Supreme Court of Florida

No. SC21-369

SUAREZ TRUCKING FL CORP., et al.,
Petitioners,

vs.

ADAM J. SOUDERS, et al.,
Respondents.

October 20, 2022

PER CURIAM.

This case presents the question whether a binding settlement agreement was formed pursuant to the provisions of section 768.79, Florida Statutes (2014), Florida's offer of judgment and demand for judgment statute, when the defendant in a tort action, Suarez Trucking, filed a written notice accepting an offer of settlement made by the plaintiff, Adam Souders. In *Suarez Trucking FL Corp. v. Souders*, 311 So. 3d 263, 272 (Fla. 2d DCA 2020), the Second District Court of Appeal affirmed the trial court's order denying Suarez Trucking's motion to enforce settlement agreement, holding

that the written notice of acceptance was not sufficient to form a binding contract and that the settlement check tendered pursuant to the offer of settlement was deficient because it included as a payee—along with Souders and his counsel—the carrier holding a workers' compensation lien created by operation of section 440.39, Florida Statutes (2014).

The Second District's decision is in express and direct conflict with the decision of the Fourth District Court of Appeal in *Cirrus Design Corp. v. Sasso*, 95 So. 3d 308, 312 (Fla. 4th DCA 2012), which held that the filed acceptance of an offer under the offer of judgment and demand for judgment statute resulted in the formation of a substituted agreement and that performance thus was not necessary to the formation of the settlement contract. We therefore have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

On the conflict issue—whether a settlement contract was formed—the framework of offer and acceptance established by section 768.79 as well as basic contract principles support the conclusion that the Second District erred in holding that no contract was formed. On this point, as Judge Atkinson explains in his cogent dissent, the district court majority erroneously conflates

acceptance with performance and errs in its understanding of what is required to manifest acceptance of an offer inviting a promissory acceptance.

We decline to go beyond the conflict issue to address whether Suarez Trucking—by tendering the settlement check to Souders with the workers' compensation lienor named as a payee—breached the settlement agreement. Because of their focus on the issue of contract formation, the parties have never fully argued issues related to breach and remedy. Those issues should be resolved on remand, uninfluenced by the erroneous view of contract formation adopted by the Second District.

I.

Section 768.79(4) provides: "An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement." Subsection (5) of the statute provides that "[a]n offer may be withdrawn in writing which is served before the date a written acceptance is filed" and that "[o]nce withdrawn, an offer is void." A related rule provision found in Florida Rule of Civil Procedure 1.442(f)(1) states that in

connection with an offer and acceptance under section 768.79(4), "[n]o oral communications shall constitute an acceptance, rejection, or counteroffer."

This framework recognizes a simple and straightforward process in which after a written offer is made under the statute, if an acceptance of that offer is timely filed, an enforceable settlement agreement is thereby created. The framework contemplates that a filed acceptance constitutes a promise to perform in accordance with the terms of the offer. Given the statute's requirement that an offer and any acceptance be written, oral discussions surrounding the offer and acceptance are—as rule 1.442(f)(1) makes clear—of no consequence to the formation of a contract. Once a proper acceptance—that is, an unqualified acceptance—is filed as specified in the statute, that's it: a settlement contract has been entered to resolve the litigation. All that remains is for performance of the settlement terms to be carried out. This is the framework established by the statute, and parties desiring to obtain the potential benefit afforded by the statute are bound to operate within its parameters.

Here, the offer of settlement made by plaintiff Souders on February 25, 2015, expressly pursuant to section 768.79 and rule 1.442, provided that the defendants "shall pay $500,000.00 to the Plaintiff . . . within ten (10) days from the date of acceptance." The offer also contained the condition that "[u]pon acceptance and payment of the Proposal for Settlement, Plaintiff . . . will enter dismissal with prejudice against Defendants." In response, on March 26, 2015, Suarez Trucking filed a notice of acceptance stating simply that "pursuant to Florida Statutes 769.89 and Florida Rule 1.442 [notice is given] that Defendants *accept Plaintiff's Proposal for Settlement* made to Defendants, dated February 25, 2015." (Emphasis added.) This notice of acceptance created a binding settlement contract by unequivocally and fully assenting to the terms of the offer. It is hard to imagine a form of acceptance that could be more clear or more effective.

II.

Avoiding this reality, the Second District invokes and misapplies "the strict common-law rule applicable to offers generally—the so-called 'mirror image' rule that generally requires the acceptance to be in every respect identical to the offer."

16 Richard A. Lord, *Williston on Contracts* § 49:40 (4th ed. 2014). The Second District denigrates Suarez Trucking's acceptance as ineffectual "boilerplate" that "lacked specificity," holding that under the mirror-image rule, Suarez Trucking could only manifest its acceptance of the offer by reciting back the terms of the offer. *Suarez Trucking*, 311 So. 3d at 269. In support of this conclusion, the Second District cites not a single case in which the mirror-image rule has been applied in a similar way.

The Second District, in a view adopted by the dissent, also erroneously sets up a dichotomy between the operation of section 768.79 together with rule 1.442 and the formation of a binding settlement contract, asserting that, as the dissent says, the statute and rule do not "specif[y] the requirements for formation of the settlement agreement itself." Dissenting op. at 1.

Pointing to oral communications between the parties, the Second District—once again echoed by the dissent—raises the specter that recognizing the formation of a contract between the parties here would somehow allow unilateral alteration of the terms of the settlement. *See Suarez Trucking*, 311 So. 3d at 271; dissenting op. at 7. The Second District also erroneously contends

that the offer of settlement could only be accepted by performance—rather than by a promissory acceptance. *See Suarez Trucking*, 311 So. 3d at 269.

None of these positions can be reconciled either with the provisions of the statute or with general rules of contract law.

III.

Basic contract law has long established that "[i]n order to create a contract, it is essential that there should be a reciprocal assent" to the contract terms. *Strong & Trowbridge Co. v. H. Baars & Co.*, 54 So. 92, 93 (Fla. 1910). The "assent must be precisely [to] the same thing." *Id.* That is, the acceptance must mirror the offer. "Consequently, if one assents to a certain thing and the other assents to it only with modifications . . . no agreement or contract arises therefrom." *Id.* We have said that "in determining whether there has been a mutual consent to a contract,"

> [t]he rule is probably best expressed by the late Justice Holmes in "The Path of the Law," 10 Harvard Law Review 457, where it was stated in part that "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing."

Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957).[1] There must therefore be an objective manifestation by both parties of assent to the same terms. This is a rule of consistency. It is not—as the Second District would have it—a rule of regurgitation.

The "general rule at common law" is simply "that [an] acceptance must comply with [the] terms of [the] offer":

> If a promise is requested, that promise must be made absolutely and unqualifiedly. This *does not necessarily mean that the precise words of the requested promise must be repeated*, but rather that, by a positive and unqualified assent to the proposal, the offeree must in effect agree to make precisely the promise requested.

