Third District Court of Appeal

State of Florida

Opinion filed March 22, 2023.
Not final until disposition of timely filed motion for rehearing.

No. 3D22-181
Lower Tribunal No. 17-22854

Florida Power & Light Company,
Appellant,

vs.

Heydi Velez, et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Squire Patton Boggs (US), LLP, Alvin B. Davis and Digna B. French; Joseph Ianno, Jr. (Juno Beach); Boies, Schiller & Flexner, LLP, Stuart H. Singer, Sashi C. Bach, and Pascual Oliu (Ft. Lauderdale), for appellant.

Armas Bertran Zincone and J. Alfredo Armas; MSP Recovery Law Firm, John H. Ruiz and Alexis Fernandez; Acosta Law Firm, Julio C. Acosta and Simeon Genadiev; Dorta Law and Gonzalo R. Dorta, for appellees.

Before FERNANDEZ, C.J., and LINDSEY, and HENDON, JJ.

FERNANDEZ, C.J.

Florida Power & Light Company ("FPL") appeals the trial court's non-final order certifying a class of FPL customers who sued FPL for breach of contract and gross negligence after Hurricane Irma. Because the trial court correctly determined that plaintiffs satisfied the elements necessary to establish class treatment of their claims against FPL under Florida Rule of Civil Procedure 1.220(b)(3), we affirm.

FACTS AND PROCEDURAL BACKGROUND

In 2005, FPL filed a base rate proceeding before the Public Service Commission ("PSC"). The parties reached a Settlement Agreement whereby FPL would be allowed to recover storm restoration costs and replenish its Storm-Recovery Reserve through the monthly storm surcharge.

Thereafter, FPL customers were affected by Hurricanes Dennis, Katrina, Rita, and Wilma. FPL petitioned the PSC to approve the issuance of storm recovery bonds pursuant to section 366.8260, Florida Statutes (2005). The bonds would allow FPL to recover over $213 million and $815 million for 2004 and 2005 storm costs; replenish its storm-recovery reserve to a level of approximately $650 million; and recover interest incurred through the bond issuance date and bond issuance costs of $23 million. As a result of the bonds, FPL customers would have to pay a monthly storm

surcharge. In return, FPL was to improve and strengthen its facilities for future storms, remove decaying utility poles, and remove vegetation that was making contact with local power lines.

During hearings the PSC scheduled on the bond issue, FPL stated the storm charge would be used for, among other things, restoring FPL's facilities to their pre-storm condition; repairing and replacing poles that were leaning or were braced during the initial restoration stage; replacing lightning arrestors; repairing or replacing capacitor banks; and strengthening system infrastructure. FPL's Storm Secure Plan further would adopt the National Electric Safety Code ("NESC") to improve FPL's system infrastructure to withstand extreme wind conditions. The PSC approved the order and the issuance of the storm-recovery bonds in the amount up to $708 million.

Later, in 2012, FPL petitioned for a permanent increase in base rates and charges. It requested a base rate increase of $528 million. A Settlement Agreement was reached, and the PSC gave FPL a revenue increase of $378 million effective January 1, 2013.

In 2016, FPL requested another base rate increase. FPL's request was intended to "reduce outages and enable FPL to restore power for customers and help local communities recover more quickly when severe weather strikes." The PSC authorized a revenue increase of $400 million effective

January 1, 2017. Also in 2016, FPL filed a petition seeking to implement a storm surcharge to recover $318.5 million for Hurricane Matthew restoration costs and to replenish its Storm-Recovery Reserve. The PSC granted FPL's 2017 storm surcharge on each customer's monthly residential bill, beginning on March 1, 2017, which was to last for twelve months.

On March 15, 2016, FPL filed its petition with the PSC for approval of FPL's Storm Hardening Plan. FPL stated it would comply with NESC extreme wind loading ("EWL") standards by hardening its system so that it would withstand winds of 145, 130, and 105 mph in the three different wind regions of the state.

In September 2017, Hurricane Irma sideswiped Florida. Named class members Heydi Velez, Miriam Perez, Guillermo Patino-Hidalgo, Enrique Arguelles, Mercedes Sastre, Ruben N. Mendiola, Carlos M. Colina, Shalom Navarro, and Jose Zarruk (collectively, "plaintiffs") were FPL customers whose power went out for an extended period after Hurricane Irma. As customers, they entered into a contract with FPL, the Tariff, for electrical services that set out the parties' obligations. In the Tariff, FPL agreed to use "reasonable diligence at all times to provide continuous service and storm recovery activities."

During Hurricane Irma, the very highest sustained wind recorded by the National Weather Service was 115 mph in Marco Island where the storm first made land fall. The highest gust recorded was 142 mph near Naples Airport. Although Irma did not approach any county east of Lake Okeechobee, over 75% of FPL customers in South Florida lost power for close to a week. In the western half of South Florida, over 90% of FPL customers lost power for over a week.

On February 1, 2018, plaintiffs brought a class action lawsuit against FPL. They alleged one count for breach of contract seeking compensatory damages for FPL's failure to comply with its contractual obligations to use reasonable diligence at all times to provide continuous service in accordance with FPL's Tariff and industry standards. Plaintiffs alleged that each of the individual plaintiffs entered into a uniform contractual agreement with FPL for services (the Tariff), for which plaintiffs paid a monthly fee. They alleged each plaintiff was individually charged a surcharge for storm restoration and hardening activities, pursuant to section 366.8260, Florida Statutes (2017). Plaintiffs suffered consequential damages such as loss of food and incurred expenses, loss of income, loss of sleep, intense discomfort, and more.

The Tariff specifically stated that FPL "will use reasonable diligence at all times to provide continuous service at the agreed nominal voltage" and

storm recovery activities. Plaintiffs claim that FPL failed to use reasonable diligence by failing to meet NESC standards and its own standards, and that as a result of FPL's breaches, Florida residents suffered unnecessary and prolonged power outages from Hurricane Irma that sideswiped South Florida.

