Florida Real Property and Business Litigation Report

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Manuel Farach

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2097

THE BANK OF NEW YORK MELLON, f/k/a The Bank of New York, as successor in interest to JPMorgan Chase Bank, N.A. as Trustee for Amortizing Residential Collateral Trust Mortgage Pass-Through Certificates, Series 2002-BC7,

Appellant,

v.

MARY J. BARBER; MELVIN V. BARBER, JR. a/k/a Melvin B. Barber, Jr. a/k/a Melvin V. Jr Barber,

Appellees.

On appeal from the Circuit Court for Gadsden County. Francis Allman, Judge.

May 1, 2020

KELSEY, J.

The final judgment on appeal denied Bank of New York Mellon's foreclosure complaint because the trial court sua sponte concluded that the note in the court file was a copy rather than an original. Appellees had asserted no affirmative defenses. They did

not deny being parties to the note and mortgage, did not challenge the note's authenticity or the bank's standing to foreclose, and did not object to the note at trial. The bank thus had no advance notice of what turned out to be the dispositive issue. Both at trial and in a timely post-trial motion, the bank requested leave to amend and bring in a new witness on authenticity. The trial court denied both requests. We reverse and remand for reinstatement and resolution of the foreclosure action.

I. Facts.

The bank's sole witness, a loan analyst, testified that the note was "either a copy or the original of the promissory note." The trial court gave the borrowers a chance to state any objection to the note, and aside from saying they had been dealing with a different entity (the loan servicer), they stated no objection. The bank's witness then proceeded with the typical information about payment history and so forth.

When the bank's witness finished testifying, the court questioned whether the note was original, noting that a prior foreclosure action was settled and the original loan documents were released. The bank's counsel explained that the note bore an original recording stamp, which coincided with the return of the note upon settlement of the earlier foreclosure action, and established the document as an original.

The trial court, however, thought the note was a copy because it had a fax header, parts of the document appeared to be copied, and the borrowers' signatures were in black. Counsel again explained that it more than likely was faxed to the title company for execution, that the clerk of court required black ink signatures at that time because scanners could not pick up blue ink very well, and that the original recording stamp established originality. The loan analyst offered to re-examine the document and testify specifically about its indicia of originality, but the trial court cut off the witness and announced that the bank had not proven its case and foreclosure was denied.

The bank's counsel immediately orally requested leave to address the issue in an amended complaint and potentially with a

new witness to authenticate the note. The court denied that request. In the subsequent written order denying foreclosure and closing the case, the court repeated the points made at trial, and added new "findings" of fact about characteristics of the note.

The bank timely moved for rehearing or new trial. The bank argued that any question about whether the note was original was waived because the defendants had not asserted any affirmative defense or otherwise questioned the note's authenticity or the bank's standing, and as a result the bank had no prior notice of any issue about the note. The bank also asserted that it had retained a documents expert who could testify that the note in the court file was an original.

The trial court denied the bank's motion, explaining what led to the conclusion that the note was a copy. The court rejected the bank's waiver argument on the grounds that the court as the trier of fact had the authority to decide whether the note was original. This appeal followed.

II. Analysis.

While the trial court correctly summarized the court's authority to resolve questions of fact in a bench trial, the analysis incorrectly skipped the threshold requirement that a party must first raise the legal issue to which the facts relate. *See Haycook v. Ostman*, 397 So. 2d 743, 744 (Fla. 5th DCA 1981) (holding that a prima facie case is made when a facially sufficient note is filed, and thereafter "[a]ll attacks upon [a promissory note] . . . must be made by way of affirmative defenses"); Fla. R. Civ. P. 1.140(h)(1) (providing defenses and objections are waived if not made by motion or responsive pleading). A party's failure to raise an argument is a waiver. *Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) (holding objection to authenticity of loan document was waived due to lack of contemporaneous objection). The trial court erred in raising and ruling on an objection and arguments the defendants did not assert.

The court is not authorized to become a party's advocate and raise a legal issue sua sponte. *See DiGiovanni v. Deutsche Bank Nat'l Tr. Co.*, 226 So. 3d 984, 988 (Fla. 2d DCA 2017) (holding that

trial court must maintain neutrality and cannot become a participant in proceedings, and exceeded its authority in independently investigating facts); *Connelly v. Matthews*, 899 So. 2d 1141, 1143 (Fla. 4th DCA 2005) (holding, where trial judge raised issue no party had raised about note, "The role of trial judges does not allow them to become advocates for one side or the other, and especially not in a nonjury trial where the judge is the decider of the claims and defenses of the parties"). The trial court erred in raising and ruling on the basis of arguments the defendants never raised.

Even if the defendants had raised these issues for the first time at trial, it would be an abuse of discretion to deny the bank any opportunity to amend and present additional evidence. *See Hernandez v. Cacciamani Dev. Co.*, 698 So. 2d 927, 928–29 (Fla. 3d DCA 1997) (reversing trial court's order denying rehearing, as abuse of discretion, where holder of note demonstrated it could provide the original). The interests of justice heavily favor allowing additional evidence under these circumstances. *See Grider-Garcia v. State Farm Mut. Auto.*, 73 So. 3d 847, 849 (Fla. 5th DCA 2011) (finding abuse of discretion and reversing order denying motion to reopen for authentication of policy document, where omission was inadvertent and a single witness could resolve the issue).

We reverse the judgment and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

RAY, C.J., and WINOKUR, J., concur.

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

Shaib Y. Rios of Brock & Scott, PLLC, Fort Lauderdale; Kimberly S. Mello and Vitaliy Kats of Greenberg Traurig, P.A., Tampa, for Appellant.

