Florida Real Property and Business Litigation Report

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Digiport, Inc. v. Foram Development BFC, LLC, Case No. 3D18-1651 (Fla. 3d DCA 2020).
The question of whether an idea constitutes a "trade secret" under the Florida Uniform Trade Secrets Act is typically a fact issue, and thus summary judgment cannot be granted for a claim that design of a data center for a building constitutes a trade secret.

Koyfman v. 1572 Pledger LLC, Case No. 3D19-1521 (Fla. 3d DCA 2020).
On rehearing, the Third District re-affirms that a person primarily liable on an obligation who pays the obligation is not entitled to subrogation against third parties, e.g., a party cannot pay off a second mortgage on which is it liable, have the mortgage assigned to it instead of having the mortgage satisfied, and then foreclose the "unsatisfied" second mortgage to extinguish junior liens.

1440 Plaza, LLC v. New Gala Building, LLC, Case No. 3D20-0120 (Fla. 3d DCA 2020).
A trial court stating that it was "granting" a party's motion but then asking for additional argument reflects the trial court was leaning toward a particular outcome but does not demonstrate the trial court had prejudged the case.

Skylink Jets, Inc. v. Klukan, Case No. 4D20-615 (Fla. 4th DCA 2020).
The Fourth District recedes from prior precedent and holds that in some situations neither party in a contract action may be the prevailing party for purposes of an attorney's fees award.

Baldwin v. Harris, Case No. 5D19-2791 (Fla. 5th DCA 2020).
Directing that a payment be made in an estate planning document does not satisfy a contractual obligation that the payment be made.

Wilcox v. Cupstid, Case No. 5D20-359 (Fla. 5th DCA 2020).
An award of attorney's fees under Florida Statute section 704.04 (statutory right of way) requires a finding that one party unreasonably refused to comply with 704.01(2) and not just that one party prevailed.

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Third District Court of Appeal

State of Florida

Opinion filed December 16, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1651
Lower Tribunal No. 13-19500

Digiport, Inc. and Data Centers Worldwide, Inc.,
Appellants,

vs.

Foram Development BFC, LLC, et al.,
Appellees.

An appeal from the Circuit Court for Miami-Dade County, Spencer Eig, Judge.

Eaton & Wolk, PL, and Douglas F. Eaton, for appellants.

Wolfe Law Miami, P.A., and Richard C. Wolfe, for appellees.

Before MILLER, GORDO and LOBREE, JJ.

PER CURIAM.

Digiport, Inc. and Data Centers Worldwide, Inc. (collectively, "Digiport")

appeal from a final summary judgment in favor of Foram Development BFC, LLC and its nine affiliated entities[1] (collectively, "Foram Group"), in this lawsuit for misappropriation of a trade secret under the Florida Uniform Trade Secret Act ("FUTSA"), misappropriation of an idea, and violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). Although Digiport's common law claim is preempted by FUTSA,[2] whether Digiport's business concept constitutes a trade secret is a question of fact. See Poet Theatricals Marine, LLC v. Celebrity Cruises, Inc., 45 Fla. L. Weekly D2275, D2275 (Fla. 3d DCA Oct. 7, 2020). Thus, we affirm in part and reverse in part.

Facts and Procedural History

Digiport's operative complaint identifies the nature of the alleged trade secret/novel idea at issue as its proposed design of a single, centralized data or collocation center for computer hardware located inside Brickell Financial Centre (the "building"), in which the building's tenants could rent space for their computer hardware, or use cloud computing and management services provided by Digiport. Pursuant to the complaint, "Digiport designs its data centers from the ground up to

[1] Brickell Financial Centre, LLC, Brickell Holdings, LLC, Elm Spring Inc., Englian Development LLC, Foram Management and Leasing, LLC, Marof Enterprises, Inc., Foram Development Bartram, LLC, Foram Development Group, LLC, and Foram Group, Inc. of Georgia.

[2] See § 688.008(2), Fla. Stat. (2010).

include state of the art servers, data backup systems, cooling, power, and fiber optic infrastructures integrated into the property envelope to provide maximum performance for tenants and efficiency for landlords." Digiport further contemplated offering other services, such as wiring the building for data and telecom and providing 24/7 on-site technical support.

Digiport first presented this proposal to Foram Group's agents, allegedly in confidence, in 2008, when the building was under construction. After Digiport acquired the technical information required to provide a specifically tailored proposal, it met with Foram Group's engineers to discuss the incorporation of the data center. The parties then explored the overall structure and design of the data center. Ultimately, Foram Group's agents hired another company to design and install a data center in the building. The building is now connected to Terremark's Network Access Point of the Americas, and its tenants are being offered many of the services Digiport had offered to provide. After its completion, the data center was marketed to potential tenants as a new approach to office space. Digiport sought to recover lost profits suffered as a result of the missed opportunity to earn what it estimated was up to $18,000 revenue annually per tenant that may have contracted to use its data center, but for the alleged misappropriation.

Foram Group moved for summary judgment on all counts. Foram Group first argued Digiport's proposal for the building was not a trade secret under FUTSA

because it was based on overall, general design features of a colocation center, which were well-known in the data center provider industry prior to 2008. Foram Group further contended that the concept at issue lacked the "genuine novelty" element required to prevail on a claim for misappropriation of an idea, or alternatively, this common law claim was displaced by FUTSA's preemption provision. Finally, Foram Group asserted that Digiport could not prevail on its FDUTPA claim as a matter of law, as it was seeking lost profits, which could not satisfy one of the necessary of prongs under FDUTPA–that is, actual damages.[3]

In support, Foram Group relied on the following evidence as conclusively establishing that the concept at issue was generally known in the information technology ("IT") industry prior to 2008, and thus not unique to Digiport: a copy of the U.S. Patent and Trademark Office denial of Digiport's patent application pertaining to the concept at issue; an affidavit of Chris Senneff, the manager of the current data center at the building, attesting that a tenant-specific central colocation center was not, as of 2008, novel or unique, but rather, was being promoted by numerous other IT companies; and a declaration of Yunexy Eloy ("Eloy"), an architect who designed the current data center in the building, who likewise declared

[3] Foram Group did not move for summary judgment on the basis that Digiport failed to make efforts that are reasonable under the circumstances to maintain the secrecy of the concept at issue or that its disclosure was not made in confidence.

that the ideas, concepts, and designs he used to build the data center were commonly known in the technology industry at that time.

In opposition to summary judgment, Digiport relied upon: a declaration of its owner Marc Billings ("Billings"), who essentially attested he was not aware of any other data center concept like this in any other building throughout the country; and several internal emails between Foram Group's agents, in which they discussed marketing the current data center to potential tenants as a new and unique approach to office space. Following a hearing, the trial court entered summary judgment for Foram Group on all three counts. This appeal ensued.

Analysis

Summary judgment is appropriate "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). It is a proper stage "to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." Fla. Bar v. Greene, 926 So. 2d 1195, 2000 (Fla. 2006).

Florida's trade secret law is governed by FUTSA, which creates a statutory cause of action for trade secret misappropriation. § 688.008(1), Fla. Stat. (2010). It defines the term "trade secret" as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 688.002(4), Fla. Stat. (2010).

Ordinarily, "whether a particular type of information constitutes a trade secret is a question of fact." Poet Theatricals Marine, LLC, 2020 WL 5931884, at *2 (quoting Treco Int'l S.A. v. Kromka, 706 F. Supp. 2d 1283, 1285 (S.D. Fla. 2010)); see also Sea Coast Fire, Inc. v. Triangle Fire, Inc., 170 So. 3d 804, 806 (Fla. 3d DCA 2014); Cooper Tire & Rubber Co. v. Cabrera, 112 So. 3d 731, 732 (Fla. 3d DCA 2013); Furmanite Am., Inc. v. T.D. Williamson, Inc., 506 F. Supp. 2d 1134, 1141 (M.D. Fla. 2007) ("The question of whether an item . . . constitutes a 'trade secret' is of the type normally resolved by a fact finder after full presentation of evidence from each side."). This is because "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords a competitive advantage and is a protectable secret." In re TXCO Res., Inc., 475 B.R. 781, 804 (Bankr. W.D. Tex. 2012) (quoting Metallurgical Indus. Inc. v. Fourtek, Inc., 790 F.2d 1195, 1202 (5th Cir. 1986)). Accordingly, "[e]ven if all of the

information is publicly available, a unique compilation of that information, which adds value to the information, also may qualify as a trade secret." Capital Asset Rsch. Corp. v. Finnegan, 160 F.3d 683, 686 (11th Cir. 1998); see Premier Lab Supply, Inc. v. Chemplex Indus., Inc., 10 So. 3d 202, 206 (Fla. 4th DCA 2009).