In Count II for gross negligence, plaintiffs claimed FPL "acted with reckless, willful, and wanton disregard for plaintiffs in the gross negligent maintenance and management of its system infrastructure, storm organization, restoration plan, and outright failure to restore, replace, and better the distribution system and hazards posed by vegetation and trees close to power lines." They alleged FPL became aware of this need after previous storms hit Florida and undertook a duty to strengthen its distribution system in anticipation of the next hurricane. Plaintiffs further alleged that FPL was grossly negligent in performing various actions such as in replacing outdated grids, decaying utility poles, and hardening its power grid after the prior storm; failing to clear vegetation from the vicinity of distribution facilities and equipment; failing to clear vegetation from all feeder circuits serving top critical infrastructures prior to the peak of hurricane season; and failing to replace defective equipment, including but limited to, company power poles, power lines, and transformers.

Thereafter, FPL moved to dismiss the action, which the trial court denied. FPL then petitioned this Court for a writ of prohibition to require the parties to take their dispute before the PSC. This Court denied the writ in Florida Power and Light Company v. Velez, 257 So. 3d 1176 (Fla. 3d DCA 2018). Thus, the matter returned to the trial court.

Plaintiffs then proceeded with class discovery. Pursuant to a discovery settlement agreement the parties entered, FPL produced data regarding its hurricane readiness and performance delivery reports to the PSC. FPL also produced data relating to power outage assessments, diagnoses, causes, and repairs during and after Hurricane Irma.

On October 18, 2021, plaintiffs filed their Motion for Entry of Class Certification Order. The plaintiffs moved to certify the following class:

> All persons and business owners who reside and are otherwise citizens of the state of Florida that entered into contractual agreement with FPL for electrical services, were charged a storm charge, experienced a power outage after Hurricane Irma, and suffered consequential damages, directly and proximately, because of FPL's breach of contract and/or gross negligence.

The trial court held a three-day evidentiary hearing on class certification and other issues in December 2021. Plaintiffs argued that the trial court should focus not on who would prevail on the issues raised related to the breach of contract or gross negligence counts, but rather whether the requirements of rule 1.220 were met. Plaintiffs contended that based on

FPL's own structured data, FPL could identify exactly which customer lost power, at what address, when they lost power, and the reason why they lost power. At the end of the hearing on the third day, the trial court granted plaintiffs' motion and certified the class. Thereafter, the trial court entered its detailed, twenty-four page "Order Granting Plaintiffs' Motion for Class Certification." FPL then appealed.

DISCUSSION

"A trial court's order certifying a class is a non-final appealable order that is reviewed for an abuse of discretion." Miami Auto. Retail, Inc. v. Baldwin, 97 So. 3d 846, 851 (Fla. 3d DCA 2012). This is because "'the determination that a case meets the requirements of a class action is a factual finding,' which falls within a trial court's discretion." Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 103 (Fla. 2011). "[T]he appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). "A trial court should resolve doubts with regard to

certification in favor of certification, especially in the early stages of litigation." Sosa, 73 So. 3d at 105.

FPL contends that plaintiffs did not meet their burden under Florida Rule of Civil Procedure 1.220(b)(3) because individual issues predominate in this case, and a class action is not manageable or superior to other forms of resolving this controversy. We find no merit in this argument.

Parties seeking class certification have the burden of pleading and proving each element of Florida Rule of Civil Procedure 1.220(a) and one of the three requirements of Florida Rule of Civil Procedure 1.220(b). Terry L. Braun, P.A. v. Campbell, 827 So. 2d 261, 265 (Fla. 5th DCA 2002). Under Rule 1.220(a), the four prerequisites for class certification are numerosity, commonality, typicality, and adequate representation. Broin v. Philip Morris Cos., 641 So. 2d 888 (Fla. 3d DCA 1994). FPL makes the general statement that plaintiffs have not satisfied the elements of Rule 1.220(a). However, it does not address this argument in its briefs. We have carefully reviewed the record and find no abuse of discretion in the trial court's determination that the class established the four elements under Rule 1.220(a). Love v. General Dev. Corp., 555 So. 2d 397 (Fla. 3d DCA 1989).

In addition to establishing numerosity, commonality, typicality, and adequacy of representation, plaintiffs must also demonstrate that the action

meets the criteria under at least one basis for class certification under Rule 1.220(b). Here, plaintiffs sought class certification under rule 1.220(b)(3). This rule states:

> (b) Claims and Defenses Maintainable: A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that
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> …
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> (3) … the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy. …

Thus, predominance and superiority must be shown. Freedom Life Ins. Co. of Am. v. Wallant, 891 So. 2d 1109, 1118 (Fla. 4th DCA 2004) ("For class certification to be appropriate under Rule 1.220(b)(3), 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as whole, must predominate over those issues that are subject only to individualized proof.'").

Plaintiffs must first establish that common questions of law and fact predominate over individual, plaintiff-specific issues. Fla. R. Civ. P. 1.220(b)(3); Sosa, 73 So. 3d at 111. "Florida courts have held that common questions of fact predominate when the defendant acts toward the class members in a similar or common way." Sosa, 73 So. 3d at 111. "The methodology employed by a trial court in determining whether class claims

predominate over individual claims involves a proof-based inquiry." Id. at 112. Thus, a class representative establishes predominance if "the class representative can prove his individual case and, by so doing, necessarily prove the cases for each of the other class members." InPhyNet Contr. Servs. v. Soria, 33 So. 3d 766, 771 (Fla. 4th DCA 2010).

