DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ESTHER BABANI,
Appellant,

v.

BROWARD AUTOMOTIVE, INC., d/b/a
AUDI FORT LAUDERDALE, a for-profit corporation,
Appellee.

No. 4D21-2694

[September 30, 2022]

Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Giuseppina Miranda, Judge; L.T. Case No. COCE21006831.

Morgan L. Weinstein of Twig, Trade, & Tribunal, PLLC, Fort Lauderdale, Joshua Feygin of Joshua Feygin, PLLC, Hallandale Beach, and Darren Newhart of Newhart Legal, P.A., Loxahatchee, for appellant.

Kenneth L. Paretti of Quinton & Paretti, P.A., Miami, for appellee.

WARNER, J.

Appellant, a leased vehicle customer, appeals from the county court's summary disposition of her complaint against the appellee dealer for damages under section 559.72, Florida Statutes (2019), known as the Florida Consumer Collection Practices Act ("FCCPA"). The court held that Customer could not prove that Dealer had actual knowledge that it was violating a provision of the FCCPA. Because discovery was still outstanding as to Dealer's practices, we reverse.

Customer leased a vehicle and signed two documents. One document was a Retail Lease Order, and the other document was the actual lease. The Retail Lease Order contained a pre-delivery service charge of $798. Immediately underneath the charge appeared the language required by section 501.976(18), Florida Statutes (2019), known as the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"): "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the

sale." However, on the lease document, the $798 was identified as a "Documentation Fee" and the "Pre-delivery" service charge was marked as "N/A." The demarcation for the pre-delivery service charge was followed by the FDUTPA statutory language.

Customer filed suit alleging that Dealer violated the FCCPA, by collecting an unlawful charge, i.e., the $798, which she claimed was a per se violation of the FCCPA. The FCCPA provides:

> In collecting consumer debts, no person shall:
>
> . . . .
>
> (9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist.

§ 559.72(9), Fla. Stat. (2019). Customer claimed that because FDUTPA required the statutory language to appear on all documents where the charge was imposed, and the $798 was improperly designated as a document fee on the lease, FDUTPA was violated, and Dealer had no right to collect the charge.

Customer filed suit in county court under summary rules. No answer was required of Dealer pursuant to those rules, and none was filed. *See* Fla. Sm. Cl. R. 7.090(c). At the court's direction, the parties moved for summary disposition. In its motion, Dealer claimed that it had substantially complied with the FDUTPA and thereby did not violate the FCCPA. Dealer asserted that it had made a bona fide error as a result of computer misalignment in the printing of documents and filed an affidavit of a corporate representative attesting to the computer error.

At the hearing on the motion, Dealer argued that Customer failed to offer any proof that Dealer had actual knowledge of the mistake in the lease, an element required under the FCCPA. Customer responded by advising the court that Dealer could only rely on a bona fide error defense if it maintained procedures adapted to try to prevent such an error. *See* § 559.77(3), Fla. Stat. (2019). Customer also contended that she still had outstanding discovery regarding Dealer's policies and practices which directly related to the bona fide error defense.

Applying Florida Small Claims Rule 7.135, which allows the court to determine whether a triable issue is set forth, the court agreed with Dealer

that Customer had failed to offer any proof that Dealer had actual knowledge of the mistake in the presentation of the pre-delivery service charge on the lease document. The court then summarily disposed of the case prompting this appeal.

We reverse because the court should not have entered summary judgment while discovery was outstanding. "Where the information contained in outstanding discovery could create genuine issues of material fact, summary judgment would not be proper." *Osorto v. Deutsche Bank Nat'l Tr. Co.*, 88 So. 3d 261, 263 (Fla. 4th DCA 2012). A trial court should not consider a motion for summary judgment until discovery is concluded. *Id.* at 262. "An order granting summary judgment while there is an outstanding request for production of documents is premature and the appellate court should reverse and remand for discovery to be completed." *Id.* at 262–63 (citing *Henderson v. Reyes*, 702 So. 2d 616, 616 (Fla. 3d DCA 1997)).