2 Lord, *Williston on Contracts* § 6:11 (4th ed. 2007) (emphasis added).

Here, the promise made by Suarez Trucking in the filed notice of acceptance was "made absolutely and unqualifiedly," and Suarez Trucking "agreed to make precisely the promise requested." It was of no consequence that "the precise words of the requested promise" were not repeated. The filed acceptance constituted "a positive and unqualified assent to the proposal" of settlement. That's what the

---

1. The common law rule has been modified with respect to transactions in goods. *See* § 672.207, Fla. Stat. (2021).

law requires for an acceptance to be effective. *See Hanson v. Maxfield*, 23 So. 3d 736, 739 (Fla. 1st DCA 2009) ("The May 13 letter, written on behalf of the Hansons, states that it 'accepts your settlement offer made on behalf of your clients in your April 15, 2005, letter.' Thus, the May 13 letter is an unequivocal and unconditional acceptance of the offer made in the April 15 letter."); *see also* Restatement (Second) of Contracts § 30, illus. 3 (Am. Law Inst. 1981) ("A orally offers to sell and deliver to B 100 tons of coal at $20 a ton payable 30 days after delivery. B replies, "I accept your offer." B has manifested assent in a sufficient form . . . ."); *id.* § 32, illus. 5 ("A mails a written order to B, offering to buy specified machinery on specified terms. The order provides, 'Ship at once.' B immediately mails a letter to A, saying 'I accept your offer and will ship at once.' This is a sufficient acceptance to form a contract.").

Nothing in section 768.79 or rule 1.442 is at odds with these basic rules of contract law regarding offer and acceptance and mutual assent. Indeed, the statute and rule operate against the backdrop of those legal principles. When the statute refers to "offer" and "acceptance," the statute speaks the language of contract. But the statute—as implemented by the rule—specifies a

particular mode for the offer and acceptance: both must be written. Accepting the position that a valid offer and acceptance under the statute do not necessarily result in an enforceable settlement contract would unnecessarily inject incoherence into the law.

In line with the purpose of establishing a clear-cut basis for the imposition of sanctions on a litigant who rejects a settlement proposal in the circumstances specified in the statute, the statutory framework does not envision a process of negotiation regarding settlement terms. On the contrary, it authorizes settlement proposals that are by their very nature take-it-or-leave-it propositions. The statutorily required written offer and acceptance are not affected by other communications between the litigants. That understanding of the operation of the statute is clearly reflected in the provision of rule 1.442(f)(1) that "[n]o oral communications shall constitute an acceptance, rejection, or counteroffer."

The focus of the Second District and the dissent on such communications between the parties here flows from a serious misconception regarding settlements pursuant to the statute. This is illustrated by *Scope v. Fannelli*, 639 So. 2d 141 (Fla. 5th DCA

1994), in which the court rejected a claim that a counteroffer had terminated an offer made under section 768.79. In rejecting that claim, the court reasoned that subsection (5) of the statute permits an offeror to withdraw an offer in writing with service effected before an acceptance is filed, but that "[n]o alternative method of reducing the time for acceptance is provided by the statute." *Scope*, 639 So. 2d at 143. Accordingly, regardless of communications between the parties concerning the offer, absent a withdrawal of the offer in accordance with the statutory provisions, the offer will remain open until the statutory 30-day offer period has passed. From this holding it follows that—whatever may have passed between the parties—an acceptance filed in accordance with the statute before an offer has either been withdrawn or expired will be effective to create a settlement contract based on the terms of the offer.

So when a settlement offer is made under the statute, the process must play out according to the requirements of the statute and rule. Of course, the parties are always free to negotiate and enter a settlement on any basis to which they mutually assent. Such a negotiating process undertaken outside the statutory

framework obviously is not subject to the requirements or benefits of the statute and rule.

There is no support for the claim that recognizing the existence of a contract here authorizes the accepting party to unilaterally alter the contract. To the extent that such a claim points to issues concerning whether a breach of the settlement contract occurred, the matter is beyond the scope of the conflict issue, and we do not address it here.

Finally, the Second District's contention that the offer made by Souders contemplated that acceptance could only be effected by performance is refuted by the plain terms of the offer. The Second District rests its position on this issue on the reference in the settlement offer to "acceptance and payment." *Suarez Trucking*, 311 So. 3d at 270. But this language—understood in context—indicates exactly the opposite of what the Second District says it means. The settlement offer makes a clear distinction between acceptance and performance rather than equating acceptance with performance. This is shown most vividly in the specification that performance by payment must occur within ten days from the date of acceptance. The offer thus clearly contemplates a two-step process in which

acceptance is followed by performance. This, of course, is consistent with the statute, which provides for acceptance by the filing of a notice of acceptance rather than acceptance by performance.

IV.

There is no basis to support the Second District's conclusion that a settlement contract could only be formed by performance or that Suarez Trucking's acceptance was otherwise defective. We therefore quash the decision on review. And we approve the conflict decision in *Cirrus* to the extent that it is consistent with our analysis here.

It is so ordered.

MUÑIZ, C.J., and CANADY, POLSTON, COURIEL, and GROSSHANS, JJ., concur.
CANADY, J., concurs with an opinion, in which POLSTON, J., concurs.
LABARGA, J., dissents with an opinion.
FRANCIS, J., did not participate.

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

CANADY, J., concurring.

Although I do not dissent from the majority's conclusion that fuller briefing of the issues related to breach and remedy is

appropriate, based on what has been presented thus far by the parties it appears doubtful to me that any breach of the settlement agreement occurred. And it must be acknowledged that the resolution of the breach issue has serious implications for the integrity of the legal framework for the protection of statutory workers' compensation liens.

Under the Workers' Compensation Law, an employee injured in the course of employment by a third-party tortfeasor may accept workers' compensation benefits and also sue the third-party tortfeasor. § 440.39(1), Fla. Stat. (2021). In such circumstances, the employee "shall sue for the employee individually and for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier." § 440.39(3)(a), Fla. Stat. Under the statute, the employer or carrier obtains lien rights:

> Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his or her dependents, which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney.

Id.

The statute thus provides for the judicial determination of the amount recoverable under such workers' compensation liens. *Id.* Specific provision is made regarding settled third-party tort claims:

> If the employer or insurance carrier has given written notice of his or her rights of subrogation to the third-party tortfeasor, and, thereafter, settlement of any such claim or action at law is made, either before or after suit is filed, and the parties fail to agree on the proportion to be paid to each, the circuit court of the county in which the cause of action arose shall determine the amount to be paid to each by such third-party tortfeasor . . . .

§ 440.39(3)(b), Fla. Stat.

The Second District itself has recognized that under these provisions of the statute, in the event of a dispute on the question, an employee's "right to the distribution of any portion of his third-party settlement did not arise until the trial court determined the amount of the [workers' compensation] lien." *City of Tampa v. Norton*, 681 So. 2d 811, 812 (Fla. 2d DCA 1996); *see also Circle K Corp./AIG Claims Servs., Inc. v. Webster*, 747 So. 2d 1010, 1011 (Fla. 5th DCA 1999) ("Where a case is settled in lieu of suit or during the pendency of a suit and the tortfeasor has notice of the employer's interest in the settlement, the case should not be settled

without the consent of the carrier or employer in order to protect the employer to the extent of benefits conferred.").

It is undisputed that the parties here were subject to the provisions of section 440.39 and that they were on notice of the carrier's lien rights. Indeed, Souders said this in his brief submitted to the Second District:

> [T]he record reflects that, both before and after the plaintiff's offer was made, plaintiff's counsel had advised Suarez Trucking's counsel that his client had a statutory obligation to satisfy the compensation carrier's lien; that he fully intended to do so in accordance with Florida law; and that he had been actively involved in negotiating the amount of the lien with counsel for the compensation carrier . . . .

In line with this statute and the acknowledgement of lien rights by Souders, Suarez Trucking now argues that it simply did what "is customary when faced with a lienholder: it included that lienholder on the settlement check." Suarez Trucking further argues that under section 440.39 if it "failed to include [the workers' compensation carrier] on the settlement check and protect the lien, it could have faced a cause of action for impairment of lien or for subrogation."