No appearance for Appellees.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

May 1, 2020

ELIZON DB TRANSFER AGENT, LLC, Appellant, v. IVY CHASE APARTMENTS, LTD., a Florida limited partnership; GAIL CURTIS, as personal representative of the estate of John Curtis, deceased; and GAIL CURTIS, an individual, Appellees.	)	Case No. 2D19-1853

BY ORDER OF THE COURT:

Appellant's motion for clarification is granted. The prior opinion dated March 25, 2020, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing or clarification will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ELIZON DB TRANSFER AGENT, LLC, Appellant, v. IVY CHASE APARTMENTS, LTD., a Florida limited partnership; GAIL CURTIS, as personal representative of the estate of John Curtis, deceased; and GAIL CURTIS, an individual, Appellees.	)	Case No. 2D19-1853

Opinion filed May 1, 2020.

Appeal from the Circuit Court for Pasco County; Declan P. Mansfield, Judge.

David B. Weinstein and Joseph H. Picone of Greenberg Traurig, P.A., Tampa, and Kimberly S. Mello of Greenberg Traurig, P.A., Orlando, for Appellant.

Ian C. White and Gerald B. Curington of Ausley McMullen, Tallahassee, for Appellees.

SILBERMAN, Judge.

Elizon DB Transfer Agent, LLC (Elizon), seeks review of an order that dismissed its mortgage foreclosure action based on its failure to prove that the original plaintiff had standing at the time of filing of the complaint. The court based its decision on the date difference between the copy of an allonge attached to the complaint and the

original, stating that Elizon did not prove that the allonge took effect prior to filing. We conclude that the difference between the copy and the original allonge is immaterial and was explained at trial without contradiction. Thus, the court erred in dismissing the complaint for lack of standing on that basis. Accordingly, we reverse.

Wells Fargo Bank, N.A., filed the foreclosure complaint against Ivy Chase Apartments, Ltd., and John and Gail Curtis (together Ivy Chase) in December 2011. The complaint alleged that Wells Fargo was the owner and holder of the pertinent notes, mortgages, guarantees, assignment documents, and allonges. Wells Fargo attached to the complaint, among other things, a copy of a note with a 2011 allonge that indorsed the note to Wells Fargo from LSREF2 Baron Trust 2011 (Baron Trust). After filing, the Ivy Chase loan was transferred several additional times and each transferee was substituted as the plaintiff in turn, with Elizon being the assignee/plaintiff at the time of trial.

A key issue at trial related to a difference between the execution date on the copy of the allonge attached to the complaint and the original allonge, which was presented at trial. Both contain the same signed indorsement to Wells Fargo, but the copy attached to the complaint shows the execution date as "September __, 2011." The allonge presented at trial had the blank filled in and reflects the execution date as "September 20, 2011." Although both were signed, Ivy Chase asserted that Elizon lacked standing due to the date difference between the copy and the original.

Elizon called two witnesses at trial to establish that, notwithstanding the difference between the copy and the original, the allonge was executed and effective prior to filing of the complaint. Summer Trejo was the senior vice president and in-

house counsel at Hudson Advisors, LP, f/k/a Hudson Americas, LLC, the loan servicer and administrator of the Baron Trust. Through Ms. Trejo, multiple documents were admitted establishing the transfer of the Ivy Chase Loan from LAREF2 Baron, LLC (Baron LLC), and Baron Trust to Wells Fargo on September 20, 2011. Among those documents was an assignment agreement between the entities dated September 20, 2011, the original note and allonge, and the copy of the note and allonge that was attached to the complaint. Ms. Trejo testified that she was personally involved with the transfer of the Ivy Chase loan.

As to the discrepancy between the copy of the allonge attached to the complaint and the original allonge, Ms. Trejo said that the original "would have been signed with all of the other documents in September of 2011" when the Ivy Chase loan was transferred from Baron LLC and Baron Trust to Wells Fargo. Ms. Trejo explained that the documents and signature pages "would've been signed by Baron, LLC, and Baron Trust, and then provided to Wells Fargo['s] counsel . . . and they would've been held in escrow pending closing."

Deborah Cussen, the attorney who represented Wells Fargo in the transfer of the Ivy Chase loan, testified that when she received the original allonge for escrow it was in the same condition as the copy attached to the complaint. She explained that the normal procedure was for the assignor to sign the documents and then her firm "would hold the documents undated and then date them when we knew the exact closing date." She confirmed that the transaction closed on September 20, 2011, and said she had no reason to believe that the normal procedure was not followed to date the documents.

Despite the introduction of this evidence, the trial court entered an order involuntarily dismissing the complaint for lack of standing based on the date discrepancy. The court found that Elizon's witnesses lacked personal knowledge of when the 2011 allonge was actually dated. The court reasoned as follows:

> By providing a dated version of the allonge, the Plaintiff himself has now called into question the authenticity of the allonge. If a Plaintiff is unable to establish that an allonge took effect prior to the filing of a complaint, that Plaintiff lacks standing to bring the foreclosure action. The evidence submitted at trial clearly demonstrates that the purported original allonge introduced at trial is not in the same condition as the allonge attached to the complaint.
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> An allonge becomes part of the promissory note. There is a presumption of standing if the copy of the note attached to a complaint is in the same condition as the original. Ortiz v. PNC Bank, National Ass'n, 188 So. 3d 923 (Fla. 4th DCA 2016). However, if the copy of the note attached to a complaint is not in the same condition as the original, the copy "does not carry the same inference of possession at the filing of the complaint." Friedle v. Bank of New York Mellon, 226 So. 3d 976 (Fla. 4th DCA 2017).
>
> It is the Courts position that the Plaintiff has failed to meet its burden of proof and thus has failed to establish Plaintiff's standing.[1]

A plaintiff is required to prove standing as a holder both at the time of filing and at the time of trial. See Russell v. Aurora Loan Servs., LLC, 163 So. 3d 639, 642 (Fla. 2d DCA 2015). If the plaintiff acquires the note after the complaint is filed, the plaintiff must prove that the original plaintiff held the note at filing and that the substitute

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[1]Following the involuntary dismissal, Elizon filed a timely motion for rehearing that was subsequently amended. In the amended motion for rehearing, Elizon asserted for the first time that the assignment agreement admitted into evidence was sufficient to establish Wells Fargo's standing to foreclose notwithstanding the difference between the copy of the allonge and the original. Elizon also challenges the court's denial of this motion on appeal. However, we need not reach the issue based on our conclusion that the trial court erred in rejecting the standing argument Elizon made at trial.

plaintiff held the note at the time of trial. Id. To prove standing as a holder, the plaintiff must establish both possession of the original note and that the plaintiff is a payee, the note is indorsed in favor of the plaintiff, or the note is indorsed in blank. Id. In cases involving an indorsed note, the plaintiff must establish the indorsement was made prior to filing of the lawsuit in order to establish standing at filing. See id.