Through her discovery requests, Customer sought information as to Dealer's policies and procedures for complying with the FCCPA and how such policies were implemented. As Customer pointed out to the court at the hearing, section 559.77(3) provides that no person can be held liable under the FCCPA "if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, *notwithstanding the maintenance of procedures reasonably adapted to avoid such error.*" § 559.77(3), Fla. Stat. (2019) (emphasis added). In order for Dealer to rely on the bona fide error defense, it must show that it had policies and procedures to avoid the error.

The court concluded that the discovery was irrelevant to the issue of knowledge. We disagree. The corporate representative's affidavit and the gist of Dealer's claim in the trial court was that an error occurred in the printing. The lease documents were all prepared by Dealer, thus supporting an inference that it knew the content of the documents and the alleged misalignment. The discovery was thus relevant to the issue of a bona fide error defense.

Because outstanding discovery remained as to a disputable issue of knowledge and error by Dealer, the court's grant of summary judgment was premature, and the case should be reversed and remanded for discovery to be completed. *See Osorto*, 88 So. 3d at 263.

Reversed and remanded for further proceedings.

KLINGENSMITH, C.J., and CONNER, J., 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

RAYMOND N. SMITH AND KRISTY L. SMITH,

Appellants,

v.

Case Nos. 5D21-1383
5D21-2174
LT Case No. 2019-CA-018766

KEVIN CARLTON AND CIN CARLTON,

Appellees.

_____/

Opinion filed September 23, 2022

Appeal from the Circuit Court
for Brevard County,
George Paulk, Judge.

David G. Larkin and Jesse L.
Kabaservice, of Fallace & Larkin,
L.C., Melbourne, for Appellants.

Allan P. Whitehead and Erika McBryde,
of Frese, Whitehead & Anderson,
P.A., Melbourne, for Appellees.

EDWARDS, J.

This case involves tons of trash, purloined gates, missing fences, and broken promises. Appellees, Kevin and Cin Carlton, contracted to sell their horse farm, complete with a barn, horse stalls, fences, and gates, to Appellants, Raymond and Kristy Smith. Appellants did a walk-through of the property prior to closing and saw that there was still a lot of trash around, despite Appellees' written agreement to clear out the trash by closing. Shortly after closing, Appellants learned that the trash was still there and several sections of fence and gates had been removed, contrary to the terms of the contract. The trial court's finding that Appellees thereby breached the contract is undisputed.[1] Appellants appeal the court's ruling that they had waived all remedies when they closed on the property. We hold that the trial court erred in finding waiver of Appellants' right to seek money damages and reverse the judgment entered in favor of Appellees.[2] We remand this matter for entry of judgment in favor of Appellants with damages based on the

[1] Appellees have not cross-appealed; thus, they are bound by the trial court's findings and rulings set forth in the final judgment.

[2] Since Appellees waived their affirmative defense of merger below, by raising the defense for the first time at trial, and because the trial court's final judgment does not set forth sufficient factual findings to permit us to fully and independently consider the potential application of merger to this case, we decline to address Appellees' tipsy coachman argument based on merger. *See Boyd v. Boyd*, 874 So. 2d 696, 698 (Fla. 5th DCA 2004); *Foley v. Azam*, 257 So. 3d 1134, 1139 n.3 (Fla. 5th DCA 2018).

evidence admitted during trial. We also reverse the award of attorney's fees and costs in favor of Appellees and instruct the trial court to award Appellants their fees and costs.

Background

Pre-contract Property Inspection

In June 2018, Appellees listed a twenty-five-acre farm located in Mims, Florida, ("the Property") for sale. The Property was marketed as a working horse farm with a small house, a barn, paddock area, horse stalls, fencing, and separated pastures. Appellants were interested in purchasing the Property and inspected the Property prior to entering into a purchase contract. Appellants made it known to Appellees that they intended to keep horses on the Property. While there, Appellants spoke with the caretaker of the Property, a friend of Appellees, and learned that she kept her horses on the Property.