In support of these points, Suarez Trucking cites cases recognizing the duty of settling parties to protect lien rights. *See, e.g.*, *Hall, Lamb & Hall, P.A. v. Sherlon Invs. Corp.*, 7 So. 3d 639, 641 (Fla. 3d DCA 2009) ("There is no question that as a party to the settlement, Sherlon had an affirmative duty to notify the law firm of the settlement and to protect the law firm's lien interest in the settlement proceeds."); *Dade County v. Pavon*, 266 So. 2d 94, 97 (Fla. 3d DCA 1972) ("We hold that the statute placed upon the appellee a duty to make no settlement until the possible existence of a hospital lien was determined."); *see also Geico Gen. Ins. Co. v. Steinger, Iscoe & Greene-II, P.A.*, 275 So. 3d 775, 777 (Fla. 3d DCA 2019) (holding that insurer had a "duty to protect [law firm's] attorney's lien by notifying [law firm] of the settlement, including [the law firm] on the settlement check or obtaining [law firm's] waiver of its lien in writing, or obtaining a Hold Harmless agreement from [firm receiving settlement proceeds]"). To the extent that Suarez Trucking can establish the existence of such a duty arising from section 440.39, it appears that analysis of the breach of contract issue should take that statute-based duty into account.

The relevance of background legal requirements to the obligations of contracting parties is by no means a novel concept in our law. "Florida courts have long recognized that the statutory limitations and requirements surrounding traditional insurance contracts may be incorporated into an insurance contract for purposes of determining the parties' contractual rights." *Found. Health v. Westside EKG Assocs.*, 944 So. 2d 188, 195 (Fla. 2006). The issue of statutory incorporation has arisen most frequently in the insurance context, but our treatment of the incorporation of statutory provisions in that context is based on a more sweeping principle of statutory incorporation. We have held broadly that

> in construing a contract, it is well established that "the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein."

City of Homestead v. Beard, 600 So. 2d 450, 454-55 (Fla. 1992) (quoting *Shavers v. Duval County*, 73 So. 2d 684, 689 (Fla. 1954)).

This principle of contract law is indeed venerable and widely acknowledged. *See Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1866) ("It is also settled that the laws which subsist at the time and

place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. . . . These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."); Richard A. Lord, *Williston on Contracts* § 30:19 (4th ed. 2012) ("Under [the generally applicable] presumption of incorporation, valid applicable laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract. Thus, contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law." (footnotes omitted.)).

As Souders admits, the parties here were subject to the provisions of section 440.39. Souders was required by law to bring his third-party tort claim not only for his own benefit, but also for "the use and benefit" of the workers' compensation carrier. He was not entitled to the disbursement of funds paid in settlement of his claim prior to an agreed or judicially determined resolution of the

workers' compensation lien. The settlement funds provided to Souders indisputably were legally encumbered by the lien.

When the contract is understood in light of these existing relationships and obligations, as is required by the well-established rule of incorporation, it is hard to see how Suarez Trucking's tender of the settlement check with the workers' compensation carrier named as a payee could be a breach—much less a material breach—of the settlement agreement. The tender of the check in that form simply acknowledged binding legal obligations that the parties to the settlement necessarily understood to exist and that they were expressly committed to honoring.

The autonomy of contracting parties is not compromised by the presumption that the contractual obligations they undertake are informed by and subject to legal obligations arising from the laws that exist when the contract is entered. And it is hard to fathom how a breach of contract can arise from action by a party—similar to the action by Suarez Trucking here—to require that the performance of contractual obligations be in harmony with such laws.

POLSTON, J., concurs.

LABARGA, J., dissenting.

I agree with the majority that the Second District improperly applied the "mirror image" rule in determining the enforceability of the settlement agreement in this case. However, I ultimately agree with the district court that the parties' failure to reach a meeting of the minds as to a material term rendered the settlement agreement unenforceable. Consequently, I dissent.

Relying on a terse application of section 768.79, Florida Statutes (2014), and Florida Rule of Civil Procedure 1.442, the majority concludes that petitioner Suarez Trucking (Suarez) and respondent Souders formed a binding settlement agreement. Section 768.79 and rule 1.442 contain the requirements for court approval and enforcement of a settlement agreement, but neither specifies the requirements for formation of the settlement agreement itself. A court's authority to ratify a settlement agreement and enter a judgment accordingly is distinct from the formation of the settlement agreement. *See Wright v. Caruana*, 640 So. 2d 197, 198 (Fla. 3d DCA 1994) ("[Section 768.79(1)] does not prevent an offeree from actually accepting an untimely offer and avoiding trial; it merely prevents the offer from later serving as the

basis for an award of costs and attorney's fees under the statute."); *Gallagher v. Dupont*, 918 So. 2d 342, 347 (Fla. 5th DCA 2005) ("A consent judgment is a judicially approved contract . . . ."); *Mady v. DaimlerChrysler Corp.*, 59 So. 3d 1129, 1133 (Fla. 2011) ("A resolution reached pursuant to the *offer of judgment* statute, as opposed to an extrajudicial settlement agreement that is not subject to judicial enforcement bears the imprimatur of a court. . . ."). The former is governed by the statute and rule, and the latter is governed by general contract law.

Even though the parties may have adhered to the procedural requirements set forth in section 768.79 and rule 1.442, that is only part of the analysis. The parties' adherence to those requirements is—and must be—secondary to whether a valid settlement agreement exists.

A settlement agreement, like all other contracts, is formed when there is mutual assent and a meeting of the minds, which requires an offer and an acceptance supported by valid consideration. *See Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985); *Perkins v. Simmons*, 15 So. 2d 289, 290 (Fla. 1943); *see also Pena v. Fox*, 198 So. 3d 61, 63 (Fla. 2d DCA 2015). If an

offeree's acceptance deviates from an offer's essential terms, it is not an acceptance but is instead a counteroffer that rejects the original offer. *Strong & Trowbridge Co. v. H. Baars & Co.*, 54 So. 92, 93-94 (Fla. 1910); *see Breger v. Robshaw Custom Homes, Inc.*, 264 So. 3d 1147, 1150 (Fla. 5th DCA 2019). If the parties are still negotiating the essential terms of the contract, there is no meeting of the minds. *See Webster Lumber Co. v. Lincoln*, 115 So. 498 (Fla. 1927); *see also de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 681 (Fla. 1st DCA 2007).

Here, because there was no meeting of the minds as to all of the material terms, no settlement agreement was formed. In arriving at its conclusion that a valid contract was formed when Suarez filed a written notice accepting Souders' settlement offer, the majority glossed over a significant factual component that impeded such a conclusion under contract law: After Souders made his initial offer, Suarez's counsel contacted Souders' counsel and asked that the settlement agreement provide that the lien issued by the workers' compensation carrier (Guarantee Insurance Company) be paid from the proceeds of the settlement check. Souders

unequivocally refused the request.[2] Despite Souders's refusal, Suarez issued a settlement check that included Guarantee as a payee and filed a notice of acceptance with the court.[3]

In the context of contract negotiations, Suarez's request to include Guarantee on the settlement check constituted a counteroffer which voided the initial offer and was ultimately rejected by Souders. Thus, at the time the acceptance was filed, there was no meeting of the minds as to who would be paid—meaning that there was no binding settlement agreement. Even if the request were not a counteroffer, Souders' rejection and Suarez's subsequent inclusion of Guarantee as a payee evinces that the parties were still negotiating who to include as payee, and thus,

---

2. The inclusion of the worker's compensation carrier (Guarantee) as a payee on the settlement check would have required Souders to negotiate the amount of the lien with Guarantee before he could cash the settlement check—a step Souders clearly did not want to take at that time.