As Elizon correctly asserts, it was not required to prove exactly when the allonge in favor of Wells Fargo was executed. See Peuguero v. Bank of Am., N.A., 169 So. 3d 1198, 1202-03 (Fla. 4th DCA 2015). "A plaintiff need not prove the exact date of a necessary [i]ndorsement to show standing at the inception of the foreclosure action." Id. The plaintiff need only present evidence that the indorsement was made before the filing of the complaint. Id.

Elizon asserts that it satisfied its burden of proof on this issue in two ways. Elizon first asserts that, contrary to the trial court's finding, it was entitled to a presumption of standing under Ortiz v. PNC Bank, National Ass'n, 188 So. 3d 923, 923 (Fla. 4th DCA 2016). Elizon also argues that, even without the presumption, the witness testimony it presented in conjunction with the original and copy of the allonge was sufficient to establish that the allonge was executed prior to filing.

In Ortiz, the Fourth District created a presumption of standing at the time of filing if the plaintiff presented an original note at trial that was "in the same condition as the copy attached to the complaint." Id. at 925. The Ortiz presumption also applies when there is a court-accepted explanation for a minor difference between the original and the copy. See Kronen v. Deutsche Bank Tr. Co., 267 So. 3d 447, 448 (Fla. 4th

DCA 2019) (applying the Ortiz presumption when the original and copy of the note were the same except for the redaction of a loan number on the copy).

Here, Ms. Cussen explained that the normal procedure was for the assignor to sign the documents and then her firm "would hold the documents undated and then date them when we knew the exact closing date." No evidence was presented to challenge Elizon's position that the allonge was dated consistent with the routine practices of documents being signed, delivered, held in escrow by Wells Fargo's counsel, and then dated to reflect that actual closing date. Under these circumstances, the trial court erred in refusing to apply the Ortiz presumption of standing.

Even without the Ortiz presumption, the witness testimony Elizon presented in conjunction with the original and copy of the allonge was sufficient to establish that the allonge was actually executed prior to Wells Fargo filing the complaint. Testimony from a competent witness may be used to prove that an entity had the right to enforce the note on the date of filing. See Sorrell v. U.S. Bank Nat'l Ass'n, 198 So. 3d 845, 847 (Fla. 2d DCA 2016); OneWest Bank, FSB v. Cummings, 175 So. 3d 827, 829 (Fla. 2d DCA 2015); Stone v. BankUnited, 115 So. 3d 411, 413 (Fla. 2d DCA 2013).

Elizon argues that its witnesses established that the allonge was signed in favor of Wells Fargo before closing, that the closing occurred on September 20, 2011, and that the blank was filled in on the allonge, documenting the actual closing date, in accordance with the standard practice. Indeed, the Fourth District has considered testimony regarding the servicer's routine business practices to establish that an indorsement was effectuated prior to filing. See Peuguero, 169 So. 3d at 1203; see also Wells Fargo Bank, N.A. v. Ayers, 219 So. 3d 89, 93 (Fla. 4th DCA 2017) (relying on

testimony regarding the servicer's routine business practices to establish that the servicer provided evidence in support of its lost note claim).

We recognize that the trial court found that neither of Elizon's witnesses had personal knowledge of when the date was placed on the original allonge. However, Ms. Cussen represented Wells Fargo in the transaction, she described the routine business practices that would be used for the transaction, and she confirmed that she had no reason to believe the routine practices were not followed in this instance. While her testimony did not directly affirm that she knew the routine business practices were followed, the evidence was undisputed that the documents, including the allonge, had been prepared, signed, and held in escrow pending closing and that the closing took place on September 20, 2011.

Guzman v. Deutsche Bank National Trust Co., 179 So. 3d 543 (Fla. 4th DCA 2015), is instructive by way of contrast. There, the copy of the note attached to the complaint did not have any allonges or indorsements. Id. at 546. However, the copy of the note attached to the amended complaint that was subsequently filed contained an allonge with an undated special indorsement to a different bank and an undated blank indorsement from that bank on the back page of the note. Id.

The plaintiff there presented the testimony of a loan analyst for its servicer to establish that the servicer had possession of all loan records. But the analyst was unable to provide dates as to when the allonge was created or the indorsement placed on the note. Id. at 545. When the analyst was asked if the blank indorsement was placed on the note prior to filing the original complaint, the analyst testified as follows: "There is no evidence to indicate to the contrary. I mean it has always been part of the

trust. This one has always been part of the trust. . . ." Id. at 546. The plaintiff's counsel conceded "that he could not prove that the allonge and the blank [i]ndorsement predated the filing of the initial complaint." Id. at 545. The district court concluded that the evidence was insufficient to meet the plaintiff's burden of proof. Id. at 547.

Unlike the situation in Guzman, in this case both the allonge attached to the complaint and the one presented at trial included the signed indorsement to Wells Fargo. There was no evidence disputing that the allonge had been executed prior to closing and was held undated pending closing, which occurred on September 20, 2011, prior to the filing of the complaint. As a result, the trial court erred in determining that because of the date issue, Elizon did not establish standing.

In summary, the trial court erred in granting dismissal based on the date difference between the copy of the allonge attached to the complaint and the original. Elizon was not required to prove exactly when the allonge was executed. Elizon was only required to present evidence that the allonge had been executed before Wells Fargo filed the complaint. Elizon carried this burden. Because the difference between the copy and the original allonge is immaterial and was explained at trial without contradiction, the court erred in dismissing the complaint for lack of standing.