Here, Rule 1.220(b)(3) certification was proper because even where some individualized issues of proof exist in a case, where an issue raised by a common contract provision predominates, "the better reasoned approach is to maintain the suit as a class action and, if required after further development of the issues, permit the lower court to create subclasses." Paladino v. Am. Dental Plan, Inc., 697 So. 2d 897, 899 (Fla. 1st DCA 1997). Further, "[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003).

The record supports the trial court's conclusion that plaintiffs established that common questions of law and fact predominate over individual plaintiff issues. FPL's Tariff is a form document, and FPL admitted it applies to all plaintiffs and class members. As previously discussed, FPL drafted the Tariff, and it was presented to its customers on a take it or leave

it basis. Plaintiffs and class members had no bargaining power in the drafting of the Tariff. The Tariff also incorporates FPL's "Service Standard" as previously discussed and incorporated the latest edition of the NESC. The Tariff further provides for the storm charge that plaintiffs referenced in their amended complaint. Plaintiffs claim that due to FPL's breach of the Tariff, plaintiffs and class members experienced consequential damages.

Predominance exists where common questions can be answered by use of computerized software systems. Roper v. Consurve, Inc., 578 F.2d 1106, 1113 (5th Cir. 1978) ("While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps with some clerical assistance."). As the trial court noted in its order, "It is well-settled in data-driven cases like this one, even if there are potential individualized determinations, that 'the necessity of making individualized factual determinations does not defeat class certification if those determinations are susceptive to generalized proof like [business] records.' Minns v. Advanced Clinical Employment Staffing LLC, 2015 WL 3491505, at *8 (N.D. Cal. 2015) …".

The evidence showed that FPL uses "cause codes" among other data related to customer power outage, which the trial court noted would provide

the court with "a reasonable methodology for generalized proof of class-wide impact." Thus, FPL's conduct in determining the cause of power loss for each client is the same. In addition, the standard Tariff is the same one given to all customers. Thus, the evidence used to prove one of the named plaintiffs' breach of contract claims is the same evidence that will be used to prove the rest of the class members' breach of contract claims. Accordingly, plaintiffs can use FPL's data to prove FPL's liability for the entire class. Regarding this predominance factor, the trial court further noted:

> FPL deploys "patrollers" and "forensic patrollers" in order to determine outage causes and restore power. FPL uses multiple data systems to track that information, makes outage information and restoration projections available to customers in real-time, draws conclusions from its data-rich systems, and reports outage causes (and makes its data available) to Florida's Public Service Commission. It stands to reason that FPL has identified the cause of an outage where it has been able to turn the power back on. FPL, though, has now dedicated the bulk of its presentation to undermining the accuracy of its own records. The Court is unmoved by those efforts.
>
> FPL's "very business model includes gathering and distilling information from a variety of sources in order to [determine the cause of outages]." . . . And, in general, "courts do not look favorably upon the argument that records a defendant treats as accurate for business purposes are not accurate enough to define a class." (citations omitted). The Court finds that the evidence supports Plaintiffs' theory and methodology for utilizing FPL's business records and data systems for determining liability on a class-wide basis.

Similarly, regarding the gross negligence claim, the court found that "these issues are common to Plaintiffs and all putative class members and will be resolved by common proof that does not vary from customer to customer based on FPL's course of conduct to utilize the same data systems and methodologies for all 5.6 million customers." The court specifically found from the information presented to it by FPL that FPL "blurred" the difference between how it collected data on customer outages on a "blue-sky day" (non-hurricane days) as opposed to how it collected data on customer outages during a hurricane. On a "blue-sky" day, the "cause code" pertaining to a power outage for a customer was the actual cause for a customer's power outage. However, FPL trained its employees to select the "cause code" of "hurricane" as the actual cause of a customer's power outage following a hurricane like Hurricane Irma. Thus, the trial court found that whether FPL adopted or did not adopt these procedures/training instructions evidenced a conscious disregard of an imminent or "clear and present danger." The court stated that "a jury could find that FPL's conscious decision to categorically subject information about outages following a storm to a different standard than information about outages on a blue-sky day, and inherently invites breaches of the type that are alleged above to be grossly negligent." The court noted that a jury could also find that FPL understood the risks

associated with its manner of documenting "causes" of customer power outages after a storm, and its integration or lack of integration with other FPL databases and that because FPL was aware, its common course of conducted evinced a conscious disregard of an imminent or "clear and present danger." Thus, the court correctly determined that common questions of law and fact predominated over individual questions in this case.

In addition, contrary to FPL's position, the superiority requirement of Rule 1.220(b)(3) was also met in this case. Under Rule 1.220(b)(3), the court examines whether class representation is superior to other available methods for the fair and efficient adjudication of the controversy. "Three factors for courts to consider when deciding whether a class action is the superior method of adjudicating a controversy are (1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable." Sosa, 73 So. 3d at 116.

Here, the trial court was correct in concluding that class representation was superior to other methods of adjudication. The court accurately noted that there were potentially millions of prospective class members and that

their small, individual economic claims were not large enough to justify each individual plaintiff filing a separate action. Thus, the court found a class action would be the "most economically feasible remedy given the potential individual damage recovery for each class member." In addition, a class action recovery system in this case would be a more manageable and efficient use of judicial resources than if each plaintiff was required to file their own individual claim against FPL. The trial court stated in its order that MSP Recovery LLC's (class action plaintiff trial counsel) chief information officer testified in his deposition that through MSP Recovery, LLC, plaintiffs would have the ability to assess FPL's data regarding this class action. The chief information officer reviewed the documents produced by FPL and testified that FPL's data contain outage tickets and other information used to calculate metrics and pinpoint the cause of a customer's power outage. Consequently, the trial court was correct in determining that plaintiffs presented evidence that a class action was superior to other available methods for resolving this controversy.