Contract

The parties entered into a standard Florida Bar/Florida Realtors "As-Is" contract for the Property. The contract specified that all improvements and fixtures existing on the Property at the time the initial offer was made

were included in the sale.[3] The contract further required Appellees to have removed all trash from the Property by the time of closing. The contract contained a provision, paragraph 18(P), that required any modification or change to the contract to be in writing and signed by the party intended to be bound. It also contained in paragraph 18(Q) a provision that a party's waiver as to one right would not constitute a waiver of any other provision or right.

Inspections

Before entering into the contract, Appellants observed that the Property was littered with trash and debris but was otherwise as described in the listing.[4] The contract provided Appellants with the right to inspect the Property on two occasions. First, within ten days of the effective date of the contract, they could inspect the Property to determine if it was acceptable to them; if it was not, they could notify Appellees in writing, terminate the contract, and have their deposit returned. Appellants conducted this inspection and went forward with the contract.

[3] The contract form permitted listing of excluded improvements or fixtures, but the parties did not exclude anything.

[4] Appellees' failed attempt at running a nursery on the Property had left old mowers, tractors, fans, a dilapidated greenhouse, scrap metal, a feed spreader, and thousands of plant pots on the Property.

Second, the contract permitted Appellants to perform a pre-closing walk-through inspection, on the day of or the day prior to closing, to confirm that all items of personal property remained and to verify that Appellees had continued to maintain the Property. Utilizing this provision, Appellants inspected the Property the day before closing and witnessed a hectic scene. There were several trucks and horse trailers on scene, the tenant who lived in the house on the Property was still collecting his belongings and preparing to leave, the caretaker was in the process of removing her horses from the Property, and there still was an overwhelming amount of trash and debris. Appellants, through their realtor, threatened to cancel the sale contract. They also offered to deal with the remaining trash and debris themselves in return for a reduction in the price, but Appellees rejected that offer. According to Mr. Smith's trial testimony, Appellees' realtor explained that they were working on removing all the trash before closing. Although the contract permitted Appellants to make a follow up walk-through on the date of closing, they did not do so prior to closing.

Closing and Post-Closing

Despite what they observed the day prior, Appellants went through with the closing on November 16, 2018. Having already signed their papers, Appellants and one of the Appellees were not present at the closing. After

closing, Appellants drove to the Property and noticed for the first time that some gates and fencing had been removed and that there was still a vast amount of trash on the Property. Within days of closing, they threatened Appellees with legal action and when Appellees failed to respond, Appellants followed through with filing suit approximately three months after closing. Ultimately, a bench trial was conducted.

Purloined Gates and Missing Fences

According to the trial court, the caretaker of the Property removed some gates and fencing from the Property, claiming that she owned them.[5] While the trial court found that the caretaker talked with Appellants prior to entering into the contract, it noted that she did not mention to Appellants that any of the gates or fences were hers or that she would be removing them. Apparently, she took and was using those gates and fencing at another nearby property where she was now boarding her horses. The trial court confirmed that the fencing, fence gates, and horse stall gates were indeed fixtures for purposes of the sales contract and were necessary items for keeping horses on the Property.

[5] The caretaker testified to taking one small section of fence and one gate, while Appellants presented evidence of several sections of fence and as many as nine gates having gone missing between the pre-closing and post-closing inspections.

Tons of Trash

The trial court rejected Appellees' argument that the meaning of "trash" was ambiguous; it found that Appellees clearly understood but breached their contractual obligation. Appellants testified that they used employees from the roofing company they owned to remove the remaining trash and debris, which required fifteen to twenty dumpster loads and three weeks to accomplish.

Standard of Review

"We review de novo the trial court's interpretation of a contract. Interpretation of a contract is a question of law, and an appellate court may reach a construction contrary to that of the trial court." *Whitley v. Royal Trails Prop. Owner's Ass'n*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005) (internal citations omitted). However, "[t]he question of waiver is an issue of fact, for which a trial judge's finding will be reversed 'only if there is no competent, substantial evidence to support' it." *WSG West Palm Beach Dev., LLC v. Blank*, 990 So. 2d 708, 715 (Fla. 4th DCA 2008) (quoting *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999)). "Competent substantial evidence is tantamount to legally sufficient evidence, and the appellate court will assess the record evidence for its sufficiency only, not its weight." *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999).