Finally, the record reflects several orders entered by the trial court prior to trial. In one, the court stated that based on its previous rulings the only two material issues that remained in dispute for trial concerned standing. Our decision resolves the issue of standing in Elizon's favor, and the parties have not challenged any other rulings of the trial court in this appeal. However, Elizon acknowledges that issues concerning damages and attorney's fees remain to be resolved. In light of the trial court's orders

and Elizon's acknowledgment, on remand the trial court shall conduct such further proceedings as are necessary to resolve all remaining issues not previously determined by the trial court or in this appeal, including damages and attorney's fees.

Reversed and remanded.

BADALAMENTI and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed April 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-964
Lower Tribunal No. 15-20187

Wilbur B. Pritchard, III,
Appellant,

vs.

Stephen A. Levin, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Rennert Vogel Mandler & Rodriguez, P.A., and Thomas S. Ward, for appellant.

Stumphauzer Foslid Sloman Ross & Kolaya, PLLC, Ian M. Ross and Erica L. Perdomo; Greenberg Traurig, P.A., and Alan T. Dimond, Elliot H. Scherker and Brigid F. Cech Samole, for appellees.

Before SALTER, LOGUE and GORDO, JJ.

PER CURIAM.

Wilbur Pritchard appeals the trial court's grant of summary judgment in favor of Stephen Levin, Alfonso Fernandez, Gold Coast Beverage Distributors, Inc., Eran Holdings, Inc., and Gold Coast Holdings, Inc. We affirm the court's order because Mr. Pritchard fails to establish the existence of any genuine issue of material fact.

FACTS & PROCEDURAL HISTORY

Mr. Pritchard served as Vice President of Operations for Gold Coast Beverage Distributors, Inc., from 1991 to 2012. On May 9, 2012, Mr. Pritchard was transferred to a position as Vice President of Facilities and his salary decreased. As a result, he requested a retirement package. On June 26, 2012, Mr. Pritchard retired and signed a Separation Agreement. As part of the retirement package, Mr. Pritchard was awarded approximately $1.1 million for the value of his units in the company's Equity Plan plus $426,000 in other compensation and benefits. In the Separation Agreement, Mr. Pritchard agreed to release Gold Coast from "each and every claim, cause of action, right, liability, or demand of any kind and nature, whether or not presently known to exist, including, without limitation, those claims arising from, or relating to, [his] employment or separation from employment with [Gold Coast]."

In October 2014, Mr. Pritchard read in a trade journal that Gold Coast had been acquired by the Reyes Beverage Group for $1.026 billion. He later discovered that Reyes had attempted to acquire Gold Coast on two prior occasions, but that Gold Coast rejected Reyes' offers in 2010 and early 2012. Gold Coast terminated

negotiations with Reyes on May 7, 2012, and there were no other negotiations between Gold Coast and Reyes until early 2014.

Upon learning of the acquisition, Mr. Pritchard sued Gold Coast companies and executives for breach of contract, common law fraud, negligent misrepresentation, violation of Chapter 517 of the Florida Statutes, and fraudulent inducement, as well as for punitive damages. Mr. Pritchard claimed that had he known of Reyes' attempts to acquire Gold Coast in the past, he would not have retired and that if he had still been a member of the Equity Plan in 2014, the value of his units would now be worth over $7 million.

Gold Coast moved for summary judgment on all counts. Gold Coast argued its executives never made any material misrepresentations to Mr. Pritchard and never intentionally or negligently withheld any material information from him. Mr. Pritchard countered that the information was material because it was information he personally would have wanted to know before retiring.

Based on the evidence submitted at the summary judgment hearing, it was undisputed that no record evidence existed of any ongoing negotiations between Gold Coast and Reyes from May 7, 2012, until February 2014. Mr. Pritchard was unable to establish a genuine issue of material fact as to whether there were any active negotiations at the time he retired on June 26, 2012, up until 2014.

The trial court granted summary judgment finding that because the record evidence established there were no ongoing negotiations between Gold Coast and Reyes at the time Mr. Pritchard retired, Gold Coast did not have a duty to disclose. The court concluded that prior failed negotiations between Reyes and Gold Coast were immaterial and there were no facts in the record that created a genuine issue of material fact that Gold Coast intended to withhold any material information. The court further found there were no facts supporting Mr. Pritchard's breach of contract or punitive damages claims.

STANDARD OF REVIEW

We review an order granting a motion for summary judgment under the de novo standard. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

LEGAL ANALYSIS

"The elements that must be established to prove a claim of fraud are: '(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and, (4) consequent injury by the party acting in reliance on the representation.'" Townsend v. Morton, 36 So. 3d 865, 868 (Fla. 5th DCA 2010) (quoting Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985)); Moriber v. Dreiling, 194 So. 3d 369, 373 (Fla. 3d DCA 2016).

"Fraud based upon a failure to disclose material information exists only when there is a duty to make such a disclosure." Garofalo v. Proskauer Rose LLP, 253 So. 3d 2, 7 (Fla. 4th DCA 2018) (citing Friedman v. Am. Guardian Warranty Servs., Inc., 837 So. 2d 1165, 1166 (Fla. 4th DCA 2003)). The threshold question of whether one has a duty to disclose is a matter of law to be decided by the court. Id. ("The existence . . . of a duty is a question of law and is appropriate for an appellate court to review." (quoting Gracey v. Eaker, 837 So. 2d 348, 354 n.7 (Fla. 2002))).

"[G]enerally, a corporation has no duty to disclose the existence of merger discussions." Bacon v. Stiefel Labs., Inc., 677 F. Supp. 2d 1331, 1343 (S.D. Fla. 2010). Florida law does not require a party to disclose an event that is merely possible or speculative. Hauben v. Harmon, 605 F.2d 920, 925-26 (5th Cir. 1979). "Those in business routinely discuss and exchange information on matters which may or may not eventuate in some future agreement. Not every such business conversation gives rise to legal obligations. . . . Information of speculative and tentative discussions is of dubious and marginal significance . . ." Taylor v. First Union Corp. of S.C., 857 F.2d 240, 244-45 (4th Cir. 1988).