Here, although Eloy and Senneff contended through their submission that the centralized data system was not, in and of itself, novel, Billings' declaration and the internal emails between Foram Group's agents created a genuine issue as to whether the proposed project contained "elements which by themselves may be readily ascertainable in the public domain, but when viewed together may still qualify for trade secret protection." See Amoco Prod. Co. v. Laird, 622 N.E.2d 912, 919 (Ind. 1993). Accordingly, the summary judgment evidence, considered in the light most favorable to Digiport, the nonmoving party, raises a factual issue as to the FUTSA claim. See also CareerFairs.com v. United Bus. Media LLC, 838 F. Supp. 2d 1316, 1320 (S.D. Fla. 2011); Bladeroom Grp. Ltd. v. Facebook, Inc., No. 5:15-cv-01370-EJD, 2018 WL 452111, at *2-3 (N.D. Cal. Jan. 17, 2018).[4]

We turn our analysis to the remaining claims. In determining if a tort cause of action is preempted by the FUTSA, courts have examined whether there are "material distinctions between the allegations comprising the additional torts and the

[4] Contrary to Foram Group's contention, novelty in the patent law sense is not required for a trade secret. See Premier Lab Supply, Inc., 10 So. 3d at 206.

allegations supporting the FUTSA claim." New Lenox Indus., Inc. v. Fenton, 510 F. Supp. 2d 893, 908 (M.D. Fla. 2007) ("[A]s a general proposition[,] other torts involving the same underlying factual allegations as a claim for trade secret misappropriation will be preempted by FUTSA."). Here, both the trade secret misappropriation claim and the misappropriation of a business idea count are premised upon allegations that Digiport invested substantial time in creating a novel business idea, the idea was disclosed to Foram Group in confidence, reasonable measures to protect the secrecy were undertaken, and Foram Group misappropriated the idea by disclosing its plans to other companies for its own benefit. Thus, there are no material variations between the counts. Under these circumstances, the trial court properly granted summary judgment on the common law claim. Compare Developmental Techs., LLC v. Valmont Indus., Inc., No. 8:14-CV-2796-MSS-JSS, 2016 WL 7320908, at *6 (M.D. Fla. July 18, 2016) (dismissing plaintiff's claims for misappropriation of ideas as preempted by FUTSA where claims not materially distinct), with Fenton, 510 F. Supp. 2d at 893, 908 (denying motion to dismiss plaintiff's fraudulent inducement claim as there were "material differences between the fraudulent inducement claim and the FUTSA claim").

Lastly, we conclude that the summary judgment evidence in the record also raises a factual issue as to the FDUTPA violation based on alleged misappropriation. As to Foram Group's contention that Digiport is constrained to seek actual damages

under FDUTPA, we agree that consequential damages are barred under the statute. See Dorestin v. Hollywood Imps., Inc., 45 So. 3d 819, 824-25 (Fla. 4th DCA 2010) ("[FDUTPA] does not allow the recovery of other damages, such as consequential damages."); Rodriguez v. Recovery Performance & Marine, LLC, 38 So. 3d 178, 181 (Fla. 3d DCA 2010) (same); Orkin Exterminating Co., Inc. v. Petsch, 872 So. 2d 259, 263 (Fla. 2d DCA 2004) (noting FDUTPA "permits a consumer to recover only the diminished value of the services received," and not "special, consequential, and incidental damages"); Diversified Mgmt. Sols., Inc. v. Control Sys. Rsch., Inc., No. 15-81062-CIV, 2016 WL 4256916, at *5 (S.D. Fla. May 16, 2016) (finding that actual damages do not include "consequential damages"). Thus, to the extent the trial court precluded an award of future lost profits, we discern no error. Compare Eclipse Med., Inc. v Am. Hydro-Surgical Instruments, Inc., 262 F. Supp. 2d 1334, 1357 (S.D. Fla. 1999) (medical equipment distributors' claims for lost future profits in action against supplier did not constitute "actual damages," and thus were not recoverable under FDUTPA), with Factory Direct Tires Inc. v. Cooper Tire & Rubber Co., Case No.: 3:11-cv-255-RV/EMT, 2011 WL 13117118, at *7 (N.D. Fla. Oct. 24, 2011) (noting that company was not seeking future lost profits, but rather

lost profits it already suffered, which could constitute "actual damages" under FDUTPA in some cases).[5]

Affirmed in part; reversed in part; and remanded for further proceedings.

[5] As the determination that a genuine issue of material fact remains is "a sufficient ground for deciding this case," we decline to reach the remaining issues raised given "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." PDK Labs., Inc. v. U.S. Drug Enf't Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring); see State ex rel. Singh v. Kemper, 883 N.W.2d 86, 124 (Wis. 2016) (Ziegler, J., concurring in part, dissenting in part) ("Judicial restraint requires that we resolve cases on the narrowest possible grounds.").

Third District Court of Appeal

State of Florida

Opinion filed December 16, 2020.

No. 3D19-1521
Lower Tribunal No. 13-38896

Mark Koyfman,
Appellant,

vs.

1572 Pledger LLC,
Appellee.

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

Michael S. Kaufman, for appellant.

Stok Kon + Braverman, and Robert A. Stok and Michael E. Bonner (Fort Lauderdale), for appellee.

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

LOBREE, J.

ON MOTION FOR REHEARING

We deny the motion for rehearing but withdraw our prior opinion and issue the following in its stead.

Mark Koyfman appeals from a final judgment of foreclosure entered in favor of 1572 Pledger, LLC (the "subsequent mortgagee"), as well as the denial of his counterclaim to quiet title, charging error to the trial court's failure to dismiss the suit below and enter judgment in his favor pursuant to CDC Builders, Inc. v. Biltmore-Sevilla Debt Investors, LLC, 151 So. 3d 479 (Fla. 3d DCA 2014). For the following reasons, we agree and reverse.[1]

Having lived together and just had a child, Koyfman and Irina Kosterina decided to move to Florida in 2003. He was a licensed realtor by trade. She was an accountant. As a couple, they invested in at least one business and purchased several properties. In 2007, Kosterina acquired the apartment foreclosed on below and executed a note and mortgage in favor of Regions Bank (the "original mortgagee") in connection with a personal $50,000 line of credit. In 2008, she quit-claimed the property to 604 Harbour House, LLC (the "first company"), an entity she formed and managed herself.

In 2009, Koyfman and Kosterina ended their personal and business relationship. Kosterina, through her first company, quit-claimed the apartment to

[1] We decline to reach the remaining issues raised on appeal.

Koyfman. The deed was "[s]ubject to that certain Mortgage given by [Kosterina] in favor of [the original mortgagee]." Koyfman made the apartment his primary residence, and paid for maintenance, condominium dues, and all property taxes. He failed, however, to make any mortgage payments.

In 2013, after several years of continuing to make mortgage payments on the loan for which the apartment served as collateral and having consulted the attorneys who represented her below, Kosterina created Apt. 604 Bal Harbour Condo, LLC (the "second company"). According to her testimony, she did this "in order to purchase the mortgage and note from [the original mortgagee] to satisfy [her] debts and recover [her] loss." Through her second company, created and managed solely by her, Kosterina paid off the balance of the loan. However, she asked the original mortgagee to sell the rights to the mortgage to her second company, instead of satisfying the loan and extinguishing the mortgage. Her second company then obtained the assignment of the mortgage by the original mortgagee.