3. In the inverse situation, where the parties have not met the requirements of section 768.79 and rule 1.442, but have met the common law requirements for contract formation, the parties would be unable to exercise the benefits of the statute, but would still have an extrajudicial private settlement contract enforceable as a matter of contract law.

there was no meeting of the minds. Therefore, there was no contract formation.

In determining that the parties formed a binding settlement agreement upon Suarez's notice of acceptance, the majority notes that "[t]he [section 768.79 and rule 1.442] framework contemplates that a filed acceptance constitutes a promise to perform in accordance with the terms of the offer." Majority op. at 4. However, herein lies the problem in this case; there was no meeting of the minds as to a material term of the offer—whether Guarantee should be included as a payee on the settlement check. In short, the parties did not agree as to who should be included in the settlement check as a payee—a material term of the contract.[4] It would be a rare circumstance indeed where the identity of the payee or payees of a settlement check would not be considered a material term of

4. Although insurance carriers enjoy an automatic lien in a settlement with a third-party tortfeasor, the workers' compensation statute clearly contemplates further negotiations and proceedings in the execution of the lien. *See* §§ 440.39(a)-(b), Fla. Stat. (2014). By including Guarantee on the check, Suarez effectively created a de facto lien that could affect those negotiations. With these consequences in mind, the payee on the check should be considered a material term of the settlement agreement.

the settlement agreement, and without an agreement as to all of the material terms of the offer, there can be no valid acceptance or promise to perform in accordance with those terms. *See Suarez Trucking FL Corp. v. Souders*, 311 So. 3d 263, 269 ("[T]he provisions of section 768.79(4) . . . do not negate the fact that contract law governs settlement agreements") (citing *Lunas v. Cooperativa de Seguros Multiples de Puerto Rico*, 100 So. 3d 239, 241 (Fla. 2d DCA 2012)). Thus, reliance on the statute/rule framework to determine the enforceability of the parties' settlement agreement is not as "simple and straightforward" as the majority opinion suggests. Majority op. at 4.

Notwithstanding the majority's reliance on rule 1.442(f)(1), which provides that "[n]o oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule," that provision only applies to the court's authority to ratify and enforce the settlement agreement. Neither it nor section 768.79 alters the requirements for the valid formation of the settlement agreement:

> By conferring jurisdiction to enforce an agreement upon the trial court only after both an offer and acceptance have been filed with the court, the statute prevents the

> trial court from enforcing an agreement based only on a party's assertion that it accepted the offer. *The statute does not, however, require the trial court to enforce a contract simply because a written acceptance has been filed. The trial court must still evaluate that acceptance as evidencing a meeting of the parties' minds.*

Suarez, 311 So. 3d at 269 (emphasis added). Although this language was stated in the context of the Second District's erroneous "mirror image" rule analysis, the court's understanding of the statute is otherwise valid. Accordingly, rule 1.442(f)(1) does not restrict a court from considering the communications between Suarez and Souders in evaluating the enforceability of the settlement agreement. Here, the parties' communications illustrate that there was no meeting of the minds and no formation of a settlement agreement.

By prioritizing compliance with section 768.79 and rule 1.442 over the formation of a valid settlement agreement, the majority risks minimizing the safeguards of contract law in favor of a purely formalistic framework, and in turn, leaves open the possibility of the troublesome scenario set forth in the Second District's opinion:

> Holding that the trial court should have granted that motion would allow offerees to file boilerplate notices of acceptance and subsequently alter the required performance as they see fit. But an offeror who complies

> with the strict requirements of the statute and the rule concerning proposals for settlement and offers of judgment should not be bound to comply with the terms of an agreement unilaterally created by the offeree simply because the offeree first filed a boilerplate notice of acceptance. Such a result is untenable.

Suarez, 311 So. 3d at 271.[5]

For these reasons, I would hold that because there was no meeting of the minds as to all of the terms of the settlement agreement, and thus no contract formation, the settlement agreement was unenforceable.

I respectfully dissent.

Application for Review of the Decision of the District Court of Appeal
Direct Conflict of Decisions

Second District - Case No. 2D19-572

(Hillsborough County)

Kansas R. Gooden of Boyd & Jenerette, Miami, Florida, and Stuart J. Freeman of Freeman, Goldis & Cash, PA, St. Petersburg, Florida,

for Petitioner Suarez Trucking Fl Corp

Daniel A. Martinez and Jennifer C. Worden of Segundo Law Group, St. Petersburg, Florida,

---

5. This risk is especially relevant here, where the record reveals that after the offer and before acceptance, the parties disagreed as to whether the settlement agreement should include satisfaction of Guarantee's lien from the settlement check.

for Petitioner Progressive Express Insurance Company

Joel D. Eaton of Podhurst Orseck, P.A., Miami, Florida, and Chris M. Kavouklis of Brennan, Holden & Kavouklis, P.A., Tampa, Florida,

for Respondents

Thomas L. Hunker and V. Ashley Paxton of Hunker Appeals, Fort Lauderdale, Florida, and Elaine D. Walter of Boyd Richards Parker & Colonnelli, P.L., Miami, Florida,

for Amicus Curiae Florida Defense Lawyers Association

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3574

GATE VENTURE, LLC,

Appellant,

v.

ARTHUR CHESTER SKINNER, III, as Trustee of the Arthur Chester Skinner, III, Revocable Living Trust dated February 10, 1984, DAVID GODFREY SKINNER, as Trustee of the David Godfrey Skinner Revocable Living Trust dated March 12, 1986, KATHERINE SKINNER NEWTON, as Trustee of the Katherine Skinner Newton Living Trust Agreement dated March 31, 1987, CHRISTOPHER FORREST SKINNER, as Trustee Of the Christopher Forrest Skinner Revocable Living Trust dated November 28, 1989, LANNY S. THOMAS, as Trustee of the Susan Skinner Thomas Revocable Living Trust Dated August 11, 1985, PATRICIA SKINNER CAMPBELL, as Co-Trustee of the Patricia Skinner Campbell Revocable Trust Dated October 24, 2002, CHARLES BRIGHTMAN SKINNER, JR., as Trustee of the Charles

Brightman Skinner, Jr., Living Trust dated September 2, 2003, RANDALL THOMAS SKINNER, LESLIE JONES, as personal Representative of the Estate of Jan Malcolm Jones, Jr., EDWARD SKINNER JONES, as Trustee of the Edward Skinner Jones Revocable Trust dated January 31, 1989, and VIRGINIA JONES CHAREST, as Trustee of the Virginia Skinner Jones Living Trust dated September 16, 1998,

Appellees.

On appeal from the Circuit Court for Duval County.
Eric C. Roberson, Judge.

October 19, 2022

LEWIS, J.

Appellant, Gate Venture, LLC, appeals the dismissal of its Second Amended Complaint ("complaint") with prejudice. Appellant argues that because it sufficiently stated a cause of action for the removal of deed restrictions on the property at issue, the trial court erred in dismissing its complaint. For the following reasons, we agree and, therefore, reverse the dismissal order. Given our disposition, we need not address Appellant's alternative contention that the dismissal should have been without prejudice.

Factual Background

In its complaint against Appellees, Appellant alleged in part:

1. On February 5, 2007, Defendants [Appellees] conveyed to Gateway Professional Campus, LLC ("Gateway") . . .

approximately 15.46 acres of property . . . (the "Property") pursuant to a warranty deed . . . .

. . . .

4. The Defendants and Gateway agreed upon certain restrictions relating to the use and development of the Property . . . .