The crux of Mr. Pritchard's argument is that he would have wanted to know about these negotiations because he was familiar with Reyes' reputation for aggressive acquisitions and he would not have retired until the company was inevitably acquired. Yet, it is undisputed that at the time Mr. Pritchard signed his

Separation Agreement, Reyes was not engaged in acquisition negotiations with Gold Coast. And there was no genuine issue of fact in the record to show that Gold Coast executives knew or anticipated that negotiations with Reyes would resume at some uncertain future date. "Under Florida law, mere statements of possibilities do not generally constitute false statements of material facts." Hauben, 605 F.2d at 925. See also TransPetrol, Ltd. v. Radulovic, 764 So. 2d 878, 879 (Fla. 4th DCA 2000) ("A defendant's knowing concealment or non-disclosure of a material fact may only support an action for fraud where there is a duty to disclose.").

Mr. Pritchard also asserts that the intentional withholding of information by Gold Coast executives and his subsequent demotion were meant to induce his early retirement. There was no documentary or testimonial evidence, however, suggesting that any of the Gold Coast executives ever discussed or considered whether those rejected offers should be disclosed to Mr. Pritchard, or that they expected negotiations with Reyes to resume in the future. Mr. Pritchard offered no evidence that Appellants intended to withhold, or recklessly or negligently withheld, any material information. He presented nothing more than sworn testimony that executives did not disclose the prior acquisition negotiations.

The trial court found that as a matter of law Gold Coast had no duty to disclose the failed negotiations based on the mere possibility that Gold Coast could

eventually be acquired by Reyes. Based upon the record before us, we find no error in the trial court's ruling and affirm the order as to the fraud-based claims.

We further conclude that Mr. Pritchard is barred from bringing his breach of contract claim against Gold Coast because the Separation Agreement releases that claim. Where, as here, "the language of a release is clear and unambiguous a court cannot entertain evidence contrary to its plain meaning." Cerniglia v. Cerniglia, 679 So. 2d 1160, 1164 (Fla. 1996) (citing Sheen v. Lyon, 485 So. 2d 422, 424 (Fla. 1986)).

Finally, the court's determination that there is a reasonable showing by evidence or a proffer providing a reasonable basis for recovery of punitive damages does not preclude summary judgment. "The conventional analysis utilized in resolving a summary judgment motion has no application in the context of a punitive damages determination under section 768.72." Noack v. Blue Cross & Blue Shield of Fla., Inc., 872 So. 2d 370, 371 (Fla. 1st DCA 2004) (citing Will v. Sys. Eng'g Consultants, Inc., 554 So. 2d 591 (Fla. 3d DCA 1989)). A finding that Appellant failed to establish that there is no material issue of disputed fact is not the equivalent of establishing a reasonable evidentiary basis for punitive damages. Id. at 372 (citing Potter v. S.A.K. Dev. Corp., 678 So. 2d 472 (Fla. 5th DCA 1996)).

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed April 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1179
Lower Tribunal No. 11-14536

Hector M. Castro,
Appellant/Cross-Appellee,

vs.

Mercantil Commercebank, N.A.,
Appellee/Cross-Appellant.

An appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Law Offices of Lisette M. Blanco, and Lisette M. Blanco, for appellant/cross-appellee.

Law Offices of Victor K. Rones, P.A., and Victor K. Rones, for appellee/cross-appellant.

Before SALTER, LINDSEY, and MILLER, JJ.

MILLER, J.

Appellant, Hector M. Castro, challenges a nonfinal order authorizing the garnishment of his disposable earnings.[1] We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii). On appeal, Castro contends the lower tribunal erred in determining his written consent to the garnishment of his earnings divested him of his right to avail himself of Florida's "head of family" statutory exemption. We discern no error, thus affirm.

BACKGROUND

In late 2009, Halmac Development, Inc. ("Halmac") executed a promissory note in the principal amount of $250,000.00 payable in stipulated installments to the order of appellee, Mercantil Commercebank, N.A. ("Mercantil"). The note was personally guaranteed by Castro, as evidenced by an unlimited continuing guaranty, and secured by certain collateral. Under the terms of the guaranty, upon default, Mercantil was entitled to "collect any deficiency balance with or without resorting to legal process."

The guaranty contained the following capitalized provision: "GUARANTOR HEREBY CONSENTS TO THE ATTACHMENT OR GARNISHMENT OF HIS/HER/ITS EARNINGS." It further specified, the "[o]bligations [hereunder] . . . shall not be affected or impaired [by] . . . [a]ny present or future law . . . purporting

[1] We affirm the wage issue raised by Mercantil in its cross-appeal without further elaboration. See In re Bhalla, No. 8:16-bk-00265-RCT (Bankr. M.D. Fla. July 12, 2018); In re Crespo, No. 16-24842 (Bankr. S.D. Fla. June 5, 2017).

to reduce, amend or otherwise affect the indebtedness . . . or any other terms of payment."

Less than one year later, Halmac defaulted under the terms of the note by failing to tender the requisite principal and interest payments. Mercantil filed suit and, in 2015, obtained final summary judgments against both Castro, in his individual capacity as guarantor, and Halmac, as the corporate borrower.

In 2019, Mercantil filed a motion for a continuing writ of garnishment against Castro. The trial court issued the writ, which was promptly served upon Castro's employer. Thereafter, Castro filed a motion to dissolve, claiming his wages were exempt from garnishment because he was the "head of family," as defined under section 222.11, Florida Statutes. The lower tribunal duly conducted a hearing and subsequently determined that Castro had renounced his right to avoid garnishment in writing. The instant appeal ensued.

STANDARD OF REVIEW

On appeal, Castro contends the contractual language is deficient to effectuate a waiver of his claim of exemption. Because this issue requires us to interpret a contractual provision, along with Florida garnishment law, we apply a de novo standard of review. See Command Sec. Corp. v. Moffa, 84 So. 3d 1097, 1099 (Fla. 4th DCA 2012) ("'The interpretation of a written contract is a question of law' and the appellate court construes the contract 'under a de novo standard of review.'")