That same year, her attorneys—now representing the second company—allegedly wrote to Koyfman to alert him of his continuing default on the mortgage from the time he took title. Thereafter, Kosterina's second company sued to foreclose, accelerating payment on the mortgage and naming both Kosterina and Koyfman as defendants. Koyfman's answer alleged that the first company had failed to effectively purchase the mortgage it attempted to foreclose on, since the payment

for the assignment should have satisfied the debt and extinguished the mortgage instrument's obligation. He also counterclaimed to quiet title due to the cloud created by the purported assignment.

In 2017, Kosterina found it hard to cope with the litigation expenses of her second company's foreclosure suit. Having consulted her attorneys, she then assigned her second company's rights under the mortgage to a third legal entity: the subsequent mortgagee. That same year, the subsequent mortgagee was substituted as the party foreclosing below. Koyfman then filed an answer to the second company's cross counter-claim, again challenging the subsequent mortgagee's standing as a note holder and alleging that he was not unjustly enriched because Kosterina deeded him the property in exchange for other real property interests of his.

After discovery and a trial where Koyfman and Kosterina testified, and different views were expressed as to the nature of the transaction,[2] the lower court entered judgment of foreclosure in favor of the subsequent mortgagee. The order

[2] It was disputed whether Kosterina's transfer of title to Koyfman was "gratuitous," as claimed by her, or one "among numerous exchanges of assets," as claimed by him. Koyfman gave deposition testimony that, in an independent effort to amicably and fairly split their assets, he ceded to Kosterina sole title to the property where the couple lived at the time, while, in return, she quit-claimed the apartment at issue to him. The trial court made no findings on this issue and, neither set of circumstances, if true, would change the legal result here. Accordingly, we express no view on this issue.

relevantly found that the subsequent mortgagee owned a valid and outstanding mortgage lien against the apartment; that Koyfman's deed subjected his interest to said mortgage; that both Koyfman and Kosterina had defaulted on the mortgage, the balance of which ascended to $72,095.27; and, as such, while Kosterina was personally liable for that debt, Koyfman was estopped from challenging the validity of the mortgage. Accordingly, the trial judge denied Koyfman's counterclaim and ordered the sale of Koyfman's apartment to satisfy the outstanding mortgage.

"To the extent the trial court's final judgment of foreclosure 'is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review.'" Gonzalez v. Fed. Nat'l Mortg. Ass'n, 276 So. 3d 332, 335 (Fla. 3d DCA 2018) (quoting Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889, 891 (Fla. 3d DCA 2010)). Koyfman argues that the trial court erred in failing to find that the subsequent mortgagee did not own a valid mortgage assignment given that the purchase by or assignment of the original mortgage to Kosterina's second company was unenforceable under the Third Restatement of Property and CDC Builders, 151 So. 3d at 479. Before analyzing whether this case falls under CDC Builders, we clarify the contours of the standard recognized therein.

In CDC Builders, 151 So. 3d at 480, a contractor holding junior liens on real property built under contract appealed from a final summary judgment of foreclosure

in favor of the senior lien. The contractor unsuccessfully defended against the foreclosure and extinguishment of its liens, arguing that the foreclosing entity that acquired the senior mortgage by assignment was formed and managed by the same individuals controlling the entity that was the original owner and mortgagor of the property, and that the assignment had been a strategy by the owner to improve its development, fail to pay the contractor, and later extinguish any resulting liens. Id. We found that the evidence created an issue of fact as to whether the same individuals were behind the entity now foreclosing, and whether, in acquiring the original mortgage by assignment instead of satisfying it, their intent had been to defeat the interest of the contractor. Id. We observed:

> The law does not permit a person to borrow money from a bank, give the bank a mortgage, incur additional liens and junior mortgages on the property, purchase the mortgage back from the bank, and then foreclose on the mortgage for the primary purpose of eliminating the additional liens and junior mortgages.

Id. at 482. In so noting, we referred to the Third Restatement of Property, which explains:

> When a payment in full is made by a person who is primarily responsible for the obligation, but the payor and payee agree not to extinguish the mortgage, the payor might attempt to claim ownership of the mortgage, either under the principle of subrogation or by taking a formal assignment of the mortgage from the mortgagee. The payor might then purport to foreclose the mortgage against the holder of some junior lien or other interest subordinate to the mortgage. However, subrogation is inapplicable to

> this situation, since one who is primarily responsible for an obligation cannot have subrogation upon paying it; Indeed, even a formal assignment of the mortgage to the payor would confer no power on the payor to foreclose the mortgage against junior interests, since doing so would unjustly enrich the payor.

Id. at 482-83. The Restatement relevantly recognized the challenge of some courts when confronted by unusual suits in this context:

> In some cases, a property owner who has paid an obligation secured by the owner's land then brings suit to recover the obligation from another person. In some of these cases, the owner characterizes the payment as a "purchase" of the note and mortgage. Some courts have been misled by this characterization and have held that the obligation is enforceable if the mortgage has not merged into the fee. Because the owner intended to keep the interests distinct, these courts have held that the obligation is enforceable. As with the other situations described in this Comment *c*, however, the doctrine of merger is irrelevant to the issue of enforceability of the obligation. . . . When a property owner pays a mortgage debt, the owner's ability to enforce the debt against another is determined by the doctrine of subrogation. (1) An owner who is primarily liable for an obligation cannot recover from anyone: The owner's payment extinguishes the obligation.

Restatement (Third) of Property § 8.5 cmt. c (1997). We observed that "[t]his rule has been part of Florida law since at least 1932," and that "Florida has expressly recognized that this rule holds true even if the borrower obtains and forecloses the

mortgage through a corporation that it controls." CDC Builders, 151 So. 3d at 483. Appropriate exceptions to the rule have also been recognized.[3]

The rule enunciated in CDC Builders, therefore, is that where payment in full is made by a person who is primarily responsible for the obligation, but the payor and payee nevertheless agree not to extinguish that obligation, that same payor may not claim ownership of the obligation—whether under principles of subrogation or assignment—or foreclosing on it "against the holder of some junior lien or other interest subordinate to the mortgage." 151 So. 3d at 482. "[E]quity will not apply

[3] The Third Restatement of Property relevantly observes:

> In many situations a mortgage obligation is discharged by one having a legal duty to do so . . . However, in many situations subrogation is appropriate even though the subrogee is personally liable on the obligation being paid, if that liability is partial or secondary. One example is . . . the mortgagor who sells the real estate subject to, or with an assumption of, the mortgage debt, with the purchaser paying cash equal to the difference between the agreed purchase price and the balance owing on the mortgage debt. Such a mortgagor, while still personally liable to the mortgagee by virtue of having executed the original note or other evidence of debt, becomes, as between the mortgagor and the grantee, secondarily liable as a surety when the transfer occurs . . . The mortgagor may pay the debt and be subrogated to the mortgage (whether the transfer was with an assumption or was merely "subject to" the mortgage) as well as the debt (if the transferee assumed the debt).

Restatement (Third) of Property § 7.6 cmt. c (1997).

the principle of subrogation, where to do so would deprive a party of a legal right." Id. at 483.

The subsequent mortgagee's attempts to distinguish CDC Builders are unavailing. Although CDC Builders involved a contractor holding junior liens and the unjust enrichment at issue entailed the property owner's benefit from the contractor's work, the general rule applies where the original mortgagor or owner attempts to later extinguish not only subsequent junior interests, such as contractor liens, but also any "*other interest* subordinate to the mortgage." CDC Builders, 151 So. 3d at 483 (emphasis added). Here, as conceded by the subsequent mortgagee, Koyfman's interest is in fee simple subject to the mortgage. Although different from the contractor's junior interest in CDC Builders, Koyfman's is still an interest equally subject to the mortgage at issue, with vested legal rights the deprivation of which equity will not allow. Id.

Because CDC Builders applies, the lower court and subsequent mortgagee's reliance on C.T.W. Co.. v. Rivergrove Apartments, Inc., 582 So. 2d 18, 19 (Fla. 2d DCA 1991), is misplaced. CDC Builders correctly distinguished C.T.W., as in that case, unlike here, no sufficient evidence existed of *identity* between the original borrower, payor, or mortgagor and the subsequent mortgagee assigned the mortgage instrument and seeking foreclosure. 151 So. 3d at 485.