CONCLUSION

The trial court correctly concluded that in this case, common questions of law and fact predominate over individual questions, and that class

representation is superior to other methods of adjudication. Accordingly, finding no abuse of discretion in the trial court's decision to certify the class under Rule 1.220(b)(3), we affirm the trial court's "Order Granting Plaintiffs' Motion for Class Certification."

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOSEPH S. DIMAURO, derivatively and as a member of
784 LAKE ROGERS, LLC,
Appellant,

v.

MICHAEL W. MARTIN and **CLAUDIA A. KIWI,**
Appellees.

No. 4D22-524

[March 15, 2023]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Gregory M. Keyser, Judge; L.T. Case No. 502020CA008260XXXXMB.

Stephen J. Padula and Joshua S. Widlansky of Padula Bennardo Levine, LLP, Boca Raton, for appellant.

Arthur C. Koski of the Law Offices of Arthur C. Koski, P.A., Boca Raton, for appellees.

KLINGENSMITH, C.J.

Appellant Joseph DiMauro, a residential contractor, appeals the trial court's final judgment in favor of appellees Michael Martin and Claudia Kiwi ("Owners") arising from a dispute involving an LLC's amended operating agreement to develop and sell a new luxury single family residence, or "spec house," to be constructed on Owners' homestead property. In the final judgment, the trial court denied DiMauro's request for specific performance of the operating agreement. We find the trial court erred in finding the operating agreement was unenforceable for lack of mutuality of remedy and lack of consideration but affirm the denial of appellant's request for specific performance.

The operating agreement, in pertinent part, required (1) Owners to vacate the subject property and deed the property to the LLC, and (2) DiMauro to fund the cost of construction of the spec house on the property. Under the operating agreement's article IV, the parties' capital contributions and the members' duties were specified as follows:

> Notwithstanding any term of this Operating Agreement to the contrary, the parties agree that the final determination of Capital Contributions and Membership Units for each Member shall be a function of the total capital contributed by each Member once the Manager has certified that construction of the Residence is complete (the "Certificate of Completion") . . . .
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> [Owners are] contributing real property known as 784 NE 35th Street, Boca Raton, FL 33431 (the "Property") and the parties have agreed that pursuant to the real property appraisal by Aucamp, Dellenbach and Whitney dated December 4, 2019, the Property has a value of $1,250,000.00. [Owners] shall deed the Property to the Company upon the execution of this Operating Agreement and, in anticipation of the demolition of the improvements on the property, [Owners] shall vacate the Property no later than March 31, 2020.
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> DiMauro is contributing and shall fund the cost of construction of the Residence on the Property, pursuant to the budget, plans and specifications attached hereto as Schedule "B" the total value of which will not be determined until the construction of the Residence on the Property is completed and the Manager has issued the Certificate of Completion. At the issuance the Certificate of Completion, DiMauro shall provide all Members with the total cost of construction which amount shall be the Capital Contribution of DiMauro.

The final membership profits were to be determined at the project's conclusion based on each member's capital contributions. Therefore, the operating agreement did not specify DiMauro's capital contributions' value because the total project cost was not yet determined.

In furtherance of the operating agreement, DiMauro provided Owners the construction contract which the LLC had executed with JSD, DiMauro's contracting company, along with the spec house's floor plans and preliminary budget. DiMauro also made upfront expenditures for surveys, engineering reports, soil borings, floor plans, and architectural work.

Due to COVID-19, the members were unable to meet certain deadlines in the original operating agreement, specifically the date at which Owners

were to vacate the premises and deed the property to the LLC. Accordingly, the members agreed to amend the operating agreement to extend those dates to within thirty days after the Governor lifted Executive Order 20-91's COVID official emergency declaration.

The Governor lifted that Order on May 4, 2020. However, Owners neither vacated nor deeded the property to the LLC as the operating agreement provided, despite DiMauro sending two separate demands to do so. DiMauro then sued to enforce the operating agreement, alleging breach of contract and seeking specific performance requiring Owners to vacate and deed the property to the LLC per the terms of the operating agreement.

Owners answered that the amended operating agreement was unenforceable due to a lack of mutuality of remedies and incomplete because of a lack of specificity and consideration, because the operating agreement did not specify DiMauro's specific capital contribution amount.

Following a non-jury trial, the trial court entered final judgment in Owners' favor and denied DiMauro's specific performance request. The court's judgment found a lack of mutuality of obligation and remedy, lack and want of consideration, and that DiMauro had an adequate remedy at law for damages to compensate him for money spent in furtherance of the operating agreement, making specific performance unavailable as a remedy. This appeal followed.

"The relief requested in a suit for specific performance may be granted if it is first established that the contract is valid and enforceable . . . . [I]ts status as a legal issue requires that we resolve it based on the de novo standard of review." *Free v. Free*, 936 So. 2d 699, 702 (Fla. 5th DCA 2006). "A contract requires consideration to be enforceable." *World-Class Talent Experience, Inc. v. Giordano*, 293 So. 3d 547, 548 (Fla. 4th DCA 2020).

Florida law is clear "there must exist a recognized mutuality of remedies in equity between the parties to the suit which can constitute a basis for awarding specific performance in equity to the complainant, as against the defendant." *Burger Chef Sys., Inc. v. Burger Chef of Fla., Inc.*, 317 So. 2d 795, 797 (Fla. 4th DCA 1975). "In suits for specific performance of a contract there must be mutuality of obligation and remedy." *Con-Dev of Vero Beach, Inc. v. Casano*, 272 So. 2d 203, 206 (Fla. 4th DCA 1973) (citing *Romines v. Nobles*, 55 So. 2d 563, 564 (Fla. 1951)). "Mutuality of obligation is sometimes confused with mutuality of remedy. Obligation pertains to the consideration while remedy pertains to the means of enforcement. Mutual obligation is essential, but the means of enforcement

may differ without necessarily affecting the reciprocal obligations of the parties." *Bacon v. Karr*, 139 So. 2d 166, 169 (Fla. 2d DCA 1962); *see Thompson v. Shell Petroleum Corp.*, 178 So. 413, 419 (Fla. 1938) (quoting 32 C.J. *Injunctions* § 297) (finding the principle of mutual obligation does not mean that "each party must have the same remedy for a breach as the other. Mere difference in the right stipulated for does not destroy mutuality of remedy . . . so long as the bounds of reasonableness and fairness are not transgressed"); *Parker v. Weiss*, 404 So. 2d 820, 821 (Fla. 1st DCA 1981) (holding that mutuality of remedy existed when the appellee was prepared at all times to purchase the property in the contract).