(quoting Gilman Yacht Sales, Inc. v. FMB Invs., Inc., 766 So. 2d 294, 296 (Fla. 4th DCA 2000)); Aramark Unif. & Career Apparel, Inc. v. Easton, 894 So. 2d 20, 23 (Fla. 2004) ("The construction of a statute is an issue of law subject to de novo review.") (citation omitted).

LEGAL ANALYSIS

Florida law confers upon "[e]very person or entity who has sued to recover a debt or has recovered judgment in any court against any person or entity . . . a right to a writ of garnishment." § 77.01, Fla. Stat. (2019). Nonetheless, the debtor may seek to avoid the garnishment. § 77.07, Fla. Stat. (2019). By statute, "[a]ll of the disposable earnings of a head of family whose disposable earnings are less than or equal to $500 a week are exempt from attachment or garnishment." § 222.11(2)(a), Fla. Stat. (2009). However, a debtor is vested with the power to waive his or her right to the garnishment of disposable earnings "which are greater than $500 a week," by "agree[ing] otherwise in writing." § 222.11(2)(b), Fla. Stat. (2009).

The head of family exemption is designed to "protect citizens against financial reverses and difficulties and to permit the citizen when residing in Florida and head of a family to be secure in money coming to him for his labor and services thereby supporting his family and preventing it from becoming a public charge." Mazzella v. Boinis, 617 So. 2d 1156, 1157 (Fla. 4th DCA 1993) (quoting Holmes v. Blazer Fin. Servs., Inc., 369 So. 2d 987, 988 (Fla. 4th DCA 1979)). Therefore, the

exemption should be liberally construed in favor of the debtor. Id. (citations omitted). Nonetheless, "section 222.11(2)(b), [Florida Statutes (2009),] does not prescribe any particular language to effect a waiver of the wage exemption." USAmeriBank v. Klepal, 100 So. 3d 56, 59 (Fla. 2d DCA 2011).

In the instant case, the parties do not dispute that Castro qualifies as the head of family. Instead, they diverge in their urged conclusions regarding the ramifications of the guaranty, as penned. Mercantil asserts that, by executing the consent to garnishment, Castro renounced his claim of exemption as to any earnings in excess of $500.00 per week, whereas Castro avers he assented to the mere issuance of a writ of garnishment.[2]

[2] Castro further contends the amended version of section 222.11, Florida Statutes (2019), applies. As the guaranty, executed in 2009, specified the obligations thereunder would not be affected or impaired by any "future law . . . purporting to reduce, amend or otherwise affect the indebtedness . . . or any other terms of payment," we find no merit to this claim. See Art I, § 10, Fla. Const. ("No bill of attainder, ex post facto law or law impairing obligation of contracts shall be passed."); Cenvill Inv'rs, Inc. v. Condo. Owners Org. of Century Vill. E., Inc., 556 So. 2d 1197, 1200 (Fla. 4th DCA 1990) ("[T]he law imposes upon the marketplace a presumption that parties enter into contracts in contemplation of existing statutory and case law. That context becomes part of the bargain and thus cannot be relied on by either contracting party to avoid an obligation or enhance a remedy."); see also Hart v. Wachovia Bank, Nat'l Ass'n, 159 So. 3d 244, 246 n.2 (Fla. 1st DCA 2015) ("We find that the version of the statute in effect when the [g]uaranty was entered is applicable here. To hold otherwise would allow the 2010 amendments to be an unlawful impairment of contracts in violation of Article I, Section 10, of the Florida Constitution.").

"Contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions." Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc., 145 So. 3d 989, 993 (Fla. 4th DCA 2014). Accordingly, "[w]hen the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent." Talbott v. First Bank Fla., FSB, 59 So. 3d 243, 245 (Fla. 4th DCA 2011) (citation omitted); see M & G Polymers USA, LLC v. Tackett, 574 U.S. 427, 435, 135 S. Ct. 926, 933, 190 L. Ed. 2d 809 (2015) ("Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.") (quoting 11 Williston, Williston on Contracts §30:6 (4th ed. 2012)). We are further "constrained by law to construe a contract as a whole so as to give effect . . . to all provisions of the agreement if it can be reasonably done." McArthur v. A.A. Green & Co. of Fla., Inc., 637 So. 2d 311, 312 (Fla. 3d DCA 1994) (citation omitted).

Here, by the plain language of the guaranty, the default in the payment obligation by the borrower vests Mercantil with expansive collection rights. Moreover, the consent to garnishment clause is both unambiguous and devoid of any limiting language. As the relevant statute merely requires the debtor "agree[] otherwise in writing" to garnishment, and, here, there was a "consent" to the "garnishment" of "earnings," the contractual language is sufficient to waive the head

of family exemption to which the debtor would otherwise have been entitled. § 222.11(2)(b), Fla. Stat. (2009).

Finally, it bears note that, regardless of the contractual terms, Mercantil, as the judgment holder, was already statutorily endowed with the "right to a writ of garnishment." § 77.01, Fla. Stat. Thus, as was so aptly penned by our esteemed sister court in an analogous dispute:

> If the garnishment paragraph authorizes only the issuance of a writ of garnishment and nothing more, then the paragraph does not give the Bank any right it did not already have by statute. "Courts must 'construe contracts in such a way as to give reasonable meaning to all provisions,' rather than leaving part of the contract useless." Publix Super Mkts., Inc. v. Wilder Corp. of Del., 876 So. 2d 652, 654 (Fla. 2d DCA 2004) (quoting Hardwick Props., Inc. v. Newbern, 711 So. 2d 35, 40 (Fla. 1st DCA 1998)). The narrow interpretation of the garnishment paragraph urged . . . renders the paragraph meaningless. The garnishment paragraph's purpose is to increase the rights available to the Bank for the enforcement of a judgment in the event of a default. A proper interpretation of the garnishment paragraph avoids rendering it useless by construing it as including an agreement for the waiver of the exemption for wage garnishment for a head of family as authorized by section 222.11(2)(b).