Here, it was undisputed that there was "substantial identity" between Kosterina and her first and second companies, through which she purported to preserve and assign the otherwise extinguished mortgage obligation allegedly justifying foreclosure below. This gave rise to the reasonable inference that Kosterina's preservation of the mortgage was intended to violate the rule adopted in CDC Builders. The inference was only reinforced by Kosterina's testimony as to why she attempted to preserve the mortgage.

She first answered that she did not know why she preserved and assigned the mortgage, and it had simply been her attorney's advice. Subsequently, she explained that she had intended to prevent the further ruin of her credit, as well as to foreclose on the property to recover her loss. The first amounted to no more than a conclusory and evasive answer and, the second, as the trial court noted, lacked any rational basis, since, having fully paid the balance of her personal obligation, her credit could not be further ruined on account of satisfied debt. Relevantly, when asked near the end of trial why her own personal debt was a "loss" that she should recover for by foreclosing a subordinate interest after her payment of that balance, the following exchange took place:

> [Counsel]: You're testifying . . . you're attempting to foreclose out and dispossess [the Subsequent Owner] of his property you're saying it was his obligation and I'm asking you at any point prior to the alleged . . . letter where was there any one notice to [him] you haven't paid this for five years. Why?

> [Kosterina]: How about he never paid for his child support for five years? You want this person to pay for that? . . .

Thus, in addition to conclusory and insufficient reasons, Kosterina clearly alluded to Koyfman's alleged failure to pay child support as the reason why she devised the mortgage assignment. This provided clear and undisputed evidence that her primary purpose in devising the assignment transaction was to wrongfully divest Koyfman of title already legally vested in him, which fell short of the rule in CDC Builders.

"While it is true that the plaintiff by substitution 'stands in the shoes of the original plaintiff/mortgagee,' . . . an order of substitution does not create standing. Rather, the substituted party acquires the standing (if any) of the original plaintiff at the time the case was filed . . . [and] must prove its own standing." Sandefur v. RVS Cap., LLC, 183 So. 3d 1258, 1260 (Fla. 4th DCA 2016) (quoting Miller v. Kondaur Cap. Corp., 91 So. 3d 218, 219 (Fla. 4th DCA 2012)). Here, the rule recognized in CDC Builders precluded the assignment from conferring any power on the assignee to foreclose against the other interests subordinate to the mortgage. Kosterina's second company, thus, was legally estopped from foreclosing on the mortgage. The subsequent mortgagee could not, by purporting to purchase the defective assignment, exercise a right greater than that which it received. Thus, not only was it also estopped from doing so, but it simultaneously lacked standing to begin with, as it relied on an unenforceable mortgage.

Because the trial court erred in entering final judgment of foreclosure in favor of the subsequent mortgagee, we vacate the order, as well as the denial of Koyfman's counterclaim to quiet title. We remand for entry of judgment of dismissal of the subsequent mortgagee's complaint, for entry of judgment in favor of Koyfman on his counterclaim to quiet title, and for any other proceedings consistent with this opinion.

Reversed and remanded with instructions.

Third District Court of Appeal

State of Florida

Opinion filed December 16, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-0120
Lower Tribunal No. 18-27045

1440 Plaza, LLC,
Petitioner,

vs.

New Gala Building, LLC,
Respondent.

A Case of Original Jurisdiction – Prohibition.

Kula & Associates, P.A., and Elliot B. Kula and W. Aaron Daniel, for petitioner.

Becker & Poliakoff, P.A., and Steven M. Davis, for respondent.

Before EMAS, C.J., and SCALES and LOBREE, JJ.

LOBREE, J.

1440 Plaza, LLC (the "buyer") seeks a writ of prohibition precluding the trial judge from continuing to preside over the underlying suit against New Gala

Building, LLC (the "seller"), charging error to the denial of its motion for disqualification. We deny the petition.

Factual and Procedural Background

Mathieu Goldenberg, a non-party, contracted with the seller to purchase a residential property by July 24, 2018. Before closing, he assigned his rights under the contract to the buyer. The closing never took place. The buyer sued for breach of contract, among other causes of action, and sought specific performance, describing the seller's failure to provide it with necessary information prior to closing. The seller raised the affirmative defense that the buyer failed to satisfy conditions precedent to the seller's duty to close, such as obtaining financing and notifying the seller of any default, and counter-claimed for breach of contract.

The seller moved for summary judgment, arguing that a breach by it could not be shown because, under the contract's cure provision, a party complaining of default must give the non-complying party notice and five days to cure the problem. The buyer filed its own motion for summary judgment, arguing that the cure provision did not apply. The trial court then sent the following e-mail to counsel:

> After review of the various motions and memoranda, [including] those related to the new and revised affirmative defenses of Buyer, and my notes from the hearings I will be granting Seller's Motion for Summary Judgment and Denying Buyer's Motion for Summary Judgment. Will the Seller please prepare, and submit via courtMAP, a proposed order reflecting this ruling and

> include within the [proposed] order at least the following points:
>
> 1) . . . The evidence on file is subject to only one conclusion, Buyer failed to close because its lender was not provided the correct closing date.
>
> [. . .]
>
> 2) If Buyer was prepared to close on June 24th and Seller did not have all of the 9(c) documents, Seller would have been entitled to the 5 day notice. This notice could not have been provided unless there was a default (i.e. when the obligation was due to be fulfilled).
>
> Before entering any order I would like to better understand why the paragraph 11 5 day notice to cure provision would not apply to the Buyer's obligation to proceed to close on June 24th. In other words, why would the Seller be entitled to 5 days to bring the 9(c) documents but not the Buyer to have its lender fund? The parties may address this question in a very brief memo within 10 days herefrom.

This communication prompted the buyer to file a motion to disqualify the trial judge, relevantly arguing that "the message Buyer received from the Judge's comments is that [he] would grant summary judgment despite inviting additional argument on a critical issue that remains unresolved and that he would rule as indicated because [he] finds Buyer . . to lack credibility." According to the buyer, the trial judge "crossed that line between forming mental impressions to prejudging the issue." The motion was summarily denied as legally insufficient.

Standard of Review

"The legal sufficiency of a motion to disqualify is a question of law which we review de novo." Sands Pointe Ocean Beach Resort Condo. Ass'n v. Aelion, 251 So. 3d 950, 954 (Fla. 3d DCA 2018) (citing Wall v. State, 238 So. 3d 127, 142 (Fla. 2018)). "[T]he standard for determining whether a motion is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair trial.'" Enter. Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001) (quoting MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1335 (Fla. 1990)). "[This] is a question of what feeling resides in the affiant's mind and the basis for such feeling." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983) (quoting State ex rel. Brown v. Dewell, 179 So. 695, 697-98 (Fla. 1938)).

Analysis

The buyer's motion alleged, "by announcing his future ruling while also acknowledging an unresolved issue . . . and inviting the parties to brief same so that [he] could 'better understand' that exact issue," the trial judge crossed the line from forming a mental impression to prejudging the issue. It claimed that "[i]t is not unreasonable for Buyer to believe, as it does, that any such brief would be futile because despite the Judge's apparent need for it, the Judge nonetheless had already determined it would rule in favor of Seller." In its petition, the buyer asserts that

"[t]here could be no clearer evidence of prejudgment: regardless of whether the 5-day cure period applied, the trial judge was 'granting Seller's Motion.'"

"A judge may form mental impressions and opinions during the course of presentation of evidence so long as she does not prejudge the case." Brown v. Pate, 577 So. 2d 645, 647 (Fla. 1st DCA 1991). As judges are "not required to abstain from *forming* [such] impressions and opinions," Mobil v. Trask, 463 So. 2d 389, 391 (Fla. 1st DCA 1985) (emphasis added), neither are they required to abstain from *conveying* them, see Pilkington v. Pilkington, 182 So. 3d 776, 779 (Fla. 5th DCA 2015) ("Comments from the bench . . . which reflect observations or mental impressions are not legally sufficient to require disqualification"). The issue is whether comments conveying such impressions, in context, "could reasonably be interpreted to mean that the judge had crossed that line from forming mental impressions to prejudging the issue." Barnett v. Barnett, 727 So. 2d 311, 312 (Fla. 2d DCA 1999); see also Gregory v. State, 118 So. 3d 770, 779 (Fla. 2013) (prohibition requires trial court's statements to be interpreted in context and as whole).

