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M & M Realty Partners at Hagen Ranch, LLC v. Mazzoni, Case No. 18-13536 (11th Cir. 2020).
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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13536

D.C. Docket No. 9:17-cv-81135-RLR

M & M REALTY PARTNERS AT HAGEN RANCH, LLC,
a New Jersey limited liability company,

Plaintiff – Appellant,

versus

WILLIAM MAZZONI,
as Co-Trustee of the William Mazzoni Trust
dated 06/04/1992,
THOMAS A. SMITH,
as Co-Trustee of the William Mazzoni Trust
dated 06/04/1992,
WILLIAM MAZZONI,
Individually,
WILLIAM MAZZONI TRUST DATED 06/04/1992,

Defendants – Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 11, 2020)

Before TJOFLAT, NEWSOM, and GINSBURG,* Circuit Judges.

GINSBURG, Circuit Judge:

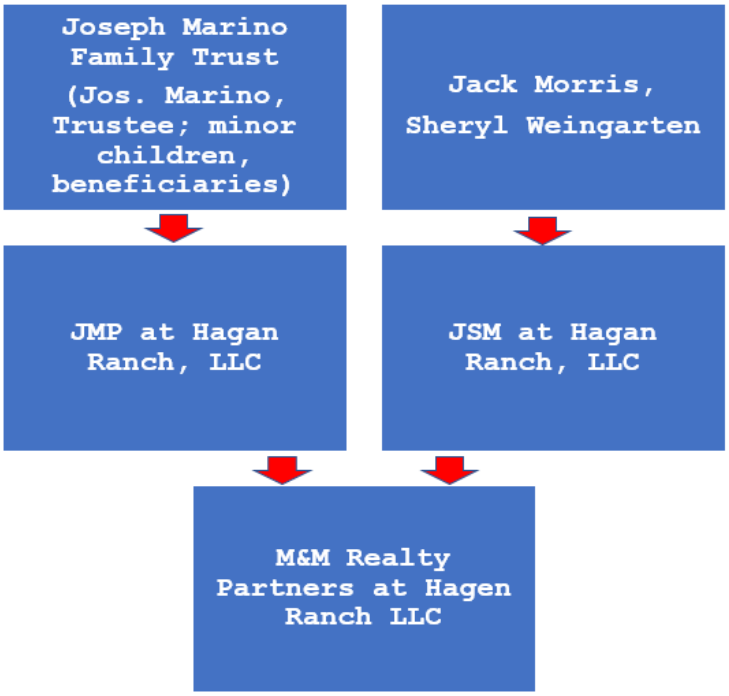
M&M Realty Partners at Hagen Ranch, LLC, a New Jersey Limited Liability Company, entered into a contract with the William Mazzoni Trust in 2011 for the purchase of a plot of land in Boynton Beach, Florida. The contract included a six-year period for M&M to secure the permits necessary to develop the property. M&M alleges, and the Trust disputes, that M&M sought to close the transaction in conformance with the contract and the Trust refused. M&M seeks specific performance of the land sale contract and damages from the Mazzoni Trust, as well as damages from William Mazzoni, as co-trustee and agent of the Trust, for tortious interference with the land sale contract.

As did the district court, we hold M&M failed to make out a prima facie claim for specific performance or for damages for breach of contract because M&M did not provide evidence that it was ready, willing, and able to perform under the contract -- specifically, that it had the necessary funds to make the purchase. We also hold William Mazzoni, as a co-trustee of the Defendant trust and signatory as its agent on the contract, is not liable for tortious interference. We therefore affirm the judgment of the district co

* Honorable Douglas H. Ginsburg, United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

I.

In August 2011, M&M entered into a contract to buy from the Mazzoni Trust a plot of land that M&M planned to develop into a shopping center. M&M is a New Jersey Limited Liability Company the two members of which are also Limited Liability Companies, to wit, JMP at Hagan Ranch, LLC, and JSM at Hagan Ranch, LLC. JMP's only member is the Joseph Marino Family Trust, of which Joseph Marino is the sole trustee, and the beneficiaries of which are Marino's minor children. JSM's two members and owners are Jack Morris and Sheryl Weingarten.