In construing *Burger Chef*'s "mutuality of remedies" requirement, we have held that "mutual" does not mean "identical." *See Burger Chef*, 317 So. 2d at 797. "It is well settled 'that parties to a contract may agree to limit their respective remedies and that those remedies need not be the same.'" *Redington Grand, LLP v. Level 10 Props., LLC*, 22 So. 3d 604, 608 (Fla. 2d DCA 2009) (quoting *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*, 463 So. 2d 437, 439 (Fla. 4th DCA 1985)); *see also Amquip Crane Rental, LLC v. Vercon Constr. Mgmt., Inc.*, 60 So. 3d 536, 540 (Fla. 4th DCA 2011). Further, if the contract provides for each party to have an enforceable remedy against the other, even if not the same remedy, mutuality of remedy is not absent. *Blue Paper, Inc. v. Provost*, 914 So. 2d 1048, 1052 (Fla. 4th DCA 2005). In other words, while a specific performance suit requires mutuality of remedy, the means of enforcement can differ without destroying mutuality of remedy. *See Casano*, 272 So. 2d at 206; *Bacon*, 139 So. 2d at 169; *Thompson*, 178 So. at 419.

Here, the trial court found the operating agreement was unenforceable due to a lack of mutuality of remedy, because if DiMauro had breached the agreement, Owners could not have asserted specific performance against DiMauro to build the house. This was error. As long as Owners had an enforceable remedy if DiMauro breached, mutuality of remedy was not lacking, even if the remedy was not the same remedy which DiMauro could obtain against Owners. *See Casano*, 272 So. 2d at 206; *Bacon*, 139 So. 2d at 169; *Thompson*, 178 So. at 419.

Regarding the court's finding that the operating agreement was unenforceable due to a lack of consideration, this too was error. "Promises have long been recognized as valid consideration in forming a contract." *Ferguson v. Carnes*, 125 So. 3d 841, 842 (Fla. 4th DCA 2013). "[A] promise, no matter how slight, can constitute sufficient consideration so long as a party agrees to do something that they are not bound to do." *Diaz v. Rood*, 851 So. 2d 843, 846 (Fla. 2d DCA 2003) (quoting *Ashby v. Ashby*, 651 So. 2d 246, 247 (Fla. 4th DCA 1995)); *see Santos v. Gen.*

Dynamics Aviation Servs. Corp., 984 So. 2d 658, 661 (Fla. 4th DCA 2008) (quoting *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1376 (11th Cir. 2005)) ("Mutual promises and obligations are sufficient consideration to support a contract."); *see also Parker*, 404 So. 2d at 821 ("[P]urchaser's promise to pay in exchange for the vendor's executory agreement was sufficient to form a binding contract.").

The operating agreement contained mutual promises by all LLC members. A valid bilateral contract can be "founded upon mutual promises to do something in the future, in which the consideration of the one party is the promise on the part of the other, each party being both a promisor and a promisee." *McIntosh v. Harbour Club Villas Condo. Ass'n*, 468 So. 2d 1075, 1076 (Fla. 3d DCA 1985) (Nesbitt, J., specially concurring). Such mutual promises create the mutuality of obligation required for a binding contract. "[W]hile parties unquestionably enjoy the freedom to limit their respective remedies under a contract, a contract must nevertheless be reasonable and must provide to a mutuality of obligation in order to be considered enforceable." *Palm Lake Partners II, LLC v. C & C Powerline, Inc.*, 38 So. 3d 844, 851 n.10 (Fla. 1st DCA 2010) (quoting *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 38 (Fla. 1st DCA 1998)). "The requisite mutuality of obligation entails consideration on both sides." *Id.*

By signing the operating agreement, both parties promised to do something in the future that they were not obligated to do. Owners promised to transfer the deed to the property and vacate, and DiMauro promised to cover the costs of building and selling a spec house on the property. Such mutual promises constitute adequate consideration. *See Ferguson*, 125 So. 3d at 842; *Diaz*, 851 So. 2d at 846; *Santos*, 984 So. 2d at 661; *Parker*, 404 So. 2d at 821. However, even if the operating agreement lacked consideration at its inception, the promises were nonetheless binding because DiMauro took steps to perform by advancing the various cost payments in furtherance of the operating agreement. *See Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 627 (Fla. 4th DCA 1982) (quoting 17 C.J.S. *Contracts* § 100(3), 799–800 (1963)) ("Although a contract is lacking in mutuality at its inception, such defect may be cured by the subsequent conduct of the parties . . . and a promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee.").

Even though the operating agreement did not specify DiMauro's capital contribution amount, DiMauro's promise to develop the spec house was clearly adequate consideration for Owners' promise to transfer the property. Further, the operating agreement expressly stated that

DiMauro's capital contribution could not be determined until after the spec house was completed. As such, the parties' mutual promises in the operating agreement would be adequate consideration to form a binding contract. *See Ferguson*, 125 So. 3d at 842; *Diaz*, 851 So. 2d at 846; *Santos*, 984 So. 2d at 661; *Parker*, 404 So. 2d at 821. While DiMauro's promise constitutes adequate consideration, his later inability to fulfill his part of the operating agreement does not mean the operating agreement lacked consideration. *See McCranie v. Cason*, 85 So. 160, 161 (Fla. 1920). Because of the nature of his promise, DiMauro could not fully complete his obligation until Owners upheld their promise to deed the property to the LLC and vacate the premises.