Here, after considering the cross-motions for summary judgment, the trial judge communicated that it "will be granting Seller's Motion," concluding that the buyer, not the seller, failed to close. However, the trial judge also noted that "notice could not have been provided unless there was a default." Wishing to "better

understand" whether and how a default existed, he advised that he would not "enter[] any order" until the parties submitted further brief memoranda on the narrower question of "why would the Seller be entitled to 5 days to bring the 9(c) documents but not the Buyer to have its lender fund."

The trial judge's communication that he would grant the seller's motion merely conveyed how he was leaning to rule, given his express reservation on entering any final order pending further argument on the cure provision. As such, this amounted to no more than advising the parties of his mental impressions and opinions on the motion as a whole and the cure provision issue particularly. Contrary to indicating prejudgment of the issue, the trial court required further memoranda on the issue precisely because it had not yet come to a firm conclusion and refused to enter an order until it did. Cf. Pilkington, 182 So. 3d at 779 ("While the comments include the judge's mental impressions, Judge Smith *clarified that he would not make any decisions based upon first impressions*.") (emphasis added).

Notably, the trial court conveyed its impressions after, not before, extensive legal argument was made by the parties and an opportunity to be heard was afforded. Compare Thompson v. State, 990 So. 2d 482, 490 (Fla. 2008) ("[J]udicial comments revealing a determination to rule a particular way prior to hearing *any* evidence or argument have been found to be sufficient grounds for disqualification.") (emphasis added), with Wargo v. Wargo, 669 So. 2d 1123, 1125 (Fla. 4th DCA 1996) (granting

prohibition where judge's remarks were made prior to hearing and "judge began to rule on the issues presented without even giving counsel a chance to present argument," thus "signal[ing] a predisposition, rather than *an impression formed after reviewing the evidence*") (emphasis added). Rather, the trial court's invitation of further argument is the opposite of ruling *regardless* of argument to the contrary. Cf. State v. Dixon, 217 So. 3d 1115, 1122 (Fla. 3d DCA 2017) ("A trial judge's announced intention *before a scheduled hearing* to make a specific ruling *regardless of any evidence or argument to the contrary*, is the paradigm of judicial bias and prejudice.") (quoting Gonzalez v. Goldstein, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994)) (emphasis added).

The authorities relied on by the buyer are primarily concerned with a trial court's announcement of specific policies requiring it to rule a certain way regardless of the circumstances. See, e.g., Dixon, 217 So. 3d at 1122 ("[A] motion to disqualify a trial judge may rely on the judge's announcement of his policy in other cases in order to establish a well-founded fear that the judge will not be impartial in the case in which the motion to disqualify was filed."); Gonzalez, 633 So. 2d at 1184 (granting prohibition due to judge's announcement that he would sentence defendant to top of guidelines before considering any mitigating evidence). No such policy was announced here. Instead, the buyer's prejudgment challenge seems to "assume[] that trial judges are motivated by a desire to protect their initial

conclusions about a case, and that they are incapable of changing those conclusions even when it becomes clear that they did not have all of the facts." Amato v. Winn Dixie Stores/Sedgwick James, 810 So. 2d 979, 984 (Fla. 1st DCA 2002) (Padovano, J., dissenting).

The trial court's request to better understand an issue on which presented argument already inclined it to rule a certain way was within its power to make statements or ask questions to stimulate a response by counsel that will assist them in better adjudicating an issue. See Mobil, 463 So. 2d at 391 (holding alleged biased statements were "of that variety . . . not infrequently posed to counsel in order to stimulate a response which would better enable the judge . . . to adjudicate the . . . claim," especially where they did not indicate that deputy had made final decision on issue); City of Palatka v. Frederick, 128 Fla. 366, 371 (Fla. 1937) ("It is the function of a judge to consider and weigh what is being said in argument in every cause and frequently it happens that in order to be more fully advised he interrupts counsel frequently and at length by propounding questions to them and by such means obtains as best he can the assistance of counsel in the administration of justice."). Under these facts, the trial court's inclination to rule a specific way, without more, did not reasonably signal prejudgment where the buyer had already been afforded an opportunity to be heard. The motion for disqualification was

legally insufficient and the trial court did not err in denying it. Accordingly, we deny the petition.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SKYLINK JETS, INC.,
Appellant,

v.

MARTIN KLUKAN,
Appellee.

No. 4D20-615

[December 16, 2020]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; David Haimes, Judge; L.T. Case No. CACE14-012098(08).

Bruce David Green of Bruce David Green, P.A., Fort Lauderdale, for appellant.

Robert O. Saunooke of Saunooke Law Firm, P.A., Cherokee, NC, for appellee.

GROSS, J.

Appellant, Skylink Jets, Inc., appeals an order denying its motion for attorney's fees. We affirm, concluding that the trial court did not abuse its discretion in finding that Skylink was not the prevailing party.

Background – The Two Contracts

Skylink is an air carrier that hired Appellee Martin Klukan as a pilot. In connection with his affiliation with Skylink, Klukan executed two agreements: (1) a Personal Loan Agreement with Skylink's president, Inger Skroder, who allegedly assigned the agreement to Skylink on October 12, 2012; and (2) a Pilot Training Expense Agreement with Skylink effective from September 1, 2013 until September 30, 2014.

The Personal Loan Agreement stated that the total amount of the loan was $8,908.64 (representing flight training and related expenses), that Klukan was to perform the duties of a pilot, that the loan would be considered paid in full upon Klukan's completion of two years of service as

a pilot, and that the loan would have to be paid back in full plus interest should Klukan quit or be terminated on or before October 1, 2014.

The Pilot Training Expense Agreement stated that Skylink would pay Klukan's pilot training expenses in the total amount of $8,617.03, but that Klukan would be responsible for repaying the training expenses if he quit or was terminated for cause on or before September 30, 2014. The Pilot Training Expense Agreement contained a prevailing party attorney's fees provision. Finally, the Pilot Training Expense Agreement stated that all previous contracts between Skylink and Klukan were "null and void."

Klukan's Resignation and Skylink's Presuit Demands

Klukan resigned from Skylink in March 2014, which was within the repayment period in the Pilot Training Expense Agreement. However, even after he had resigned, Klukan flew four additional flights for Skylink on the understanding that he could repay his debt at a rate of $500 per flight. Skylink never compensated Klukan for these flights.

Following Klukan's resignation, Skylink sent him two demand letters. In the second demand letter, Skylink claimed that it had incurred $20,419.73 in training expenses for Klukan and demanded repayment under the Pilot Training Expense Agreement. Klukan did not respond and did not pay the monies demanded.

The Lawsuit

Skylink then sued Klukan. In the Amended Complaint, Skylink asserted five counts against Klukan:

> Count I – Breach of Contract (Pilot Training Expense Agreement)
>
> Count II – Breach of Contract (Personal Loan Agreement)
>
> Count III – Unjust Enrichment (Personal Loan Agreement and Pilot Training Expense Agreement)
>
> Count IV – Money Lent (Personal Loan Agreement)
>
> Count V – Promissory Note (Personal Loan Agreement)

Skylink did not allege a specific amount of damages in Count I, but the Amended Complaint did contain a general allegation that Skylink had

"advised Klukan that the final reconciliation showed that he was indebted to Skylink in the amount of $20,419.73."

The parties eventually entered into a Joint Pretrial Stipulation. The parties stipulated that (1) Klukan executed both the Personal Loan Agreement and the Pilot Training Expense Agreement, (2) Skroder paid for Klukan's pilot training set forth in the Personal Loan Agreement, (3) Skylink paid for the training and related expenses that were the subject of the Pilot Training Expense Agreement, (4) Klukan had not reimbursed Skylink for the cost of Klukan's pilot training, and (5) Klukan had not paid any money pursuant to the Personal Loan Agreement.

The Joint Pretrial Stipulation stated that the disputed issues for trial were the amount of Skylink's damages and the validity of the assignment of the Personal Loan Agreement.