The contract provided a "contingency period" of six years for M&M to secure the necessary permits and approvals for its proposed development. The purchase price was $5 million, with a potential increase based upon the projected future revenue of the property once developed.

M&M alleges, and the Mazzoni Trust disputes, that the land sale contract allowed M&M to close the sale at any time prior to the expiration of the six-year contingency period. The Trust argues the provision of the contract increasing the price based upon revenue from M&M's development of the land indicates M&M had to secure the necessary permits and approvals before it could close the sale.

M&M alleges that from 2011 through 2017 it expended substantial sums to secure the permits and approvals necessary to develop the land. Meanwhile, it says the Mazzoni Trust received a better offer for the land and, in pursuit of that offer, attempted to avoid closing on its contract to sell the property to M&M. The Trust acknowledges, and the district court found, that the Trust attempted to withdraw from the contract in 2013 because it did not want to do business with M&M after M&M failed to file progress reports on its development of the property and Morris and Marino had sued it over an unrelated matter. For his part, William Mazzoni admits he removed from the property official notices of public meetings as well as "for lease" signs and on one occasion refused to sign documents related to M&M's

efforts to get needed permits.[1] M&M further alleges that, having secured the necessary approvals, in May 2017 it notified the Trust of its desire to close the sale that October. According to M&M, in June the Trust refused to close on the grounds that the notice was deficient and that M&M had failed to complete some of the contingencies under the agreement.

M&M then sued the Trust for specific performance and damages for breach of the contract of sale and sued William Mazzoni seeking damages for his allegedly tortious interference with that contract. All three parties moved for summary judgment.

The district court held M&M failed to make out a prima facie claim for specific performance or damages for breach of contract because it had not shown it was ready, willing, and able to perform under the contract. More specifically, the court held evidence that Messrs. Marino and Morris had funds available for the closing was not sufficient to establish that M&M, the actual purchaser, had the funds necessary to close. The district court also held that under the circumstances, William Mazzoni, as the agent for a party, could not be liable for tortious interference with the contract; given the Trust's business reason for no longer wanting to close on the contract – namely, Marino and Morris's unrelated suit

[1] M&M was able nonetheless to get the necessary permits because the contract of sale appointed M&M as Mazzoni's "authorized signatory."

against the Trust – he cannot be said to have acted solely out of malice, as required by Florida law. Accordingly, the district court entered summary judgment for both the Mazzoni Trust and William Mazzoni. For the reasons below we affirm.

II.

We review a grant of summary judgment *de novo*, drawing reasonable inferences in favor of the non-moving party, here the Plaintiff M&M. *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005). The substantive law governing this diversity case is that of Florida.

A.

To establish a prima facie claim for specific performance of a contract or for damages for breach of a contract, Florida law requires the plaintiff to show it was ready, willing, and able to perform the contract. *See*, *e.g.*, *Hollywood Mall, Inc. v. Capozzi*, 545 So. 2d 918, 920 (Fla. Dist. Ct. App. 1989); *Lusigman v. Lusigman*, 972 So. 2d 1076, 1077–78 (Fla. Dist. Ct. App. 2008). A purchaser may show it is financially ready and able by showing it has (1) the necessary "cash in hand," (2) "personal[] possess[ion] of assets . . . and a credit rating" that show a "reasonable certainty to command the requisite funds," or (3) "a binding commitment . . . by a financially able third party." *Capozzi*, 545 So. 2d at 920–21 (emphasis omitted). It is undisputed that M&M, the purchaser in this case, had neither (1) the necessary

$5 million of cash in hand nor (2) assets and a credit rating sufficient to command that sum. Therefore M&M's only hope is to show it had (3) a binding commitment from a financially able third party.

M&M argues that it was ready, willing, and able to perform under the contract, first, because Morris and Marino could command credit from a bank in excess of $5 million and, second, because Morris and Marino each had over $5 million in cash. As M&M is relying upon the resources of third parties, namely Morris and Marino, to show it was ready, willing, and able to close, M&M's arguments properly go to the third possible showing, i.e., that it has a binding commitment from a financially able third party. M&M argues that its principals' personal resources are sufficient to show the company had a "reasonable certainty" of being able to complete the purchase, but this falls short of the "binding commitment" the law requires. *Capozzi*, 545 So. 2d at 920-21 (emphasis omitted).