5. Among other limitations, the Restrictions limited the development of the Property "solely for all office uses permitted by law, including, but not limited to, general office, professional office and medical office (including surgery centers but not walk-in clinics)."

. . . .

15. At the time that the First Deed was executed, Defendants owned almost all of the non-residential property adjacent to or nearby the Property.

16. At the time that the First Deed was executed and recorded, the Property was zoned PUD [Planned Unit Development] pursuant to Ordinance 2006-1204, City of Jacksonville (the "Original PUD").

. . . .

18. The Original PUD designated approximately 13.33 acres south of the Property as "Parcel B."

19. The Original PUD allowed commercial sales and services uses on Parcel B.

20. In case number 2010-CA-011743, filed in the Circuit Court in and for Duval County, Florida, title to the Property was conveyed pursuant to a Certificate of Title to Space Coast Credit Union . . . .

. . . .

22. Subsequent to taking ownership of the Property, Space Coast sought and obtained [in 2015] an amendment to the zoning of the Property pursuant to 2015-0240 (the "Revised PUD"). . . .

23. As owners of property within three hundred and fifty (350) feet of the Property at the time, Defendants received notice of the rezoning.

24. Upon information and belief, the Defendants did not object to the Revised PUD.

25. The Revised PUD approves a development plan that would not be allowed if the Restrictions controlled.

26. Specifically, the Revised PUD:

> a. allows a total building area of 180,000 square feet
>
> b. increased the allowed height of buildings on the Property to fifty (50) feet; and
>
> c. changed the site plan as compared with the original PUD

27. Subsequent to the approval of the Revised PUD, Space Coast conveyed the Property to Gate Venture [Appellant] [on March 21, 2018] pursuant to that special warranty deed . . . .

28. The Gate Venture Deed makes no reference to the Restrictions.

29. The Property is designated as Residential Professional Institutional Category ("RPI") on the Future Land Use Map in the City of Jacksonville Comprehensive Plan.

30. At the time that the First Deed was recorded, all of the non-residential property near the Property was also designated RPI.

31. At the time that the Original PUD was approved, the Property and Parcel B were designated RPI.

32. The RPI category limits commercial retail sales and service establishments to fifty percent (50%) of an area.

33. Approximately 29.39 acres of the property surrounding the Property has been changed on the Future Land Use Map to Community General Commercial ("CGC").

34. The CGC category has no limit on the amount of commercial retail sales and service establishments within an area.

35. Since the Property was conveyed to [Appellant], Parcel B has changed from RPI to CGC on the Future Land Use Map.

36. Defendants authorized the change of Parcel B to CGC.

37. Since the Property was conveyed to [Appellant], the property to the north of the Property (the "North Property") has changed from RPI to CGC on the Future Land Use Map.

38. Defendants authorized the change of the North Property to CGC.

39. Since the Property was conveyed to [Appellant], the North Property has been entitled by the City of Jacksonville for commercial retail sales and services pursuant to a planned unit development zoning.

40. Defendants authorized the rezoning of the North Property for commercial retail sales and services.

41. Since the Property was conveyed to [Appellant], Parcel B has been entitled by the City of Jacksonville for expanded commercial retail sales and services pursuant to a planned unit development zoning.

42. Defendants authorized the rezoning of Parcel B for expanded commercial retail sales and services.

43. Defendants no longer own any property adjacent to or nearby the Property.

44. A representative for Defendants informed [Appellant] that Defendants believe the Restrictions apply to [Appellant's] use of the Property, and the Defendants would agree to remove the Restrictions in exchange for six million dollars . . . .

45. Moreover, after [Appellant] acquired the Property, an international pandemic known as COVID-19 spread across the country.

46. One of the largest adverse economic impacts of COVID-19 is on office space.

. . . .

53. On February 2, 2021, [Appellant] notified the Defendants' representative of its desire to develop the Property as a multi-family community and that this development would compliment, and not compete with, the uses of the properties that are surrounding the Property, and on February 23 2021, followed up the request with a copy of the site plan . . . .

54. On March 8 2021, the Defendants' representative, notified [Appellant] that the Request for Multi-Family Community Development was "met with opposition" and could not be accommodated . . . .

In its declaratory judgment count, Appellant alleged in part:

> 64. Moreover, as Defendants have since conveyed their interest in all properties adjacent to or nearby the Property, the Restrictions provide no benefit to Defendants.
>
> 65. As the Restrictions are not part of a common scheme to development, the Restrictions provide no benefit to property owners adjacent to or nearby the property.
>
> 66. Further, Gate Venture's intended use of the Property for multi-family community development will compliment, and not compete with, the uses of the properties that are surrounding the Property.
>
> 67. Since the Restrictions were recorded, circumstances in the area surrounding the Property have substantially changed.
>
> 68. Defendants have acquiesced to changes of the zoning of the Property which conflict with the Restrictions.
>
> 69. The material changes in character of the area in which the Property is located frustrate the objective(s) of the Restrictions.
>
> 70. There is no property which serves as dominant property with respect to the Restrictions.
>
> 71. The Restrictions are an unlawful restraint on free and fair use of the Property.
>
> 72. The Restrictions serve no purpose or provide any benefit to any party.
>
> 73. The Restrictions are of no actual or substantial benefit to Defendants and Defendants would sustain no harm if the Restrictions were extinguished.

> 74. Defendants have already demonstrated that the Restrictions serve no beneficial purpose to any other property in the area when Defendants offered to remove or revise the Restrictions in exchange for substantial monetary consideration, even though the Restrictions expressly state that the Defendants' "approval or disapproval shall not be unreasonably withheld or delayed or based upon monetary consideration therefor."
>
> . . . .
>
> 75. Moreover, as a result of COVID-19 and What Business Owners Learned, the Restrictions do not permit the Property to be developed in an economically feasible manner, or in a manner that would benefit the Property or adjacent and nearby properties.

Appellant sought a judgment declaring, among other things, that the original purpose and intent of the restrictions were frustrated by the subsequent material changes in the area and requested that the trial court remove and extinguish them.

Appellees moved to dismiss the complaint on the basis that none of the alleged changes prevented Appellant from following the restrictions and carrying out the intent behind them. During the hearing on the motion, the trial court stated in part:

> Everything I'm hearing is it's now more financially advantageous to go to multifamily.
>
> I – frankly, it frightens me that there's some argument that a court might be able to come in here and say, well, I just don't think that's right anymore and strip, you know, real estate restrictions and really just use my magic wand to say what's the best use of the property. I mean, that frightens me to no end.
>
> And then to say COVID can undo every contract for anything because it's a changed circumstance, I'm not there either.

Appellant's counsel explained that he was not asking the court to wave a magic wand, but was "saying the original intent of this restriction was because of the original RPI and future land use map designation [a]nd once that was changed by [Appellees], the purpose for the restriction went away." After the trial court asked what the "road map for all the discovery" was and noted that it did not "hear many factual disputes," Appellant's counsel asserted, "We need to know the original purpose. We need to have an understanding whether that original purpose makes sense in light of the zoning, both at the time the restriction was recorded and the time after."

The trial court ruled as follows:

> I don't blame [Appellant] at all for trying to maximize the monetary benefit of the property, but it's – I have tried to fathom every single route to get there, and it's just not there.
>
> The restriction is clear. It's – this is not – I'd be astonished if it was the rule and the law that in a limitation or a deed restriction like this, that we get to go try to go look for a subjective intent, which really is what [Appellant] is advocating for.
>
> It is clear from the face of the deed restriction what the restriction is and what its purpose is. And I can't see any circumstance other than ignoring reality and what is just plain and obvious to anybody who knows that area, whether, you know, there is some benefit or some purpose or some reason, or whatever you want to call it, to saying it can only be office space over there.
>
> And changing economic circumstances in the pandemic, I – if that works, then basically every contract could be unwound in a heartbeat. So I don't see where there's any viable cause of action here where an amendment would serve any purposes whatsoever, because in the end, it's – and I don't blame them. . . .