Analysis

Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). Any contractual right can be waived. *See id.* "The elements of waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Bishop v. Bishop*, 858 So. 2d 1234, 1237 (Fla. 5th DCA 2003); *see also Zurstrassen v. Stonier*, 786 So. 2d 65, 70 (Fla. 4th DCA 2001) ("A waiving party must possess all of the material facts in order to constitute waiver." (citation omitted)).

As there was no express waiver, the trial court implied waiver based on Appellants' conduct. And "[w]hen a waiver is implied, the acts, conduct or circumstances relied upon to show waiver must make out a clear case." *See Kirschner v. Baldwin*, 988 So. 2d 1138, 1142 (Fla. 5th DCA 2008) (citation omitted). Therefore, to constitute an implied waiver, there must have been a clear showing that Appellants voluntarily and intentionally relinquished their rights to the removal of all trash and inclusion of all fixtures on the Property.

See Raymond James Fin. Servs., 896 So. 2d at 711. The evidence here does not establish a clear showing.

Waiver – Gates and Fencing

There is no evidence that Appellants knew, prior to or at the time of closing, that any gates or fencing were going to be removed. Furthermore, as soon as they became aware of the missing gates and fencing, Appellants complained to Appellees, threatened, and then promptly filed legal action on March 1, 2019. This is the antithesis of waiver. Thus, the trial court erred with regard to finding Appellants waived Appellees' contractual obligation to convey all fixtures such as fencing, fence gates, and stall gates.

Waiver – Trash Removal

The trial court's finding that Appellants waived the right to require Appellees to remove the trash is flawed for two reasons. First, the trial court misperceived the deadline for Appellees to remove the trash. Second, the trial court inexplicably found that the contract provided Appellants with a single remedy, cancellation or termination of the deal, when in fact the contract specifically permitted post-closing suits for money damages regarding breaches of the contract.

The contract specifically provided that "at Closing, [Appellees] shall have removed all personal items and trash from the Property . . . ." Thus,

Appellees were not obliged to remove all the trash prior to closing, nor could Appellants have declared a breach for their pre-closing failure to do so. The trial court also found that Appellants intended to enforce the trash removal requirement, but it found waiver, in part, because they delayed enforcement until after closing by suing for money damages. That finding ignores that Appellants' right to a trash-free property only ripened at closing, regardless of what they noticed the day before closing.

Furthermore, "[m]ere delay is insufficient to support waiver." *O'Brien v. O'Brien*, 424 So. 2d 970, 971 (Fla. 3d DCA 1983); *see also Mercede v. Mercede Park Italian Rest., Inc.*, 392 So. 2d 997, 998 (Fla. 4th DCA 1981) (holding where landlord delayed ten months to make demand upon tenant for increased rent, "mere delay [wa]s insufficient to support a defense of either waiver or estoppel"); *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098, 1104 (Fla. 5th DCA 2006); *Cnty. of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1052 n.4 (Fla. 1997) ("Waiver does not arise from forbearance for a reasonable time, but may be inferred from conduct or acts 'putting one off his guard and leading him to believe that a right has been waived.'" (quoting *Gilman v. Butzloff*, 22 So. 2d 263, 265 (Fla. 1945))). As previously noted, on the day before and the day after closing, Appellants made it clear that they were dissatisfied with and did not accept Appellees'

failure to remove the trash, and the suit was filed in just over three months following closing.

Under these facts, there was no competent substantial evidence that Appellants unreasonably delayed enforcing their rights or that Appellees were lulled into inaction and led to believe that leaving tons of trash was acceptable. Thus, the trial court's ruling was erroneous based on timing.