In Skylink's trial brief, Skylink stated that the total amount it was seeking from Klukan pursuant to both agreements was $20,419.73 (plus interest, fees, and costs). In other words, the $20,419.73 figure included both the initial training paid for by Skroder in 2012 and the subsequent training paid for by Skylink.[1]

The Trial Court's Rulings and the Final Judgment

The case proceeded to a bench trial. The trial court entered judgment in favor of Skylink on Count I of the Amended Complaint (i.e., breach of contract for the Pilot Expense Training Agreement) and denied recovery on the remaining four counts.

The trial court ruled that Skylink was not entitled to recover under the Personal Loan Agreement because the subsequent Pilot Expense Training Agreement contained language voiding all prior agreements between the parties.

The trial court also rejected the unjust enrichment claim. The trial court reasoned that there was no unjust enrichment for the training provided to Klukan under the voided Personal Loan Agreement because the certification from that training lasted only one year and "Skylink Jets got the benefit of [Klukan flying] for one year until the second certification was due . . . ." And, although the trial court made no express findings

[1] At trial, Skylink clarified that it was actually seeking "$74.96 less than what was pled." However, to avoid confusion, we will use the original $20,419.73 figure throughout this opinion.

regarding the unjust enrichment claim for the training expenses under the Pilot Training Expense Agreement, the trial court presumably rejected this claim because there was an express contract between the parties.

The trial court ruled that Skylink was entitled to $8,617.03 (i.e., the amount of Training Expenses expressly set forth in the Pilot Expense Training Agreement) plus interest, less a $2,000 credit that Skylink owed to Klukan for the four unpaid flights.

The trial court entered a final judgment awarding Skylink $6,617.03 in damages, together with interest of $2,624.50, for a total judgment of $9,241.53.

Denial of Skylink's Motion for Attorney's Fees

Skylink moved for an award of attorney's fees. Attached to Skylink's motion was an affidavit of attorney's fees in which Skylink's counsel attested that his total fee in the matter was $45,360.

Ultimately, the trial court ruled that Skylink did not prevail on the significant issues in the litigation and thus was not the prevailing party for purposes of an award of attorney's fees:

> THE COURT: This one is a tough one. I take a step back. I just don't see how Skylin[k] Jets [w]as the more prevailing party when you look at the comparison.
>
> * * *
>
> THE COURT: I'm struggling with – I don't see how Skylin[k] was the one who had prevailed on the bulk of authority or significant issues of the litigation. Definitely they were successful on an issue in the litigation, but not overall. Again, they were not the more successful party in the case.
>
> * * *
>
> THE COURT: . . . But based on what's presented, I just don't see how Skylin[k] was the prevailing party here.
>
> * * *

> THE COURT: . . . [T]he party prevailing on the significant issues, plural, in the litigation is the party that should be considered the prevailing party for attorney's fees.
>
> * * *
>
> THE COURT: . . . There were different parts of the training. You were looking to recover all of the different training costs.
>
> * * *
>
> THE COURT: I did not see Skylin[k] Jets as prevailing on the significant issues of the litigation, so I'm denying the motion for entitlement.

The trial court entered an order denying Skylink's motion for attorney's fees, finding that Skylink "was not the prevailing party for the reasons stated on the record." This appeal ensued.

Analysis

On appeal, Skylink argues that the trial court abused its discretion when it determined that Skylink was not entitled to recover its attorney's fees from Klukan. Skylink argues that it is entitled to attorney's fees because it "prevailed on the breach of contract claim in Count I of the Amended Complaint which was a significant issue in litigation which achieved some of the benefit sought by Skylink in bringing suit."

The standard of review of a trial court's ruling on the issue of entitlement to prevailing party attorney's fees is abuse of discretion. *Newton v. Tenney*, 122 So. 3d 390, 392 (Fla. 4th DCA 2013). The trial court has broad discretion to determine which party prevailed in the litigation. *Sidlow v. Bowles Custom Pool & Spas, Inc.*, 32 So. 3d 722, 722 (Fla. 5th DCA 2010).

In *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992), the Florida Supreme Court declared that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." There, the court explained that "the fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Id.* However, the court also quoted *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), for the proposition that "the test is whether the party 'succeed[ed] on any significant issue in

litigation which achieves some of the benefit the parties sought in bringing suit.'" *Id.* at 809–10.

Ultimately, the *Moritz* court held that the trial court was within its discretion when it determined that a contractor was the prevailing party on the significant issues in the case, even though the owners who breached the contract obtained the return of their deposit and thus recovered an amount which exceeded the damages awarded to the contractor on its counterclaim. *Id.* at 810. The *Moritz* court also disapproved of cases holding that the prevailing party "is the one who recovers an affirmative judgment." *Id.* at 809–10.

One year after deciding *Moritz*, the Florida Supreme Court held that in considering whether to apply the net judgment rule in cases involving enforcement of a mechanic's lien, "the trial judge must have the discretion to consider the equities and determine which party has in fact prevailed on the significant issues." *Prosperi v. Code, Inc.*, 626 So. 2d 1360, 1363 (Fla. 1993). Our supreme court noted that in some cases "the net judgment rule appears to have been applied mechanically without regard to the equities." *Id.* Rejecting this approach, the court declared: "We believe that *Moritz* now requires a more flexible application. The fact that the claimant obtains a net judgment is a significant factor but it need not always control the determination of who should be considered the prevailing party." *Id.*

Later, in *Trytek v. Gale Industries, Inc.*, 3 So. 3d 1194 (Fla. 2009), the Florida Supreme Court mentioned both the "significant issues" test and the "any significant issue" test, without addressing the subtle difference between the two tests:

> The rule of *Prosperi* is that in determining "prevailing party" under section 713.29, the trial court should look to which party prevailed on the "significant issues," as recognized in our case of *Moritz* that had been decided the previous year. Together, *Prosperi* and its predecessor *Moritz* require that the trial court's determination of a prevailing party rest on whether the party "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Moritz*, 604 So. 2d at 809–10 (quoting *Hensley*, 461 U.S. at 433, 103 S. Ct. 1933).

Id. at 1200 (citation and footnote omitted). Our supreme court went on to emphasize that its jurisprudential approach favored "a flexible rule in determining which party is the prevailing party." *Id.* at 1202. Moreover,

the court opined: "Certainly the possibility that neither party is a 'prevailing party' is consistent with an application of the 'significant issues' test of *Moritz* and *Prosperi*." *Id.* at 1203.

While Skylink argues that *Trytek*'s formulation of the prevailing party test has superseded the test from older cases, Skylink ignores that both the "singular" and "plural" versions of the test originated in *Moritz* and have coexisted in the case law since then. Notably, this court has applied both the "significant issues" test and the "any significant issue" test. *Compare Blue Infiniti, LLC v. Wilson*, 170 So. 3d 136, 138 (Fla. 4th DCA 2015) ("[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees."), *with Hamilton v. Ford Motor Co.*, 936 So. 2d 1203, 1207 (Fla. 4th DCA 2006) ("The test for determining the substantially prevailing party is 'whether the party succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'").

In any event, putting aside the proper formulation of the prevailing party test, this court has stated that "[i]n a breach of contract action, one party must prevail." *Lucite Ctr., Inc. v. Mercede*, 606 So. 2d 492, 493 (Fla. 4th DCA 1992). For example, in a case where the only claim submitted to the jury was a homeowner's breach of contract claim against his HOA, the jury's finding that the HOA breached the contract made the homeowner the prevailing party on the litigation's significant issues even though the jury awarded no damages. *See Khodam v. Escondido Homeowner's Ass'n, Inc.*, 87 So. 3d 65, 66 (Fla. 4th DCA 2012).

To be sure, some of this court's cases contain dicta suggesting that breach of contract cases can never be ties. *See Port-A-Weld, Inc. v. Padula & Wadsworth Constr., Inc.*, 984 So. 2d 564, 569 (Fla. 4th DCA 2008) ("Although some districts recognize that cases can sometimes effectively be 'ties,' such that the parties can both be viewed as winners or losers, we have maintained that '[i]n a breach of contract action, one party must prevail.'"); *see also Animal Wrappers & Doggie Wrappers, Inc. v. Courtyard Distribution Ctr., Inc.*, 73 So. 3d 354, 356 (Fla. 4th DCA 2011) (same).