> What we're asking for – or what [Appellant] is asking for is the Court to come in, more in equity than anything legal, to take that restriction out because it would be more financially advantageous.
>
> And for that reason, rather than going through – I still don't know the exact scope of what discovery would be required to resolve the – at least questions, because I, frankly – I just – I'm not seeing factual disputes here. I'm seeing changed circumstances that now make it much more lucrative to be multifamily than office.
>
> But I will put it in the position to be reviewed by the higher court. And I've said enough as far as what my reasonings are and how I got there.
>
> Again, there's zero blame. . . . They're trying to increase value. But that deed restriction, I don't see any scenario where a viable claim can be stated to get that deed restriction removed for office use only.
>
> I'll enter an order granting the motions to dismiss. I'll do it with prejudice . . . .

This appeal followed.

Analysis

In determining whether a complaint states a cause of action upon which relief can be granted, courts are confined to the four corners of the complaint and its attachments. *Banks v. Alachua Cnty. Sch. Bd.*, 275 So. 3d 214, 215 (Fla. 1st DCA 2019); *see also Jackson v. Sch. Bd. of Okaloosa Cnty.*, 326 So. 3d 722, 725 (Fla. 1st DCA 2021) (noting that in reviewing a trial court's ruling on a motion to dismiss, an appellate court must accept as true a complaint's well-pleaded factual allegations and must draw all reasonable inferences from the allegations in the plaintiff's favor); *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 600 (Fla. 1st DCA 2013) (noting that courts must confine themselves to the allegations contained in the complaint and must not speculate as to what the "true facts may be or what facts will be ultimately

proved in the trial of the cause"). Whether a plaintiff will be able to produce sufficient evidence in a hearing on the merits is irrelevant in ruling on a motion to dismiss. *Id.* On appeal, the question of whether a plaintiff's complaint sufficiently states a cause of action is a question of law that is reviewable de novo. *Malden v. Chase Home Fin., LLC,* 312 So. 3d 553, 554 (Fla. 1st DCA 2021).

Our analysis begins with an examination of Florida's controlling precedent on the test to be applied when a party seeks the removal or cancellation of deed restrictions. In *Allen v. Avondale Co.*, 185 So. 137, 138 (Fla. 1938), the Florida Supreme Court explained, "This Court has repeatedly held that a change in the circumstances and the neighborhood materially affecting the lands will warrant the granting of relief from restrictive covenants . . . ." Later, in *Wahrendorff v. Moore*, 93 So. 2d 720, 722 (Fla. 1957) (en banc), the supreme court set forth:

> We come to the second point as to whether there was an adequate showing of changed conditions that would justify cancelling these contractual restrictive covenants. In *Dade County v. Thompson*, 146 Fla. 66, 200 So. 212, we held in substance that to justify the removal of restrictive covenants such as those before us, it must be alleged and proved that conditions and circumstances existing at the time the restrictions were placed on the land have changed to the extent that the effect of the covenants has been brought to nought. We there stated that the test to be applied is whether or not the original intent of the parties to the restrictive covenants can be reasonably carried out or whether the changed conditions are such as to make ineffective the original purpose of the restrictions. . . .

Our Court affirmed the removal of restrictions in *Crissman v. Dedakis*, 330 So. 2d 103 (Fla. 1st DCA 1976). The trial court there removed restrictions after finding that although there had been no changes in the conditions within the subdivision at issue that materially affected it, "r[a]dical changes" had occurred outside the subdivision in the general area and in close proximity "which were sufficient to neutralize the protection of the restrictive covenants."

Id. at 103. We found the evidence "more than ample" to support the trial court's findings, and we agreed that in order to warrant the granting of relief from restrictive covenants, it is only necessary that the change in circumstances materially affecting the lands for which relief is sought be in the immediate neighborhood of those lands, but not necessarily within the same subdivision. *Id.*; *see also Dozier v. Wood*, 431 So. 2d 184, 186 (Fla. 1st DCA 1983) ("[T]he party seeking relief from the restrictions must show, and the court must find, that *material* changes have occurred which so frustrate the object of the restriction that the original purpose and intent of the grantor cannot be reasonably carried out.").

In *Marco Island Civic Association, Inc. v. Mazzini*, 881 So. 2d 99, 103 (Fla. 2d DCA 2004), the Second District reversed a trial court's cancellation of deed restrictions based upon its determination that the evidence was legally insufficient for the trial court to conclude that enforcement of the deed restrictions would no longer substantially benefit the dominant estate. The Second District referenced its prior decision in *AC Associates v. First National Bank*, 453 So. 2d 1121, 1127 (Fla. 2d DCA 1984), and its declaration that in an action to cancel a restrictive covenant, the test is "whether or not the covenant is valid on the basis that the intention of the parties can be carried out despite alleged materially changed conditions or, on the other hand, whether the covenant is invalid because changed conditions have frustrated the object of the covenant without fault or neglect on the part of the party who seeks to be relieved from the restrictions." *Id.*

Appellant argues that the trial court refused to recognize a cause of action for the removal of deed restrictions. Indeed, the trial court's characterization of Appellant's desire for it to use its magic wand to say what the best use of the property is supports this argument. The same can be said of the court's statement that it would "be astounded if it was the rule and the law that in a limitation or a deed restriction like this, that we get to go try to go look for a subjective intent." On appeal, Appellees acknowledge *Wahrendorff's* test for the removal of restrictive covenants or deed restrictions. They also acknowledge that Appellant "alleged several reasons why it contends that changed circumstances no

longer justify the [r]estrictions." They assert, however, that because Appellant is not prevented from abiding by the restrictions as a result of the change in circumstances, it failed to state a cause of action for their removal. In support of their prevention argument, Appellees cite *Essenson v. Polo Club Associates,* 688 So. 2d 981 (Fla. 2d DCA 1997) and *Victorville West Limited Partnership v. Inverrary Association, Inc.*, 226 So. 3d 888 (Fla. 4th DCA 2017). Yet, neither opinion states that a party must be prevented from adhering to a restrictive covenant in order for the party to seek the removal or cancellation of such. In *Essenson*, the Second District reversed a summary judgment in part on the basis that the covenant at issue continued to provide benefits to the dominant estate. 688 So. 2d at 984. Similarly, in *Victorville West Limited Partnership*, the Fourth District focused on the restrictive covenant's benefit to the dominant estate when reviewing the trial court's determination that the covenant could not be cancelled. 226 So. 3d at 891.

In this case, Appellant alleged that the restrictions provide no benefit to current adjacent or nearby property owners or to Appellees given that they conveyed their interest in those properties. Appellant also alleged "material" and "substantial" changes in its complaint, including zoning changes and the decreased need for more office space in the area. The trial court focused heavily on what it considered to be Appellant's financial motivation in seeking the removal of the restrictions. Clearly, whether some use of a party's property is the highest and best use "is not the correct test in determining continued validity of restrictive covenants." *See Acopian v. Haley*, 387 So. 2d 999, 1002 (Fla. 5th DCA 1980). Had Appellant alleged only that the restrictions should be removed because it would be more financially advantageous for it to develop the property as a multi-family community, the trial court's focus may have been appropriate. As the complaint stands, however, the court's focus at this stage of the proceedings should have been on whether Appellant sufficiently alleged that a change in circumstances made the original purpose of the restrictions ineffective. We believe Appellant satisfied that test.