The second flaw in the finding of waiver is the trial court's ruling that essentially found that Appellants had but a single remedy—namely, cancellation or termination of the contract. The trial court correctly noted that the sales contract gave Appellants several opportunities to inspect and the right to terminate the contract under certain circumstances. By not doing a follow-up pre-closing inspection on the day of closing, Appellants may have waived that right. Furthermore, by going through with closing, Appellants may have waived their right to terminate the contract as a remedy for Appellees' breaches, although it is not clear that the contract provided such a remedy at that point. However, the anti-waiver provision found in paragraph 18(Q) does not support a finding that waiver of the right to inspect and the right to terminate somehow morphed into a waiver of Appellants' other rights to require full performance by Appellees.

Additionally, paragraph 15(b) of the contract provides that even if Appellants, as the buyers, had sought return of their deposit from Appellees, as the sellers, on the day prior to or at closing, they could elect to do so without "thereby waiving any action for specific performance or damages resulting from [Appellees'] breach . . . ."

Further, the trial court made no mention of paragraph 16 of the contract, which provides in part:

> 16. **DISPUTE RESOLUTION:** Unresolved controversies, claims and other matters in question arising out of or relating to this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows:
>
> (a) [By mediation][6]
>
> (b) . . . Disputes not settled pursuant to this Paragraph 16 may be resolved by instituting action in the appropriate court having jurisdiction of the matter. This Paragraph 16 shall survive closing or termination of this Contract.

It is clear, as Appellants argued, that the contract expressly provided them with remedies beyond termination, including specifically the remedy to initiate and pursue legal action for money damages. We find, as a matter of law, that the trial court did not properly interpret the contract and erred in

[6] Nobody raised the failure to pursue mediation as an issue below or on appeal.

ruling that Appellants waived any contractual remedies other than any right to terminate the contract.

Conclusion

Accordingly, we conclude and hold that there was no competent substantial evidence supporting the trial court's ruling that Appellants waived Appellees' contractual obligation to ensure that all fixtures such as fencing, fence gates, and horse stall gates remained on the property as of closing. We further conclude and hold that there was no competent substantial evidence to support a finding of waiver based on delay by Appellants in enforcing their contract rights, in light of them providing written complaints and notice of intended legal action on the days prior to and immediately following closing and filing suit in little more than three months. Finally, we conclude and hold that the trial court erred as a matter of law in interpreting the contract to not permit Appellants to pursue a lawsuit seeking money damages, despite that remedy being clearly and expressly set forth in the contract.

The judgment in favor of Appellees is hereby reversed as is the judgment awarding Appellees their attorney's fees and costs. We remand this matter to the trial court for entry of a judgment in favor of Appellants and against Appellees with the amount of damages to be determined based upon

the evidence already presented during the bench trial. The trial court is instructed to grant Appellants' motion for its reasonable attorney's fees and costs incurred at trial. By a separate order, we grant Appellants' motion for appellate attorney's fees. As to both of those motions, the trial court shall determine what those reasonable fees are in further proceedings.

REVERSED and REMANDED.

EVANDER and WALLIS, JJ., concur.

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11742

Non-Argument Calendar

In Re: NRP LEASE HOLDINGS, LLC, et al.,

Debtors.

1944 BEACH BOULEVARD, LLC,

Plaintiff-Appellant,

versus

LIVE OAK BANKING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:20-cv-01344-TJC

Before NEWSOM, LAGOA, and ANDERSON, Circuit Judges.

LAGOA, Circuit Judge:

This case returns to us for disposition from the Florida Supreme Court, to which we certified three questions of Florida law. *1944 Beach Boulevard, LLC v. Live Oak Banking Co.* (*In re NRP Lease Holdings, LLC*) ("*1944 Beach I*"), 20 F.4th 746, 758 (11th Cir. 2021). In considering our certified questions, the Florida Supreme Court found dispositive a threshold issue that we did not expressly address: "Is the filing office's use of a 'standard search logic' necessary to trigger the safe harbor protection of section 679.5061(3)?" *1944 Beach Boulevard, LLC v. Live Oak Banking Co.* ("*1944 Beach II*"), No. SC21-1717, 2022 WL 3650803, at *1 (Fla. Aug. 25, 2022).

