substantive grounds or to hold an evidentiary hearing which would be required to adjudicate the substantive grounds raised in the motion.

We affirm because, under the order on review, appellants received exactly the relief they requested. Morgan v. Morgan, 404 So. 2d 1101 (Fla. 3d DCA 1981). We reject appellants' contention on appeal that the trial court was obligated to adjudicate the alternative substantive grounds asserted by appellants in their motion. Having granted appellants the relief they requested in their motion, upon the procedural ground asserted in that motion, the trial court was not required to address or adjudicate the alternative substantive grounds raised in support of the very same relief sought.[1]

[1] We would ordinarily dismiss the case for lack of standing upon the premise that a party cannot appeal an order which is wholly in its favor. Credit Indus. Co. v.

Affirmed.

Remark Chem. Co., 67 So. 2d 540 (Fla. 1953); Morgan, 404 So. 2d at 1101. However, appellants did raise, in their motion below, the issue of the trial court's subject-matter jurisdiction. Although appellants' motion did not seek dismissal of the cause, the trial court expressly addressed the issue in its order and determined it had jurisdiction. Given this determination, we cannot say that the order on appeal was wholly favorable to appellants. See Katz v. Red Top Sedan Serv., Inc., 136 So. 2d 11 (Fla. 3d DCA 1962). Nevertheless, we affirm without further discussion the trial court's determination of that issue.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BATYA GOODMAN,
Appellant,

v.

ROSE REALTY WEST, INC., a/k/a **CENTURY 21 ROSE REALTY WEST, INC., DONALD J. SARLEY, ORNA SARLEY, FLEET INSPECTIONS, INC., AND REALTY ASSOCIATES FLORIDA PROPERTIES, INC.,**
Appellees.

No. 4D15-285

[May 11, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates, Judge; L.T. Case No. CACE 13-019717 (12).

Jon Polenberg, Jude C. Cooper and Yasin Daneshfar of Polenberg Cooper, PLLC, Fort Lauderdale, for appellant.

Bradford J. Beilly and John Strohsahl of Beilly & Strohsahl, P.A., Fort Lauderdale, for appellee, Rose Realty West, Inc., a/k/a Century 21 Rose Realty West, Inc.

GROSS, J.

The buyer in a residential real estate sale brought a fraudulent nondisclosure action against the seller and the seller's real estate broker, Rose Realty West, Inc., among others. *See Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). Without explanation, the circuit court granted the broker's motion for summary judgment and entered judgment for the broker. Viewing the facts in the light most favorable to the buyer, we reverse because issues of fact exist concerning the broker's liability.

> A trial court may enter summary judgment only when there are no genuine issues of material fact conclusively shown from the record and the movant is entitled to judgment as a matter of law. All doubts and inferences must be resolved against the

> moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available.

Reeves v. N. Broward Hosp. Dist., 821 So. 2d 319, 321 (Fla. 4th DCA 2002) (citation omitted). We therefore state the facts in the light most favorable to the buyer, the non-moving party in the summary judgment below. *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 262 (Fla. 4th DCA 2007).

A twist in this case is that the seller of the home was also his own real estate agent on the transaction, affiliated with Rose Realty, the seller's broker. The seller completed a disclosure worksheet indicating that he had no knowledge of any defects in the home. After closing, the buyer discovered many defects materially affecting the value of the property, which were not readily observable and not known to the buyer.

When the seller replaced his seller's hat with that of a real estate agent, his knowledge about the condition of his home remained the same. *Johnson v. Davis* requires a seller of residential real estate to disclose to a buyer all known facts "materially affecting the value of the property which are not readily observable and are not known to the buyer . . . ." *Johnson*, 480 So. 2d at 629. The duty of disclosure announced in *Johnson* extends to a seller's real estate broker. *Syvrud v. Today Real Estate, Inc.*, 858 So. 2d 1125, 1129 (Fla. 2d DCA 2003); *Revitz v. Terrell*, 572 So. 2d 996, 998, n.5 (Fla. 3d DCA 1990). Accepting as we must, the buyer's version of the facts, the seller/agent knew of facts that materially affected the value of the property, and he failed to disclose them to the buyer.

A principal is civilly liable for the tortious acts of his agent that are within the scope of the agent's employment, "even where the agent's acts or representations are fraudulent or deceitful . . . ." *Nessim v. DeLoache*, 384 So. 2d 1341, 1344 (Fla. 3d DCA 1980). Conduct is within the scope of an agency if it is motivated, at least in part, by a purpose to serve the principal. *See Hennagan v. Dep't of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 751 (Fla. 1st DCA 1985) cited with approval in *McGhee v. Volusia Cty.*, 679 So. 2d 729, 732 (Fla. 1996); *see also Valeo v. E. Coast Furniture Co.,* 95 So. 3d 921, 925 (Fla. 4th DCA 2012) (recognizing that an employer could be liable for an employee's battery committed during course of employment, if to further a "purpose or interest" of the employer, however "excessive or misguided").

If the seller/agent withheld material information, this was done during his work as a real estate agent to facilitate a sale, which was in the interest of the principal/broker, who would earn a commission. We reject the broker's argument that the seller/agent was acting outside the scope of his agency *because* he was engaged in fraudulent conduct. No legitimate

business countenances fraud. This application of the law would swallow the rule described in the preceding paragraph.

We do not comment on the validity of the broker's defenses except to say that their application involves disputed issues of fact, so that summary judgment was not proper.

Reversed and remanded.

DAMOORGIAN and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JORG M. RIVERA,

Appellant,

v. Case No. 5D13-1618

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, L.P., F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P.,

Appellee.

_____/

Opinion filed May 13, 2016

Appeal from the Circuit Court for Marion County,
William T. Swigert, Senior Judge.

Mark A. Skipper, of Law Office of Mark A Skipper, P.A., Orlando, for Appellant.

Mary J. Walter, of Liebler, Gonzalez & Portuondo, Miami, for Appellee.

EDWARDS, J.

While this appeal was pending before this court, the Appellant, Jorg Rivera, filed for bankruptcy relief. Relevant bankruptcy pleadings and orders were filed with this court, and we granted Appellee's, Bank of America N.A., Successor by Merger to BAC Home Loans Servicing, L.P., f/k/a, Countrywide Home Loans Servicing, L.P., request to take

judicial notice of those documents. In the bankruptcy proceeding, Appellant admitted that he owed a non-contingent, undisputed mortgage debt to Appellee, and he surrendered the mortgaged property to Appellee. The bankruptcy court entered its order confirming the debt and surrender of the property. *See In re Metzler*, 530 B.R. 894, 900 (Bankr. M.D. Fla. 2015) ("In the context of Bankruptcy Code §§ 521 and 1325, the Court concludes the term ["surrender"] means that a debtor must relinquish secured property and make it available to the secured creditor by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest in secured property."). Appellant's actions and the orders of the bankruptcy court have fully resolved this matter.

APPEAL DISMISSED.

LAWSON, C.J. and PALMER, JJ., concur.