Klepal, 100 So. 3d at 60-61. Accordingly, we conclude that the written consent to garnishment rendered the claim of exemption unavailable, and we affirm the order under review. Id. at 61; see Hart v. Wachovia Bank, Nat'l Ass'n, 159 So. 3d 244, 246 (Fla. 1st DCA 2015) ("We hold that [appellant] 'agreed otherwise in writing' to garnishment as required by section 222.11, when he signed the [g]uaranty with the waiver language. To construe the waiver in the [g]uaranty as not allowing the

[a]ppellee to seek garnishment is to construe the [g]uaranty in a manner which defeats its purpose.") (citations omitted).

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed April 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1341
Lower Tribunal No. 15-15456

CWELT-2008 Series 1045 LLC,
Appellant,

vs.

Park Gardens Association, Inc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Bruce Botsford, P.A., and Bruce C. Botsford (Fort Lauderdale); P.A. Bravo, P.A., and Paul Alexander Bravo, for appellant.

Blaxberg, Grayson, Kukoff, & Forteza, P.A., and Ian Barry Blaxberg and Edward A. Proenza, for appellee.

Before EMAS, C.J., and MILLER and GORDO, JJ.

EMAS, C.J.

INTRODUCTION

CWELT-2008 Series 1045, LLC ("CWELT") appeals a nonfinal order denying its motion to dismiss the counterclaim of Park Gardens Association, Inc. ("the Association"). CWELT contends that dismissal of the counterclaim was required because the Association failed to comply with the mandatory arbitration provision of Florida's Condominium Act, section 718.1255(4)(a), Florida Statutes (2015). We have jurisdiction, see Fla. R. App. P. 9.130(a)(3)(C)(iv), and affirm, as CWELT, by its own actions, waived its right to compel the Association's compliance with the arbitration provision.

FACTS AND PROCEDURAL BACKGROUND

CWELT owns a unit in the Park Gardens Condominium in Miami Beach. CWELT obtained title to the unit in 2014. CWELT intended to renovate the unit, lease the unit for one or two years and then resell it. However, four years before CWELT purchased the unit, the Association had recorded an Amendment to its Declaration of Condominium ("the Amendment") which prohibited any unit owner from leasing a unit for the first two years of ownership without prior written approval of the Board of Directors.

In July 2015, CWELT filed a two-count complaint (for declaratory judgment and breach of the declaration of condominium) seeking a final judgment declaring

the Amendment void and seeking damages for lost rental income due to the Association's reliance on, and enforcement of, the Amendment.

The Association, in August 2015, filed a motion to dismiss CWELT's complaint contending, inter alia, that CWELT's claims were barred by the statute of limitations, and that an earlier amendment to the Declaration of Condominium (recorded in 1990) accomplished the same result as the Amendment being challenged by CWELT.

The parties litigated the case for the next twenty-nine months. In January 2018, CWELT filed its response to the Association's 2015 motion to dismiss. Soon after, the trial court denied the Association's motion to dismiss and directed the Association to file an answer to CWELT's July 2015 complaint. In March 2018, the Association filed its answer and a counterclaim, alleging two breach of contract counts (nuisances and unauthorized tenants), and a count for declaratory judgment.

The Association alleged in its counterclaim that CWELT circumvented the Amendment's leasing restriction and approval process by amending CWELT's Articles of Organization to identify unauthorized tenants as authorized members of CWELT (and thus ostensibly not "tenants," but rather, unit owners who can reside in the unit without complying with the Amendment). The Association's counterclaim sought, inter alia, to enjoin CWELT from violating the Amendment by leasing its unit to "unauthorized tenants," and further sought a declaration by the

trial court that, under the Amendment, "the authorized members of CWELT who reside in the Unit are considered tenants and are required to go through the Association's tenant approval process."

On April 29, 2019, CWELT filed the subject motion to dismiss the counterclaim, contending that, before filing its counterclaim, the Association was required to proceed to nonbinding arbitration under section 718.1255(4)(a). The Association responded that 1) the case (and the Amendment at issue in both the complaint and counterclaim) had been litigated for nearly four years, and thus, requiring arbitration at this point would not serve the express purpose of the statute; and (2) the claims asserted by CWELT in its complaint and those asserted by the Association in its counterclaim are so intertwined that severing them is likely to lead to inconsistent rulings. The trial court denied CWELT's motion to dismiss in an unelaborated order, and the record on appeal contains no transcript of the hearing. This appeal follows.

ANALYSIS AND DISCUSSION[1]

Chapter 718 of the Florida Statutes is known as the Condominium Act. As expressly provided in section 718.102, the purpose of this chapter is:

> (1) To give statutory recognition to the condominium form of ownership of real property.

[1] "This Court reviews de novo a trial court's ruling on a motion to dismiss." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 592 (Fla. 2013).

> (2) To establish procedures for the creation, sale, and operation of condominiums.

This court has further recognized that "the intent of the statute is to increase judicial economy and to reduce the cost of litigation for the parties, ***especially the unit owner***, without eliminating either party's right to a trial by jury." Sterling Condo. Ass 'n, Inc. v. Herrera, 690 So. 2d 703, 704 (Fla. 3d DCA 1997) (emphasis added). See also § 718.1255(3), Fla. Stat. (2015) (providing: "The Legislature finds that unit owners are frequently at a disadvantage when litigating against an association. . . . The high cost and significant delay of circuit court litigation faced by unit owners in the state can be alleviated by requiring nonbinding arbitration and mediation in appropriate cases").

To that end, section 718.1255 provides alternative methods (including nonbinding arbitration) for resolving certain condominium-related disputes, and authorizes the Division of Florida Condominiums, Timeshares, and Mobile Homes (a division of the Department of Business and Professional Regulation) to employ attorneys as arbitrators to conduct the arbitration hearings under chapter 718. Section 718.1255 also provides that the decision of an arbitrator, while final, is nonbinding. The parties are not foreclosed from proceeding in a trial de novo unless the parties have agreed that the arbitration shall be binding.