Mere possession of funds by Morris or Marino does not establish that either man had made a binding commitment – or, indeed, any commitment – to lend or give those funds to M&M in order to close the deal. M&M relies upon Marino having been the trustee and Morris a member-owner, respectively, of the two members of the purchasing LLC, M&M, but to no avail. In *Capozzi*, a company was held unable "to perform when its only ability [was] derived from funds not within its control and subject to the gratuitous payment by another." *Id.* at 920. In

that case, the non-binding commitment by Capozzi, chairman of the board of the purchasing corporation -- which was wholly owned by his children -- to provide funds to close the transaction was insufficient to establish the purchasing company's ability to "command" the requisite funds. *Id.* at 919–20. It necessarily follows that in this case, where there is no commitment from Morris or Marino, M&M was not ready, willing, and able to close the purchase.

M&M argues the lack of binding commitment was "only part of the court's analysis" in *Capozzi*; it went on to consider Capozzi's financial ability to close the transaction, which it found wanting. In contrast, Morris and Marino say they "confirmed" that they each possessed sufficient funds to close the sale. M&M argues the ability of Marino and Morris to command the necessary funds satisfied the more flexible standard the Florida Supreme Court set out in *Perper v. Edell*, where it said a purchaser need not be "standing outside of the office door with all the cash in hand" but should be considered financially able if it can "command the necessary money to close the deal on reasonable notice." 35 So. 2d 387, 391 (Fla. 1948).

M&M once again, however, fails to explain how it, as the purchaser of the property, could "command" the funds of Marino or Morris, neither of whom had made a binding commitment to provide those funds. Although both gentlemen undeniably have an interest in M&M's business, their legal relationship to M&M is

mediated through two limited liability companies and a trust. As the district court pointed out, if the situation were reversed and the Trust were suing M&M for specific performance and damages, it clearly would be inappropriate to pierce those corporate veils; so too is it inappropriate to disregard the corporate forms Marino and Morris used here to insulate themselves from the would-be corporate purchaser. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 820 (7th Cir. 2015) (citation omitted) ("[A] corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties.").

M&M's failure to show it was ready, willing, and able to perform under the contract is fatal to its claims for damages and specific performance under the contract. Therefore, we do not need to address the Trust's argument that the contract terminated before M&M satisfied the conditions precedent to closing.

B.

We turn now to M&M's claim against William Mazzoni for tortious interference with its contract to purchase land from the Mazzoni Trust. In response, Mazzoni points out that under Florida law neither a party to a contract nor its agent can be held liable for interfering with his own contract. *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1294 (11th Cir. 2001) ("Under

Florida law, a claim for tortious interference with contract cannot lie where the alleged interference is directed at a business relationship to which the defendant is a party"); *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 385-86 (Fla. Dist. Ct. App. 1999) (holding a party's agent cannot tortiously interfere because "the interfering defendant must be a third party, a stranger to the business relationship"); *see also Walter v. Jet Aviation Flight Servs.*, No. 9:16-CV-81238, 2017 WL 3237375, at *8 (S.D. Fla. July 31, 2017); *Hamilton v. Suntrust Mortg. Inc.*, 6 F. Supp. 3d 1312, 1320 (S.D. Fla. 2014).

In this case William Mazzoni signed the contract as a trustee of the Mazzoni Trust and acted as the agent of the Trust. Given the Trust's economic interest in terminating the contract, demonstrated by its 2013 effort to end the deal, William Mazzoni's attempts to thwart the contract were not actions taken out of malice alone, or solely for ulterior purposes. William Mazzoni cannot, therefore, be held liable for tortious interference with the contract.

C.