The Florida Supreme Court answered that question in the affirmative. And the court further determined that Florida does not employ a "standard search logic." *Id.* The Florida Supreme Court thus concluded that the statutory safe harbor for financing statements that fail to correctly name the debtor cannot apply, "which means that a financing statement that fails to correctly

name the debtor as required by Florida law is 'seriously misleading' under Florida Statute § 679.5061(2) and therefore ineffective." *Id.*

We therefore hold that Live Oak did not perfect its security interest in 1944 Beach Boulevard, LLC's, assets because the two UCC-1 Financing Statements filed with the Florida Secured Transaction Registry (the "Registry") were "seriously misleading" under Florida Statute § 679.5061(2), as the Registry does not implement a "standard search logic" necessary to trigger the safe harbor exception set forth in Florida Statute § 679.5061(3). Accordingly, we reverse the district court's order affirming the bankruptcy court's grant of Live Oak Banking Company's cross-motion for summary judgment and remand for further proceedings.

I. RELEVANT BACKGROUND[1]

Beach Boulevard, and its affiliated businesses, filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. *Id.* at 750. Beach Boulevard and its affiliates were jointly and severally liable to Live Oak on two loans guaranteed by the U.S. Small Business Administration; these loans purported to be secured by a blanket lien on all of Beach Boulevard's assets. *Id.* Live Oak, in an attempt to perfect its security interest in these assets, filed two UCC-1 Financing Statements with the Registry. *Id.* "These filing statements identify the debtor as '1944 Beach Blvd., LLC,' instead of its legal name, '1944 Beach Boulevard, LLC,' as

[1] The relevant facts of this appeal are set forth in our previous decision, *1944 Beach I*. *See* 20 F.4th at 750–52.

listed in the articles of organization filed with the Florida Secretary of State." *Id.*

Beach Boulevard filed a complaint asserting that Live Oak's UCC-1 financing statements were "seriously misleading" under Florida Statute § 679.5061(2) and therefore ineffective to perfect Live Oak's security interest. *Id.* at 750–51. The parties eventually cross-moved for summary judgment, and the bankruptcy judge granted summary judgment for Live Oak, concluding that Live Oak's financing statements fell under the "safe harbor" of Florida Statute § 679.5061(3) "because the Registry's standard search logic discloses the Financing Statements on the page immediately preceding the initial page on the Registry's website." *Id.* at 751. Thus, the bankruptcy court found the Live Oak's financing statements were "not seriously misleading and [were] effective to perfect [Live Oak's] security interest in all of [Beach Boulevard's] assets." *Id.* (some alterations in original). The district court, sitting in an appellate capacity, affirmed the bankruptcy court's order. *Id.* at 751–52. Beach Boulevard then appealed to this Court.

II. STANDARD OF REVIEW

District courts sit in an appellate capacity when reviewing bankruptcy court judgments; they accept the bankruptcy court's factual findings unless they are clearly erroneous and review legal conclusions *de novo*. *Rush v. JLJ Inc.* (*In re JLJ Inc.*), 988 F.2d 1112, 1116 (11th Cir. 1993). As the second court of review, this Court "independently examines the bankruptcy court's factual findings

for clear error and reviews *de novo* the legal determinations of both the bankruptcy and district courts." *Id.*

The standard of review for a motion for summary judgment under Rule 7056 of the Federal Rules of Bankruptcy Procedure is the same as Rule 56 of the Federal Rules of Civil Procedure. *See Gray v. Manklow* (*In re Optical Techs., Inc.*), 246 F.3d 1332, 1334 (11th Cir. 2001). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord In re Optical Techs.*, 246 F.3d at 1334.

III. ANALYSIS

As we explained in *1944 Beach I*, 11 U.S.C. § 544(a) provides that "the trustee in a bankruptcy case is granted the status of a hypothetical lien creditor and may avoid any lien that is not properly perfected under state law as of the petition date." 20 F.4th at 752. Thus, we must look to Florida law to determine whether Live Oak perfected its security interest in Beach Boulevard's assets. To perfect a security interest under Florida law, "a creditor must file a 'financing statement' with the Registry," *id.* (quoting Fla. Stat. § 679.5011), and "[a] financing statement must provide three pieces of information to be considered sufficient for perfection: (1) the name of the debtor; (2) the name of the secured party; and (3) a description of the collateral covered by the financing statement," *id.* (quoting Fla. Stat. § 679.5021(1)).