However, we find no error in the court denying specific performance to DiMauro because he had an adequate remedy at law. Specific performance is not a matter of right, and "[t]he decision whether to decree specific performance of a contract is a matter that lies within the sound judicial discretion of the trial court and it will not be disturbed on appeal unless it is clearly erroneous." *Free*, 936 So. 2d at 702.

Specific performance is an appropriate remedy only when there is no adequate remedy at law, and a party that has an adequate remedy at law is not entitled to specific performance. *Vagabond Travel and Tours, Inc. v. Universal Inns of Am., Inc.*, 440 So. 2d 482, 483 (Fla. 2d DCA 1983). Specific performance is available only where, under the circumstances of a particular case, an action at law for compensatory damages for the defendant's breach of the contract by virtue of his or her failure to carry out the agreement would be inadequate to afford complete justice between the parties. *See Bird Lakes Dev. Corp. v. Meruelo*, 626 So. 2d 234, 238 (Fla. 3d DCA 1993). This court has held that compensatory damages are an adequate remedy at law and can preclude specific performance even in cases involving land sale contracts. *See Hiles v. Auto Bahn Fed'n, Inc.*, 498 So. 2d 997, 999 (Fla. 4th DCA 1986); *Wolofsky v. Behrman*, 454 So. 2d 614, 615 (Fla. 4th DCA 1984) (awarding damages in a land-sale contract instead of specific performance).

While land is considered unique and the court may grant specific performance in cases dealing with land-sale contracts, the trial court has discretion to decide whether to grant or deny specific performance when not expressly provided for in the contract. *See Mann v. Thompson*, 100 So. 2d 634, 637 (Fla. 1st DCA 1958); § 672.716(1), Fla. Stat. (2020). Here, the operating agreement does not limit the parties' remedies. As such, DiMauro has an adequate remedy at law in money damages for breach of contract.

We reverse the court's final judgment finding that the parties' operating agreement and its subsequent amendment was unenforceable for lack of mutuality and consideration and remand for further proceedings. We affirm the court's denial of appellant's request for specific performance.

Affirmed in part, reversed in part, and remanded.

CIKLIN, J., concurs.
WARNER, J., concurs specially with opinion.

WARNER, J., concurring specially.

I concur in the majority's conclusions that the contract was enforceable, because it did not lack mutuality of obligation or remedy. The trial court made an alternative ruling that even if the operating agreement was enforceable, specific performance was unavailable because appellant had an adequate remedy at law. The majority affirms that ruling, and I agree.

The majority's "remand for further proceedings" should be limited to the assessment of attorney's fees and costs. In the original complaint, appellant sought only specific performance, not damages. At no time did appellant seek to amend the pleadings to seek the alternative relief of damages. Therefore, this court cannot give the appellees a second bite at the apple. To do so would conflict with supreme court precedent. As the supreme court has stated, "[A] procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice." *Dober v. Worrell,* 401 So. 2d 1322, 1324 (Fla. 1981). Hence, our remand should not be considered as authority for appellant to seek additional relief in this proceeding.

* * *

Not final until disposition of timely filed motion for rehearing.

Third District Court of Appeal

State of Florida

Opinion filed March 15, 2023.
Not final until disposition of timely filed motion for rehearing.

No. 3D22-835
Lower Tribunal No. 21-18225

S and A Property Investment Services, LLC,
Appellant,

vs.

Pedro J. Garcia, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Pedro P. Echarte, Jr., Judge.

Law Office of Stanley H. Beck, and Stanley H. Beck (Hallandale Beach), for appellant.

Geraldine Bonzon-Keenan, Miami-Dade County Attorney, and Daija Page Lifshitz, Assistant County Attorney, for appellees Pedro J. Garcia and Peter Cam.

Before SCALES, MILLER and BOKOR, JJ.

SCALES, J.

Appellant, plaintiff below, S and A Property Investment Services, LLC ("Taxpayer"), appeals an April 26, 2022 final summary judgment entered in favor of appellees, defendants below, Pedro J. Garcia, the Miami-Dade County Property Appraiser ("Property Appraiser") and Jim Zingale, executive director of the Florida Department of Revenue.[1] The trial court's summary judgment confirmed a determination by both the Property Appraiser and the Miami-Dade County Value Adjustment Board ("VAB") that, under the facts presented, the conveyance of the subject non-homestead residential property from Taxpayer's owners to Taxpayer constituted a "change of ownership or control" of the property. As such, the trial court found, pursuant to section 193.1554(3) of the Florida Statutes, that the Taxpayer lost its annual assessment cap (the "10% Assessment Limitation").

We affirm because the Taxpayer's assertion that the conveyance to Taxpayer was merely a transfer between legal and equitable title, rather than a change of ownership, is belied by (i) the plain language of section 193.1554, (ii) the subject quitclaim deed, and (iii) Florida's limited liability company (LLC) law.

I. Relevant Factual Background

[1] The Florida Department of Revenue filed a notice of joinder below, adopting the Property Appraiser's pleadings at the summary judgment stage. The Department did not file an answer brief with this Court.

In 2000, Sylvester and Angela Anderson (the "Andersons") purchased, as tenants by the entireties, a non-homestead property in Miami (the "Subject Property"). In 2015, the Andersons established Taxpayer, a for-profit Florida limited liability company, with the Florida Department of State's Division of Corporations. Angela Anderson owns fifty-one percent of Taxpayer; Sylvester Anderson owns the remaining forty-nine percent.