Appellant is also correct when it argues that the trial court improperly focused on the merits of the action rather than on its

allegations. At one point, the court said, "I'm not seeing factual disputes here." Yet, the case was not before the court on a summary judgment motion. *See Carolina Cas. Ins. Co. v. Spicer*, 323 So. 3d 350, 352 (Fla. 1st DCA 2021) (noting that summary judgment is appropriate when the material facts are not in dispute and only legal questions remain). At another point, the court found that it was "plain and obvious to anybody who knows that area . . . there is some benefit or some purpose or some reason, or whatever you want to call it, to saying it can only be office space over there." Be that as it may, the purpose behind the restrictions permitting only office space on the property is the crux of the case and should not have been determined at the motion-to-dismiss stage. *See Bohatka*, 112 So. 3d at 600 (noting that the sufficiency of the evidence is irrelevant in ruling on a motion to dismiss).

For these reasons, we agree with Appellant that the trial court erred in dismissing its complaint and reverse the order of dismissal.

REVERSED.

MAKAR and BILBREY, JJ., concur.

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

Richard R. Thames of Thames Markey, Jacksonville; S. Hunter Malin of Hunter Malin Law, P.A., Jacksonville, for Appellant.

Cristine M. Russell and Scott J. Kennelly of Rogers Towers, P.A., Jacksonville for Appellees Arthur Chester Skinner, III, David Godfrey Skinner, Katherine Skinner Newton, Christopher Forrest Skinner, Patricia Skinner Campbell, Randall Thomas Skinner, Leslie Jones, Edward Skinner Jones, and Virginia Jones Charest.

Daniel Nordby and Eric Yesner of Shutts & Bowen LLP, Tallahassee; Tirso Carreja and S. Elizabeth King of Shutts & Bowen LLP, Tampa, for Appellees Lanny S. Thomas and Charles Brightman Skinner, Jr.

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

WILLIAM A. HOHNS, MARCELLUS RAMBO BENSON, JR., KATHLENE HOHNS, JORDAN J. REARDON, PATRICK HOHNS, AND MARK F. BERNARD,

Appellants,

v.

Case No. 5D21-3143
LT Case No. 05-2016-CA-021071-X

JOE LEE THOMPSON,

Appellee.

_____/

Opinion filed October 14, 2022

Appeal from the Circuit Court
for Brevard County,
Curt Jacobus, Judge.

Mayanne Downs, Jason Alec Zimmerman, Jeff Aaron, of GrayRobinson, P.A., Orlando, and Ted Craig, of GrayRobinson, P.A., Miami, for Appellants.

Michael R. Riemenschneider and Jeffrey L. DeRosier, of Riemenschneider, Wattwood &

DeRosier, P.A., Melbourne, for Appellee.

SASSO, J.

William A. Hohns, Marcellus Rambo Benson, Jr., Kathlene Hohns, Jordan J. Reardon, Patrick Hohns, and Mark F. Bernard (collectively "the Toyosity defendants") appeal the order granting summary judgment in favor Joe Lee Thompson ("Thompson"). The Toyosity defendants present several arguments on appeal, including that the trial court erred in applying a nonexistent requirement for enforcement of a promissory note between William A. Hohns and Thompson. As explained below, we agree with the Toyosity defendants on this point and find it dispositive. As a result, we reverse the judgment in favor of Thompson and remand for entry of final judgment in favor of the Toyosity defendants.

BACKGROUND AND FACTS

In February 2013, Thompson and William A. Hohns ("Hohns") formed Toyosity, LLC to manufacture, market, and sell a toy invented and patented by Thompson called the Surfer Dude ("the toy"). The following month, Thompson and Hohns executed the Toyosity Operating Agreement, which provided they were equal members of the company and required Thompson to assign the patents and the intellectual property to Toyosity.

A few months after forming the company, Thompson was injured and unable to work. As a result, Hohns agreed to loan Thompson $50,000. To memorialize the agreement, the parties executed a promissory note, secured by Thompson's interest in Toyosity. Under the terms of the note, Hohns was to provide Thompson $5,000 per month, from June 3, 2013, until March 3, 2014, and Thompson was required to repay in full by December 31, 2014. As to the possibility of default, the note provided, in pertinent part:

> In the event *Borrower* shall fail to pay the aggregate principal balance remaining together with all interest due on or before December 31, 2014, *Borrower* will promptly, with an effective date no later than December 31, 2014, transfer to *Holder* that portion of *Borrower's* equity interests in Toyosity, LLC . . . .
>
> *Borrower* hereby authorizes *Holder* to effect any such transfer of *Borrower's* equity interests in Toyosity, LLC, as determined in accordance with this *Note*, on the books and records of Toyosity, LLC, on or after December 31, 2014, without any further action on the part of *Borrower*. *Borrower* waives any requirement of notice setting forth, or presentment of notice of, any default to so effect, such transfer, either contemplated or as transferred, be provided to *Borrower*.

On July 1, 2013, Marcellus Rambo Benson, Jr. ("Benson"), joined Toyosity, obtaining a 5% interest in the company. Benson's ownership in Toyosity diluted both Thompson's and Hohns' interests in Toyosity to 47.5% each. With Hohns and Benson together having a majority share, they voted Thompson off as a managing member of the Board. Then, as the sole manager, Hohns initiated a capital call of $425,000. The capital call required

Thompson to pay $201,875, which he did not pay. Hohns ultimately paid Thompson's share of the money, and he converted the loan to a capital contribution, thus divesting Thompson of substantially all of his ownership interest in the company, leaving him with approximately 4%. Thereafter, Thompson began engaging in what the Toyosity defendants characterized as "a series of detrimental acts intended to disparage Toyosity."

These events—the addition of Benson as a managing member and Thompson's actions purportedly disparaging Toyosity—led to two relevant lawsuits.

Orange County Case

First, and in April 2014, Toyosity filed a complaint against Thompson in the circuit court in and for Orange County for temporary and permanent injunctive relief based on Thompson's actions. During the pendency of litigation, and on December 31, 2014, Thompson defaulted on the note. During a two-day trial that followed, Toyosity introduced evidence to support its request for injunctive relief as well as evidence regarding the note and Thompson's default. Specifically regarding the note, Hohns testified about the terms of the note, that Thompson collateralized 100% of his interest in Toyosity, that Thompson did not repay any part of the loan, and that Thompson no longer held any membership interest in the company.

The following day, while Thompson was presenting his evidence, he acknowledged on the stand that he had accepted all of the $5,000 payments from Hohns pursuant to the note but he did not make any payments under the note. After the trial, the Orange County court entered its final judgment of injunction ("Orange County final judgment"). Within that order, the court found "Thompson's failure to repay the note on maturity resulted in the loss of his interest in Toyosity" and that, as a result of the breach, "his interest in Toyosity was properly transferred to Hohns in accordance with the Promissory Note." The final judgment further determined that because of the valid and enforceable assignment of Thompson's intellectual property rights in the toy to Toyosity, "Thompson does not have any interest in the intellectual property rights in the Surfer Dudes toy, including its protected trademark and trade dress." Thompson did not appeal the Orange County final judgment.

Brevard County Case

Undeterred, Thompson next filed suit in circuit court in and for Brevard County in April 2016, which gives rise to this appeal. The operative complaint seeks one count of declaratory relief and one count of "relief pursuant to paragraph 6.8 of the operating agreement." Both counts rest on the allegation that Thompson was unlawfully divested of his interest in Toyosity.