However, in both *Port-A-Weld* and *Animal Wrappers*, we held that the result was "not even close" to a "tie." Thus, because the language at issue was unnecessary to the ultimate holdings in *Port-A-Weld* and *Animal Wrappers*, those cases do not establish a precedent that a trial court can *never* determine that neither party prevailed in a breach of contract case.

Indeed, while some of this court's cases state that one party must prevail in a breach of contract action, we have also left open the possibility

that there may be compelling circumstances in which a trial court may determine that neither party prevailed in a breach of contract action. *See Newton*, 122 So. 3d at 392 (acknowledging that "there may be compelling circumstances in which a trial court determines that neither party prevailed in a breach of contract action"); *M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A.*, 975 So. 2d 1288, 1290 (Fla. 4th DCA 2008) (holding that the parties in a contractual dispute "battled to a draw" where the defendant defeated the plaintiff's complaint and succeeded on his own counterclaims despite never collecting damages); *Hutchinson v. Hutchinson*, 687 So. 2d 912, 913 (Fla. 4th DCA 1997) (stating that "in a breach of contract action, one party must prevail, absent compelling circumstances").

A categorical rule may be "especially inequitable in the ever increasing number of cases in which the attorney's fees far exceed the claims for damages arising from the contract." *KCIN, Inc. v. Canpro Invs., Ltd.*, 675 So. 2d 222, 223 (Fla. 2d DCA 1996).

Here, the trial court acted within its discretion in determining that Skylink was not "the party prevailing on the significant issues in the litigation" under *Moritz*.

We conclude that the significant issues tried before the court were (1) the validity of the Personal Loan Agreement, (2) Klukan's potential liability on an unjust enrichment theory, and (3) the amount of Skylink's damages. Klukan prevailed on the first two of these issues and largely prevailed on the issue of damages. That Skylink recovered an affirmative judgment does not control the prevailing party determination. *See Moritz*, 604 So. 2d at 809–10.

We need not reconcile any possible tension between the "significant issues" test and the "any significant issue" test. We conclude that Skylink did not prevail on any *significant* issue in the litigation.

Although Skylink established that Klukan breached the Pilot Training Expense Agreement, Klukan's liability under the Pilot Training Expense Agreement was a relatively insignificant issue in the litigation. Klukan admitted in both the pretrial stipulation and in a deposition that he had not reimbursed Skylink for the training expenses that were the subject of the Pilot Training Expense Agreement.

The amount of damages was the real point of contention between the parties. Skylink had sought over $20,000 in the litigation, but Skylink recovered only $6,617.03 (excluding interest). Notably, Skylink sought

damages under a voided agreement, failed to credit Klukan for flights that reduced his debt, and sought an inflated amount of damages under the Pilot Training Expense Agreement.[2]

The Florida Supreme Court has emphasized a flexible approach that gives the trial courts broad discretion in determining which party is the prevailing party, including the discretion to make a determination that neither party has prevailed on the significant issues in the litigation. *Trytek*, 3 So. 3d at 1202.

In light of this broad discretion, we hold that the trial court did not abuse its discretion in finding that Skylink was not the prevailing party under the circumstances of this case. Skylink failed to prevail on four out of five of its counts and only partially prevailed on Count I. Although Skylink prevailed on an issue of liability as to Count I, it was an issue that was not seriously contested and thus was not a significant issue in the litigation. Klukan largely prevailed on the significant issue of damages by defeating most of Skylink's claimed damages, making the case a wash.[3]

The significant issues of the litigation were issues other than Klukan's liability under the Pilot Expense Training Agreement. The trial court could have concluded that an award of fees to Skylink would have been inequitable where, as here, the parties were mostly disputing the amount of damages and Skylink's attorney's fees far exceeded the damages to which Skylink was actually entitled.

Because the trial court was within its discretion to conclude that Skylink was not the prevailing party, we affirm the denial of Skylink's motion for attorney's fees.

Affirmed.

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[2] For example, rather than seeking the $8,617.03 in training expenses expressly set forth in the Pilot Training Expense Agreement, Skylink inexplicably sought damages of $11,511.09 (excluding interest) on Count I—i.e., the total damages of $20,419.73 that it was claiming (excluding interest), less the $8,908.64 attributable to the Personal Loan Agreement.

[3] We distinguish *Khodam*, 87 So. 3d at 66, because in that case it appears that the issue of whether the HOA breached its declaration of covenants was a significant issue in the litigation, even though the HOA defeated the homeowner's claim for damages. By contrast, in this case, the issue of whether Klukan breached the Pilot Expense Training Agreement was not a significant issue in the litigation.

CIKLIN, J., and BELL, CAROLYN, Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

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

LETETIA N. BALDWIN F/K/A LETETIA N. HARRIS,

Appellant,

v. Case No. 5D19-2791

MARC D. HARRIS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HENRY LOUIS HARRIS, DECEASED, AND AS THE SUCCESSOR TRUSTEE OF THE HENRY L. HARRIS FAMILY TRUST,

Appellee.

_____/

Opinion filed December 18, 2020

Appeal from the Circuit Court
for Seminole County,
Michael J. Rudisill, Judge.

Joseph A. Frein, of Joseph A. Frein, P.A., Orlando, for Appellant.

Robert Clayton Roesch and Alexander S. Douglas II, of Shuffield, Lowman & Wilson, P.A., Orlando, for Appellee.

EISNAUGLE, J.

Appellant, Letetia N. Baldwin f/k/a Letetia N. Harris ("Baldwin"), appeals a final summary judgment in favor of Appellee, Marc D. Harris, as Personal Representative of the Estate of Henry Louis Harris, Deceased, and as the Successor Trustee of the Henry

L. Harris Family Trust ("Appellee"), on all three counts of Baldwin's amended complaint. As to Counts I and II, Baldwin argues that the trial court erred in entering summary judgment because her former husband, Henry L. Harris ("Harris"), breached a prenuptial agreement when he failed to provide her with a monthly payment upon his death. As to Count III, Baldwin argues that summary judgment should be reversed because she established a presumption that transfers from the Trust were the product of undue influence.

We agree with Baldwin as to Counts I and II and reverse the summary final judgment on those counts. We affirm as to Count III without further discussion.

Prior to taking their vows, Baldwin and Harris executed a prenuptial agreement. Pertinent here, paragraph 10(e) of the agreement provides:

> If LETETIA survives HENRY, and the parties are not married at HENRY's death, HENRY shall provide, in his estate planning documents or otherwise, for LETETIA to continue to receive the monthly payment in the same amount she was receiving as of the date of HENRY's death pursuant to Paragraph 11(c) as long as she shall live.

It is undisputed that Baldwin survived Harris, and that they were not married at the time of Harris's death. It is further undisputed that Harris created a Trust prior to his death which purports to provide Baldwin with a monthly payment, but that he intentionally defunded the Trust shortly before his death.

On appeal, Baldwin argues that the plain language of paragraph 10(e) does not permit Harris to simply include empty words in his estate planning documents, but rather required that he provide for Baldwin to actually receive a monthly payment, either via his estate planning documents or otherwise. Appellee, on the other hand, argues that Harris complied with the plain language of the prenuptial agreement when he included a

provision in his Trust requiring a monthly payment to Baldwin, regardless of whether the Trust was funded.

Interpretation of a Contract Generally

The interpretation of a prenuptial agreement—a contract—is a question of law reviewed de novo. *Hahamovitch v. Hahamovitch*, 174 So. 3d 983, 986 (Fla. 2015); *Nagel v. Cronebaugh*, 782 So. 2d 436, 439 (Fla. 5th DCA 2001).