In June 2019, the Andersons executed a quitclaim deed transferring to Taxpayer fee simple interest in the Subject Property. The Andersons received no consideration for the transfer, and, according to the testimony of Angela Anderson, the Andersons transferred the Subject Property to Taxpayer so that the Andersons would not face any personal tort liability arising from their ownership of the Subject Property.

While the Andersons owned the Subject Property as tenants by the entireties, they enjoyed the 10% Assessment Limitation for non-homestead residential property on the Subject Property. In January 2020, though, after the 2019 transfer of the Subject Property from the Andersons to Taxpayer, the Property Appraiser re-assessed the Subject Property at its just value, thereby removing the 10% Assessment Limitation. Without the benefit of the 10% Assessment Limitation that the Andersons had enjoyed, the Property

Appraiser's assessed value of the Subject Property rose from $104,023 in 2019, to $273,409 in 2020, resulting in an increased property tax liability.

II. Procedural History

Taxpayer appealed its 2020 tax assessment to VAB, challenging the Property Appraiser's decision to remove the 10% Assessment Limitation from the Subject Property. The VAB magistrate ruled in favor of the Property Appraiser and denied Taxpayer's VAB appeal.

Taxpayer then, pursuant to sections 194.036(2) and 194.171 of the Florida Statutes,[2] filed a two-count complaint in circuit court. Count II of Taxpayer's complaint challenged the Property Appraiser's removal of the Andersons' 10% Assessment Limitation.[3]

The parties filed cross-motions for summary judgment. Taxpayer's summary judgment evidence consisted of an affidavit by Angela Anderson stating the legal conclusion that the Andersons retained equitable ownership of the Subject Property after quitclaiming the Subject Property to Taxpayer. Thus, according to Angela Anderson's affidavit, the transfer was "between

[2] These related statutes provide a taxpayer with the right to file an action in circuit court to contest a tax assessment.

[3] Count I of the complaint, which eventually was dismissed, challenged the market value assigned to the Subject Property, and is not a part of this appeal.

legal and equitable title," and therefore, did not constitute a "change of ownership" under section 193.1554(5). After an April 18, 2022 hearing on the parties' competing summary judgment motions, the trial court entered the challenged April 26, 2022 final summary judgment in favor of the Property Appraiser, rejecting Taxpayer's assertion that the Andersons had retained equitable title after transferring the Subject Property to Taxpayer. The trial court found that nothing in the quitclaim deed or in Taxpayer's LLC operating agreement indicated that the Andersons retained equitable title in the Subject Property. Taxpayer timely appealed the judgment.

III. Analysis[4]

A. Section 193.1554

As mentioned above, section 193.1554(3) provides that any change resulting from the annual assessment of a non-homestead residential property is capped at ten percent of the assessed value of the property for the prior year. § 193.1554(3), Fla. Stat. (2020). The property retains this 10% Assessment Limitation so long as the property does not undergo "a change of ownership or control." § 193.1554(5), Fla. Stat. (2020). If, however, there

[4] This Court reviews *de novo* a trial court's summary judgment. Ibarra v. Ross Dress for Less, Inc., 350 So. 3d 465, 467 (Fla. 3d DCA 2022). A trial court's interpretation of a statute is reviewed *de novo* as well. Rahimi v. Global Discoveries Ltd., LLC, 252 So. 3d 804, 806 (Fla. 3d DCA 2018).

is “a change of ownership or control,” the property “shall be assessed at just value as of January 1 of the year following such change in ownership or control.” Id.

Section 193.1554(5) defines “a change of ownership or control” as “any sale, foreclosure, transfer of legal title or beneficial title in equity to any person, or the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value.” Id.

The statute contains four express exemptions to this definition. The exemption at issue in the instant case reads as follows: “There is no change of ownership if: . . . [t]he transfer is between legal and equitable title.” § 193.1554(5)(b), Fla. Stat. (2020).

B. Crescent City Miami and Kuro cases

Taxpayer asserts on appeal, as it did below, that the Property Appraiser wrongfully characterized the Andersons’ 2019 conveyance of the Subject Property to Taxpayer as a change of ownership of the property. Taxpayer asserts that when real property is transferred from two married individuals to an LLC that is owned solely by the two married individuals, as occurred here, only a transfer between legal and equitable title has occurred, and ownership has not changed for the purposes of section 193.1554(5)(b).

In support of its argument, Taxpayer relies on two cases construing a different statute from the one involved here – section 201.02(1) of the Florida Statutes, the documentary tax statute.[5] These cases are Crescent Miami Center, LLC v. Florida Department of Revenue, 903 So. 2d 913 (Fla. 2005) and Kuro, Inc. v. State Department of Revenue, 713 So. 2d 1021 (Fla. 2d DCA 1998). The Crescent Miami Center Court held that "the transfer of property between a grantor and its wholly owned grantee, absent any exchange of value, is without consideration or a purchaser and thus not subject to the documentary stamp tax in section 201.02(1)." Crescent, 903 So. 2d at 919; see Kuro, Inc., 713 So. 2d at 1022 ("[w]e conclude that Kuro was not a purchaser within the meaning of section 201.02(1) and, thus, no additional taxes were due. Section 201.02(1) applies to transfers of real estate for consideration to a 'purchaser.'")

Taxpayer asserts that the transfer from the Andersons to Taxpayer is identical to the transfers in Crescent Miami Center and Kuro, Inc. where in each of those cases the courts concluded that the challenging taxpayer was not a "purchaser" under section 201.02(1). Crescent Miami Center, 903 So.

[5] In relevant part, this statute provides that when a deed for real property is conveyed, the purchaser shall pay a documentary stamp tax of $.70 per every $100 of consideration paid for that real property. § 201.02(1), Fla. Stat. (2020).