Florida Statute § 679.5061 concerns the "[e]ffect of errors or omissions" in financing statements. The statute provides, in relevant part:

> (1) A financing statement substantially complying with the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.
>
> (2) Except as otherwise provided in subsection (3), a financing statement that fails sufficiently to provide the name of the debtor in accordance with s. 679.5031(1) is seriously misleading.
>
> (3) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with s. 679.5031(1), the name provided does not make the financing statement seriously misleading.

As explained by the Florida Supreme Court, the "first subsection states that a financing statement may contain minor errors or omissions and remain effective to perfect a security interest, unless the error or omission renders the financing statement 'seriously misleading.'" *1944 Beach II*, 2022 WL 3650803, at *3 (quoting § 679.5061(1)). The second and third subsections of the statute, in turn, define "seriously misleading" as it relates to errors or admissions in naming the debtor. *Id.* Section 679.5061(2) "creates a zero-

tolerance rule, under which a financing statement that fails to name the debtor as directed in [Florida Statute § 679.5031(1)] is 'seriously misleading.'"[2] *Id.* And section 679.5061(3) creates a "safe harbor exception" to subsection (2)'s zero-tolerance rule providing that a financing statement with errors or omissions in naming a debtor "will still be effective to perfect a security interest so long as 'a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose' the financing statement." *Id.* at *4 (quoting § 679.5061(3)).

Turning to this case, Beach Boulevard and Live Oak disagree as to whether Live Oak's financing statements fell under the safe harbor exception in section 679.5061(3). As we explained before, "Live Oak's financing statements do not appear on the initial page of twenty names generated by a Registry search using Beach Boulevard's correct legal name," but "they do appear on an immediately preceding page." *1944 Beach I*, 20 F.4th at 754. Beach Boulevard

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[2] Section 679.5031(1) specifies how to correctly name a debtor that is a registered organization:

> [a] financing statement sufficiently provides the name of the debtor . . . only if the financing statement provides the name that is stated to be the registered organization's name on the public organic record most recently filed with or enacted by the registered organization's jurisdiction of organization that purports to state, amend, or restate the registered organization's name

1944 Beach II, 2022 WL 3650803, at *3 (quoting § 679.5031(1)(a)).

contends that "the initial page of twenty names is both the beginning and the end of the 'seriously misleading' inquiry," while Live Oak asserts that "it is just the beginning and that its financing statement appearing on the preceding page falls into the statutory safe harbor." *Id.*

Because this case presented a novel issue of Florida law that divided bankruptcy courts within our Circuit, and because we faced substantial doubt as to how the Florida Supreme Court would resolve the split, we certified these three questions to that court:

> (1) Is the "search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic," as provided for by Florida Statute § 679.5061(3), limited to or otherwise satisfied by the initial page of twenty names displayed to the user of the Registry's search function?
>
> (2) If not, does that search consist of all names in the filing office's database, which the user can browse to using the command tabs displayed on the initial page?
>
> (3) If the search consists of all names in the filing office's database, are there any limitations on a user's obligation to review the names and, if so, what factors should courts consider when determining whether a user has satisfied those obligations?

1944 Beach I, 20 F.4th at 758.

The Florida Supreme Court, however, found "dispositive a threshold question" that was not expressly certified by this Court:

"Is the filing office's use of a 'standard search logic' necessary to trigger the safe harbor protection of section 679.5061(3)?"[3] *1944 Beach II*, 2022 WL 3650803, at *1. And reading the language of section 679.5061(3), the court concluded "yes." *Id.*