"Where a contract is clear and unambiguous, it must be enforced pursuant to its plain language." *Hahamovitch*, 174 So. 3d at 986 (citing *Crawford v. Barker*, 64 So. 3d 1246, 1255 (Fla. 2011)). When interpreting an agreement, "[w]ords and phrases . . . should be given a natural meaning or the meaning most commonly understood in relation to the subject matter and the circumstances; and a reasonable construction is preferred to one that is unreasonable." *Sheldon v. Tiernan*, 147 So. 2d 167, 169 (Fla. 2d DCA 1962) (citation omitted); *see also Mason v. Fla. Sheriffs' Self-Ins. Fund*, 699 So. 2d 268, 270 (Fla. 5th DCA 1997) (a contract "must be read in light of the skill and experience of ordinary people, and be given [its] everyday meaning as understood by the 'man on the street'" (quoting *Thomas v. Prudential Prop. & Cas.*, 673 So. 2d 141, 142 (Fla. 5th DCA 1996))).

Of course, "[t]he entire contract should be considered and provisions should not be considered in isolation to other provisions in the contract." *Walsh v. Walsh*, 262 So. 3d 212, 215 (Fla. 5th DCA 2018) (citation omitted). "An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." *Seabreeze*

Rest., Inc. v. Paumgardhen, 639 So. 2d 69, 71 (Fla. 2d DCA 1994) (quoting *Herian v. Se. Bank*, *N.A.*, 564 So. 2d 213, 214 (Fla. 4th DCA 1990)).

The Prenuptial Agreement

Appellee boldly argues that Harris did, at least in some obscure and technical sense, "provide for" a payment when he included such a directive in his estate planning documents. In Appellee's view, Harris provided for a payment with words, but had no obligation to ensure that Baldwin actually received a payment.

However, such an interpretation strains the contractual language well beyond the bounds of common understanding. Paragraph 10(e) does not say that Harris would provide for Baldwin to continue receiving a monthly payment *if his estate still has available funds*. Nor does it say that Baldwin will continue receiving a monthly payment *unless Harris defunds the Trust before his death*. Instead, we conclude that the plain and ordinary meaning of paragraph 10(e) is that Harris agreed to arrange for Baldwin to actually receive the monthly payment—not that she would receive meaningless language in an estate planning document.

Appellee implores us not to read paragraph 10(e) in isolation. Specifically, Appellee correctly observes that, pursuant to paragraph 3, Harris had the sole right to control and manage his separate assets. Paragraph 3 provides in relevant part:

> Each of the parties shall retain independent control and management of his or her separate property (as hereinafter defined), whether now owned or hereafter acquired. Each party shall have the sole, unqualified, exclusive right to buy, sell, give, devise, encumber, create a security interest in, use, consume or otherwise dispose of or deal with his or her separate property as freely, and without joinder or consent by the other, as if he or she was unmarried.

Appellee argues that paragraph 3 allowed Harris unfettered discretion to dispose of his assets, and that paragraph 10(e) must therefore mean that Harris need do no more than direct a payment to Baldwin from an empty Trust. We disagree.

In our view, paragraph 3 and paragraph 10(e) can be harmonized so that both are given their common, ordinary, and everyday meaning. While paragraph 3 clearly prohibited Baldwin from controlling the way in which Harris complied with paragraph 10(e),[1] it does not negate Harris's obligation to provide for a monthly payment through a vehicle of his choosing. In other words, while Harris was free to choose from any of the several options which would provide Baldwin with the required monthly payment, he was not at liberty to avoid the payment altogether. To give the agreement any other construction would render paragraph 10(e) essentially meaningless.

We therefore reverse the summary final judgment entered in favor of Appellee as to Counts I and II and otherwise affirm.

AFFIRMED in part; REVERSED in part; and REMANDED.

WALLIS and LAMBERT, JJ., concur.

[1] Our record indicates that Baldwin unsuccessfully attempted to do exactly that during the parties' divorce proceeding.

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

WINTON W. WILCOX, JR.
AND THEA WILCOX,

Appellants,

v. Case No. 5D20-359

MANLEY L. CUPSTID, VIVIAN F. VINES,
MARY F. VINES, ANTONETTE G. LAKE,
MITCHELL AND FREEMAN FAMILIES TRUST,
DUKE ENERGY FLORIDA, LLC, ERVIN LAKE,
HOME TURNERS, LLC, JANICE HOPE,
JOHN FAVORS, ET AL.,

Appellees.

_____/

Opinion filed December 18, 2020

Appeal from the Circuit Court
for Marion County,
Lisa D. Herndon, Judge.

Lawrence C. Callaway, III, of Klein & Klein,
LLC, Ocala, for Appellants.

Linda G. Blackburn, of Bice Cole Law Firm,
PL, Ocala, for Mary F. Vines.

No appearance for remaining Appellees.

HARRIS, J.

Winton and Thea Wilcox ("Appellants") appeal the trial court's order granting attorney's fees and costs to Mary Vines. Because we find that the statute relied upon by

the trial court does not provide a basis for attorney's fees under the facts of this case, we reverse.

In 2014, Appellants purchased a parcel of real property in Marion County that was immediately across the road from a parcel owned by Vines. Despite having alternative access to the nearest public road, Appellants contended that their land was hemmed in and claimed an easement across Vines' property under section 704.01(2), Florida Statutes (2016). That statute creates a statutory way of necessity to provide ingress and egress from landlocked property to "the nearest practicable public or private road." § 704.01(2). Because Appellants had other means of ingress and egress to their property, Vines objected to the easement, and Appellants filed suit, seeking declaratory and injunctive relief to formally establish the statutory way of necessity they were claiming. Count one of that complaint named Vines as a defendant and addressed her property.

Vines ultimately moved to strike count one as a sham pleading. Following an evidentiary hearing, the trial court struck count one, finding that Appellants' property was not hemmed in. In so doing, the court specifically found that, despite the fact that Appellants had another practicable means to access their property, the complaint was not inherently false and thus, not a sham pleading.

Following the striking of count one, Vines moved to tax attorney's fees and costs pursuant to section 704.04, Florida Statutes (2019), seeking to recover the fees she incurred in defending Appellants' claim. Following a hearing on that motion, the court ordered Appellants to pay almost $27,000 in attorney's fees and costs to Vines, finding that Appellants "unreasonably prosecuted [their] 704.01(2) claim." On appeal, Appellants

argue that section 704.04 does not authorize an award of attorney's fees in this case. We agree.

Under section 704.04, if the parties dispute whether a statutory easement exists under section 704.01(2), either one may file a lawsuit to have the court determine if the claimed easement exists. The court is also given the discretion to award attorney's fees and costs to either party if it determines that the opposing side unreasonably refused to comply with the provisions of section 704.01(2). In this case, there was no argument that Appellants refused to comply, unreasonably or otherwise, with section 704.01(2). Vines simply argued, and the court found, that the decision to file the claim against Vines when Appellants had another means of access to their property was unreasonable. This is not the finding required under the statute in order to authorize an award of attorney's fees.

The entitlement to fees and costs under section 704.04 requires a finding that one party unreasonably refused to comply with 704.01(2), which merely establishes a statutory right of way to legally hemmed in property. Disagreements as to whether the easement properly exists, e.g., whether the dominant parcel is truly hemmed in, are to be judicially determined. This is precisely the avenue Appellants pursued. Just because the facts of this case ultimately did not support their claimed easement does not mean that they unreasonably refused to comply with section 704.01(2). The court's finding that Appellants should be ordered to pay Vines' attorney's fees and costs because the filing of this lawsuit was unreasonable is not the finding required in this case to establish Vines' entitlement to fees. The order awarding fees and costs in essence treats section 704.04 as a prevailing party statute, which is not how the statute was drafted by the legislature. While it does not seem equitable for Vines to have incurred significant fees and costs in

defending what proved to be a baseless claim, it is nonetheless the outcome required by applying the statute. Vines chose not to pursue fees under section 57.105, Florida Statutes (2016), the court found that the complaint was not a sham pleading, and there was no finding that Appellants unreasonably refused to comply with section 704.01(2). As a result, Vines did not establish an entitlement to fees and costs from Appellants, and the court erred in awarding those fees.

The order taxing attorney's fees and costs is reversed and the case is remanded to the trial court with directions to enter an order denying Vines' motion.

REVERSED and REMANDED with instructions.

EVANDER, C.J., and LAMBERT, J., concur.