2d at 919; Kuro, Inc., 713 So. 2d at 1022 (holding that the "beneficial ownership of the land remained unchanged."). Taxpayer urges us to come to a similar conclusion when analyzing the transactions under section 193.1554(5).

The inquiry in both Crescent Miami Center and Kuro, Inc. was whether, under section 201.02(1), there had been a sale, supported by consideration, to a "purchaser." As the Crescent Miami Center and Kuro, Inc. Courts held, documentary tax liability under section 201.02(1)'s plain language is triggered only when there is a "purchaser" and, relatedly, when there is "consideration." Crescent Miami Center, 903 So. 2d at 918; Kuro, Inc., 713 So. 2d at 1022. While our inquiry under section 193.1554(5) might seem similar to the inquiry undertaken by the Crescent Miami Center and Kuro, Inc. courts, our focus is not whether there was a purchaser and consideration for the transaction. Rather, our focus, based on section 193.1554(5)'s plain language, is whether there was a "change of ownership." Clearly, the transfer of the property from the Andersons – who held the property in the entireties – to Taxpayer, a Florida LLC, constituted a change of ownership.

Taxpayer is an entity separate and distinct from its owners, the Andersons. § 605.0108(1), Fla. Stat. (2020); Palma v. S. Fla. Pulmonary & Critical Care, LLC, 307 So. 3d 860, 866 (Fla. 3d DCA 2020 ("[A]n LLC is an

autonomous legal entity, separate and distinct from its members").[6] Indeed, the purpose of the 2019 transfer of the Subject Property to an LLC was to separate the Andersons from their ownership of the property so that tort liability for occurrences on the property would not touch them. Nothing in the summary judgment record indicates that this purpose was not effectuated by the transfer.

Plainly, there was a "change of ownership" – as that term is defined in section 193.1554(5) – in the Subject Property. The transfer to LLC ownership was not a mere "book transaction," as Taxpayer suggests. We find Taxpayer's reliance on Crescent Miami Center and Kuro, Inc. unpersuasive.

C. Transfer between Legal and Equitable Title – the Statutory Exception

Finally, Taxpayer asserts that, because the Andersons control Taxpayer, the 2019 transfer was merely "between legal and equitable title,"

[6] While not critical to our analysis, we note that, contrary to Taxpayer's assertion, this transfer was not a mere "book transaction" whereby they "received no interest in the property that they did not already have before the transfer." Crescent Miami Center, 903 So. 2d at 916. Before the transfer, each Anderson spouse, as a tenant in the entirety, owned a one hundred percent undivided interest by the property with a right of survivorship. See Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45, 52 (Fla. 2001). After the transfer, Angela Anderson owned a fifty-one percent interest and Sylvester Anderson owned a forty-nine percent interest in Taxpayer. Additionally, the summary judgment record does not indicate that the Andersons' ownership interest in Taxpayer was subject to a right of survivorship.

and therefore, pursuant to the statutory exception found in section 193.1554(5)(b), no change of ownership occurred. Put another way, Taxpayer argues that only legal title to the Subject Property was transferred by the quitclaim deed, and that the Andersons retained equitable title to the Subject Property because they are the owners of Taxpayer. They claim the authority to "revest" ownership of the Subject Property.

In our view, Taxpayer's argument misapprehends the effect of a quitclaim deed, Florida LLC law, and equitable ownership. First, it is black-letter Florida real property law that when a grantor delivers a quitclaim deed, the grantor is divested of any interest in the deeded property, and any interest of the grantor vests in the grantee. See June Sand Co. v. Devon Corp., 23 So. 2d 621, 623 (Fla. 1945). "When the language of a deed is clear and certain in meaning and the grantor's intention is reflected by the language employed, there is no room for judicial construction of the language nor interpretation of the words used." Rogers v. United States, 184 So. 3d 1087, 1095 (Fla. 2015) (quoting Saltzman v. Ahern, 306 So. 2d 537, 539 (Fla. 1st DCA 1975)). The quitclaim deed in this case unambiguously transferred fee simple ownership of the Subject Property to Taxpayer. Neither the deed, nor any other document in the summary judgment record,

purports to reserve to the Andersons any interest, equitable or otherwise, in the Subject Property.

Also, of import here, the grantee Taxpayer is a Florida limited liability company. Section 605.0110 of the Florida Statutes unequivocally specifies that "[a]ll property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or other method is limited liability company property." § 605.0110(1), Fla. Stat. (2019). "It is basic hornbook law that 'corporate property is vested in the corporation itself, and not in the individual stockholders, *who have neither legal nor equitable title in the corporate property*.'" Brevard Cnty. v. Ramsey, 658 So. 2d 1190, 1196 (Fla. 5th DCA 1995) (quoting In re Miner, 177 B.R. 104, 106 (Bankr. N.D. Fla. 1994) (emphasis added)). Consequently, an LLC member has "no interest in any *specific limited liability company property*." § 605.0110(4), Fla. Stat. (2019) (emphasis added).

Taxpayer has cited no authority for the proposition that owners or members of an LLC who convey, via quitclaim deed, real property to an LLC retain, as a matter of law, the equitable title to the conveyed property because those owners or members control the LLC. We therefore agree with the Property Appraiser, VAB, and the trial court that, for the purposes of

section 193.1554(5)(b), the Andersons did not retain equitable ownership of the Subject Property when they conveyed the Subject Property to Taxpayer.

IV. Conclusion

The transfer from the Andersons to the Taxpayer constituted a "change of ownership" of the Subject Property. While we are not unsympathetic to Taxpayer's argument that the 10% Assessment Limitation should be retained under the circumstances presented here, we are simply not free, by judicial fiat, to craft what would amount to a fifth exception to section 193.1554(5) to exempt from the definition of "change of ownership" any real property transfer from individuals to a Florida limited liability company wholly owned by such individuals. We therefore affirm the trial court's final summary judgment for appellees.

Affirmed.