Finally, and most relevant to the instant case, section 718.1255(4)(a) provides: "Prior to the institution of court litigation, a party to a dispute shall petition the division for nonbinding arbitration."

The question presented is whether, under the circumstances presented, the Association was required to arbitrate its dispute before filing its counterclaim. In urging affirmance of the trial court's order, the Association relies primarily on our decision in Sterling. In Sterling, 690 So. 2d at 704, the Association sought an injunction against a unit owner after the owner made "substantial structural changes" to her unit without the consent of the association's board of directors. The unit owner answered and filed her own counterclaim. On the eve of trial, the unit owner moved to dismiss the association's lawsuit for failure to comply with mandatory arbitration under section 718.1255(a). The unit owner also voluntarily dismissed her counterclaim at that time. The trial court granted the unit owner's motion and dismissed the association's claim for failure to comply with the mandatory arbitration provision. We reversed that dismissal, holding that (1) "where the parties have litigated in circuit court for over two years, the intent of the statute would not be furthered by compelling arbitration and would, in fact, be contrary to the statute's stated intent," and (2) the unit owner waived her right to compel arbitration by filing an answer and counterclaim and actively litigating the action for two years before asserting the mandatory arbitration provision. Id.

We recognize that the facts of the instant case differ somewhat from Sterling. In Sterling, it was the original lawsuit—which had been pending for two years—that was the subject of the dismissal order. Here, by contrast, it was the counterclaim, which had been pending for only one month before CWELT filed the motion to dismiss.

Nevertheless, we conclude that the rationale of Sterling advances our analysis, because the mandatory arbitration provision of section 718.1255(4)(a) applied to the dispute raised in CWELT's 2015 complaint as well as the dispute raised in the Association's 2018 counterclaim. Notwithstanding this, CWELT did not seek to arbitrate the dispute before filing suit against the Association, seeking damages and a declaration that the Amendment (prohibiting the leasing of its unit without authorization) was unenforceable. Indeed, CWELT continued to prosecute its lawsuit for nearly three years, and only after the Association filed its counterclaim in March of 2018 did CWELT raise the specter of mandatory arbitration under section 718.1255.

More importantly, both CWELT (in its 2015 complaint) and the Association (in its 2018 counterclaim) sought relief premised upon the exact same Amendment to the Declaration of Condominium. In other words, the "dispute" contained in CWELT's complaint and the "dispute" contained in the Association's counterclaim, relate to the very same subject matter, constituted a "dispute" as defined by section

718.1255,[2] and were both subject to the mandatory presuit arbitration procedure in section 718.1255(4)(a). We hold that, by its own action (and inaction), CWELT waived the right to assert that the Association could not file its counterclaim without first complying with that same statute.

In reaching this conclusion, we find most helpful the Second District's analysis in Hawkins v. James D. Eckert, P.A., 738 So. 2d 1002 (Fla. 2d DCA 1999). In Hawkins, a law firm sued a former client to recover unpaid attorney's fees claimed to be owed under a written contract with an arbitration provision. The former client answered and filed a counterclaim against the firm. In response, the firm moved to compel arbitration of the counterclaim in accordance with the written contract providing for mandatory arbitration of any fee disputes.

The trial court granted the motion to compel arbitration, and the former client appealed. The law firm argued that, although it waived its right to arbitrate the fee dispute by filing the complaint, the right to demand arbitration was "revived" when the former client filed her counterclaim. Id. at 1003. Our sister court rejected that argument and reversed, holding that the former client's counterclaim "did not alter

[2] Under the statute, "a dispute" is "any disagreement between two or more parties that involves," among other things, "[t]he authority of the board of directors, under this chapter or association document to [] [r]equire any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto." § 718.1255(1)(a)1, Fla. Stat. (2015).

the scope and nature of the litigation to the extent that it revived the [law firm's] previously waived right to demand arbitration." Id.

In like fashion, the requirement of presuit arbitration was waived when CWELT initially filed its complaint without first complying with section 718.1255(4)(a). The Association's counterclaim, filed nearly three years into the litigation, did not revive CWELT's right to compel arbitration under section 718.1255(4)(a), because the counterclaim did not alter the scope and nature of the litigation. To the contrary, the parties' claims are flip sides of the same coin: CWELT's complaint sought a declaration that the Amendment is void and sought damages for loss rental income; the Association's counterclaim sought enforcement (and by necessity a declaration of the validity) of the very same Amendment prohibiting CWELT from leasing the unit to unauthorized tenants without the Board of Directors' approval. See also Chaikin v. Parker Waichman LLP, 253 So. 3d 640, 645 (Fla. 2d DCA 2017) (reaffirming Hawkins and holding: "As in Hawkins, by pursuing relief in the trial court based upon the Partnership Agreement, [plaintiff] waived its right to compel arbitration of [defendant's] counterclaims, which were also based upon the Partnership Agreement"); Owens & Minor Med., Inc. v. Innovative Mktg. and Distrib. Servs., Inc., 711 So. 2d 176, 177 (Fla. 4th DCA 1998) (affirming trial court's denial of plaintiff's motion to compel arbitration of defendant's counterclaim and holding: "[T]he counterclaim does not involve issues

separate and distinct from those raised in appellant's amended complaint. . . . The matters raised in the counterclaim are intertwined with issues raised in the amended complaint, since to decide each claim a fact finder would necessarily have to resolve fact issues common to both. This close relationship between the claims of the parties distinguishes this case from those cited by appellant, where claims subject to arbitration were 'separate and distinct' from claims for which arbitration had arguably been waived.")[3]

Affirmed.

[3] Given the length of time during which the parties had already litigated the validity and enforceability of this Amendment, we also find (as we did in Sterling) that "the intent of the statute would not be furthered by compelling arbitration and would, in fact, be contrary to the statute's stated intent." Sterling Condo. Ass 'n, Inc. v. Herrera, 690 So. 2d 703, 704 (Fla. 3d DCA 1997).