After analyzing the relevant statutory text, the Florida Supreme Court also explained that section 679.5061(3) "does not define the scope of the search of the filing office's records that is necessary to determine whether the safe harbor applies," i.e., did not explain what "standard search logic" means in the context of the statute. *Id.* at * 4. But, the court noted, "the meaning of 'standard search logic' as used in Article 9 of the Uniform Commercial Code, which governs secured transactions and which Florida has adopted is well understood within the industry. . . . and is reasonably accepted to mean a procedure that 'identif[ies] the set (which might be empty) of financing statements on file that constitute hits for the search,' or stated differently, that produces an '[u]nambiguous identification of hits.'" *Id.* (quoting Kenneth C. Kettering, *Standard Search Logic Under Article 9 and the Florida Debacle*, 66 U. Mia. L. Rev. 907, 913 (2012) (citations omitted)). The court then concluded that Florida's Registry, while offering an option for searching its records, did not have an option that was a "standard search logic." *Id.* Indeed, when conducting a search, "the Registry returns a list of twenty names starting with the name that most closely

[3] Because the Florida Supreme Court found this question dispositive, it found it unnecessary to reach the questions we certified to it. *1944 Beach II*, 2022 WL 3650803, at *5.

matches the name entered," which " is but a point from which the user can navigate forward and backward through all of the names indexed in the Registry." *Id.* And, as the Florida Supreme Court explained, a "'search procedure that returns as hits, for any search string, all financing statements in the filing office's database cannot rationally be treated as a 'standard search logic.'" *Id.* (quoting Kettering, *supra*, at 913).

The Florida Supreme Court therefore adopted "the definition of 'standard search logic' accepted in the secured transactions industry, which requires the search to identify specific hits, if any," and held that "the search option offered by the Registry, which returns the entire index, is not a 'standard search logic.'" *Id.* at *5. The court held that "section 679.5061(3) provides one way and one way only to search the filing office's records for purposes of determining whether the safe harbor applies to a financing statement that incorrectly names a debtor—i.e., 'using the filing office's standard search logic, if any.'" *Id.* As a result, the court explained that "[b]ecause the Registry lacks a 'standard search logic,' the search contemplated by section 679.5061(3) is impossible, which means that filers are left with the zero-tolerance rule of section 679.5061(2)." *Id.* Because the zero-tolerance rule applies "until the Registry employs a standard search logic, . . . any financing statement that fails to correctly name the debtor as required by section 679.5031(1) is 'seriously misleading' and therefore ineffective." *Id.*

The Florida Supreme Court's answer to the threshold question it identified resolves this appeal. As explained by the Florida

Supreme Court, since the Registry currently does not implement a "standard search logic," it is impossible to conduct a search necessary to qualify for the safe harbor exception contained in section 679.5061(3). *Id.* Thus, section 679.5061(2)'s zero-tolerance rule applies. As previously noted, Live Oak's filing statements identify Beach Boulevard as "1944 Beach Blvd., LLC," instead of its legal name, "1944 Beach Boulevard, LLC," listed in its articles of organization filed with the Florida Secretary of State. *1944 Beach I*, 20 F.4th at 750. Under section 679.5061(2), Live Oak's financing statements are "seriously misleading" because they "fail[] sufficiently to provide the name of the debtor in accordance with [section] 679.5031(1)," and are therefore ineffective to perfect a security interest in Beach Boulevard's assets under Florida law. *See 1944 Beach I*, 20 F.4th at 752; § 679.5011.

Because Live Oak did not properly perfect its security interest in all of Beach Boulevard's assets under Florida law, and because § 544(a) grants the bankruptcy trustee the status of a hypothetical lien creditor who may avoid any lien that is not properly perfected under state law as of the petition date, the bankruptcy court erred in concluding that Live Oak perfected its security interest. We therefore conclude that the district court erred in affirming the district court's grant of summary judgment for Live Oak.

IV. CONCLUSION

Because Live Oak's financing statements are seriously misleading under Florida law, they were not effective to perfect its security interest in all of Beach Boulevard's assets. The district court

therefore erred in affirming the bankruptcy court's order granting Live Oak's cross motion for summary judgment. Accordingly, we reverse the district court's order affirming the bankruptcy court's grant of summary judgment for Live Oak, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.