Ultimately, the parties filed competing summary judgment motions. Thompson argued the transfer of 5% interest to Benson and the capital call were done in violation of the Operating Agreement and were null and void. He alleged those actions made it "untenable" to pay the note. Thompson's prayer for relief included a request for a declaration that he is a fifty-percent owner in Toyosity, along with associated fees and costs.

By contrast, the Toyosity defendants argued that they were entitled to summary judgment for several reasons, including that Thompson's claims were barred by the doctrines of collateral estoppel and res judicata, that he lacked standing to bring the claim, and, regardless and separately, that summary judgment was appropriate as a matter of law because Thompson was no longer a member of Toyosity due to his default on the note.

At the hearings on the parties' motions for summary judgment, the trial court presented a question unraised and unaddressed by the parties' pleadings: whether Hohns had filed a lawsuit as a result of Thompson's failure to pay the note. Counsel for the Toyosity defendants explained that Hohns had filed no such suit, and after answering additional questions, the hearing proceeded.

Following the hearings, the trial court entered an order on the competing motions for summary judgment. The trial court found Hohns

violated the terms of the Operating Agreement with the transfer of ownership interest to Benson and with the capital call, concluding both actions were null and void. Regarding the note, the trial court determined the undisputed facts established that Thompson was required to repay the note on December 31, 2014, and had failed to do so. Nonetheless, the court ultimately determined that Thompson retained a 50% interest in Toyosity, reasoning that a note has a five-year statute of limitations, that Hohns had until December 31, 2019, to bring an action on the note, and that Hohns had failed to do so. As a result, the trial court entered a final judgment granting Thompson's motion for summary judgment and denying the Toyosity defendants' motion for summary judgment.

On rehearing, the Toyosity defendants challenged, inter alia, the court's determination that Thompson retained his interest in Toyosity due to Hohns' failure to file a lawsuit on the note. In support, the Toyosity defendants explained that the plain language of the note provides the mechanism by which Thompson's interest was transferred to Hohns. The Toyosity defendants further emphasized that section 679.609(1)(a), Florida Statutes, supports that transfer, as that section provides that a secured party may take possession of collateral without judicial process if it proceeds

without breach of the peace. The motion was denied in an unelaborated order, and this appeal followed.

STANDARD OF REVIEW

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." *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1134 (Fla. 4th DCA 2022). "In applying the amended rule [1.510, Florida Rule of Civil Procedure (2021)], 'the correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (citation omitted). We review the order de novo. *Fernandez v. Cruz*, 341 So. 3d 410, 412 (Fla. 3d DCA 2022).

ANALYSIS

While the Toyosity defendants argue the trial court erred in several respects, we find it necessary to address only one: the trial court erred in granting summary judgment in favor of Thompson because it incorrectly determined that Thompson retained his interest in Toyosity due to Hohns' failure to file a lawsuit enforcing the note. To the contrary, long-standing Florida law as applied to the undisputed facts presented in the Brevard

County case demonstrate that Thompson had been divested of his interest in Toyosity by virtue of his default under the note.

Section 679.609, Florida Statutes, provides that, after default, a secured party may take possession of the collateral without judicial process "if it proceeds without breach of the peace." § 679.609(1)(a), (2)(b), Fla. Stat. Section 679.610 then provides for the disposition of collateral after default, providing a party "may" sell, lease, license, or otherwise dispose of the collateral. Alternatively, a secured party in possession of the debtor's collateral may, after default, propose to retain the collateral in satisfaction of the obligation. *See* § 679.620(1), Fla. Stat. Together, these statutory provisions empower secured creditors to take possession of collateral after a debtor's default without the necessity of filing suit. *See Spellman v. Indep. Bankers' Bank of Fla.*, 161 So. 3d 505, 507 (Fla. 5th DCA 2014) (noting that "a secured creditor's transfer of collateral, such as stock, to the creditor itself, does not constitute a disposition"). This privilege to "self-help repossession" existed in Florida long before statutes were enacted to regulate it. *See, e.g.*, *Northside Motors of Fla., Inc. v. Brinkley*, 282 So. 2d 617 (Fla. 1973).

The implication of the statutory language is clear—Hohns was not required to file a lawsuit in order to enforce the note. Despite the Toyosity

defendants bringing this to the trial court's attention at the first opportunity,[1] the trial court denied the Toyosity defendants' motion for summary judgment and granted Thompson's, finding the lack of a lawsuit meant Thompson's interest did not transfer and the statute of limitations had run for Hohns to do so. This was error.

The plain language of the note undermines the trial court's determination as well. Under the terms of the note, the parties agreed to the transfer of Thompson's ownership interest without court intervention, should Thompson default, and Thompson ultimately defaulted during the pendency of the Orange County case. And at all times in the Brevard County case, the Toyosity defendants contended Thompson's interest transferred to Hohns. Thompson has never disputed that fact.[2] He did not raise it as an issue in his

[1] We therefore reject Thompson's argument that this issue is unpreserved for appellate review. Because the trial court injected this issue, sua sponte, the first opportunity for the Toyosity defendants to address the argument was in their motion for rehearing. Having done so, they properly preserved the argument for review. *See Smith v. Smith*, 273 So. 3d 1168, 1171 (Fla. 1st DCA 2019) ("[W]here an error by the court appears for the first time on the face of a final order, a party must alert the court of the error via motion for rehearing or some other appropriate motion in order to preserve it for appeal.").

[2] Instead, Thompson's own affidavit stated that rather than repay the note, he instituted legal action to "recover [his] ownership interest" and argued if "he had not been illegally diluted to near nothing, he was ready, willing and able to pay the money he owed to Hohns."

operative complaint, nor did he raise it in his response to the Toyosity defendants' motion for summary judgment, which stated: "As evidenced by the statements of undisputed material facts in [Thompson's] cross-motion for summary judgment, there is simply no dispute regarding the dispositive issue in this case—[Thompson] lost his interest in the company on December 31, 2014, when he defaulted on a note."

Thompson's attempts to challenge the undisputed nature of the transfer of his interest in his answer brief and during oral argument fall short. The issue presented in this appeal is whether the trial court erred in denying the Toyosity defendants' motion for summary judgment and entering judgment in favor of Thompson. In the proceedings below, Thompson did not seek any relief or a determination under the note. By contrast, the Toyosity defendants affirmatively sought summary judgment on the basis that Thompson's interest transferred after the default, which Thompson did not dispute. With this material fact undisputed, the Toyosity defendant's motion was properly supported. If Thompson believed there was a material issue of fact precluding summary judgment on that issue, it was his obligation to demonstrate that, such as by submitting evidence of the type that he now argues is lacking on appeal. *See* Fla. R. Civ. Pro. 1.510(c) (2021) (delineating procedure by which a party asserting that a fact cannot be or is

genuinely disputed must support the assertion); *see also Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fid. Life Ins. Co.*, 958 F.2d 836, 838 (8th Cir.1992) ("[T]he [non-movant] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986))).

In sum, the undisputed facts establish that Hohns was entitled, both under the statute and under the terms of the note, to take possession of Thompson's interest after the default. It was error for the court to conclude a lawsuit was required. And because the issue was not disputed by Thompson, the court should have granted summary judgment in favor of the Toyosity defendants. As a result, we reverse the judgment in favor of Thompson and remand for entry of final judgment in favor of the Toyosity defendants. *See Principal Life Ins. Co. v. Halstead*, 310 So. 3d 500, 504 (Fla. 5th DCA 2020).

REVERSED and REMANDED with instructions.

WALLIS and EDWARDS, JJ., concur.