M&M next argues its claim for tortious interference with contract will lie against Mazzoni because he comes within an exception for a party or agent who used "improper means" to thwart the contract, *Ethyl v. Balter*, 386 So. 2d 1220, 1225 (Fla. Dist. Ct. App. 1980), here referring us to various things Mazzoni did to

frustrate M&M's efforts to get the permits it needed. Mazzoni responds that, because M&M never advanced the "improper means" exception in the district court, the issue has been forfeited and cannot be raised on appeal. M&M replies that it raised the issue in the district court by citing caselaw applying it.

Resolving this dispute over forfeiture would require the court to decide whether the improper means exception is a "new issue" and therefore forfeit, or is merely a "new argument" for why M&M should win on the issue of tortious interference, and therefore properly before us. *See in re Home Depot*, 931 F.3d 1065, 1086 (11th Cir. 2019) ("There is a difference between raising new issues and making new arguments on appeal. If an issue is properly presented, a party can make any argument in support of that issue.") (cleaned up).

We need not, however, engage in that line-drawing exercise because the improper means exception is totally inapposite to this case. As mentioned in Part II.B, Mazzoni acted as an agent of the Trust. Indeed, for the purposes of this case, Mazzoni basically *is* the trust. Dist. Ct. Op. at 16 ("[T]he crux of Plaintiff's position is that Defendant Mazzoni essentially tortiously interfered with himself"). M&M concedes as much. Br. of Appellant at 27 ("We do not challenge here the trial court's decision that Mr. Mazzoni's interest as trustee was equivalent to an interest in the trust's contract"). The improper means exception simply does not apply to the agent of a party to the contract.

Under Florida law, a person with "any beneficial or economic interest in, or control over," a contractual relationship is not considered a "stranger" to the contract and therefore has a "privilege to interfere" in that relationship. *Hamilton*, 6 F. Supp. 3d at 1320. Being neither a contracting party nor someone acting on behalf of a party, such a person is aptly described as an "interested third party." *Palm Beach Cty. Health Care Dist. v. Prof'l Med. Educ., Inc*., 13 So. 3d 1090, 1094 (Fla. Dist. Ct. App. 2009). The rationale for the privilege is to allow interested third parties to interfere to "protect their own economic interests." *Hamilton*, 6 F. Supp. 3d at 1320; *see also Palm Beach Cty.*, 13 So. 3d at 1095. The improper means doctrine is an exception to this broader privilege. *See Ethyl*, 386 So. 2d at 1225 ("So long as improper means are not employed, activities taken to safeguard or promote one's own financial, and contractual interests are entirely non-actionable") (cleaned up and footnote omitted). This exception does not affect the core rule that a tortious interference claim does not lie against an agent acting within the scope of his agency, which stems from the bedrock understanding that a contracting party is never liable for interfering with its own contract. While interested third parties are not complete strangers to the contract, holding them liable for interference when they use improper means is consistent with this fundamental understanding because, unlike agents, they are not identified with the contracting parties themselves.

All the cases M&M cites for the improper means argument concern interested third parties rather than agents acting on behalf of a contracting party. For example, in *KMS Restaurant Corp. v. Wendy's International, Inc*., Wendy's claimed a privilege to interfere with KMS's purchase of franchise restaurants from Citicorp because it was the franchisor and the purchase contract was conditioned on its approval. 361 F.3d 1321, 1322, 1325-27 (11th Cir. 2004). The other cases are no different. *See Ethyl*, 386 So. 2d 1221-23 (interference by creditor with agreement between officer of bankrupt corporation and his financier); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526 (11th Cir. 1985) (interference by developer of a lodge with management company's relationships with company's employees and unit owners); *Bluesky Greenland Env't. Sols., LLC v. 21st Century Planet Fund, LLC*, 985 F. Supp. 2d 1356 (S.D. Fla. 2013) (interference with distributorship agreement by competing distributor); *Making Ends Meet, Inc. v. Cusick*, 719 So. 2d 926 (Fla. Dist. Ct. App. 1998) (interference by landlord with lessee's proposed sale of lease); *McCurdy v. Collis*, 508 So. 2d 380 (Fla. Dist. Ct. App. 1987) (interference by Exxon with relationship between welding subcontractor's employee and his employer). By contrast, the facts of *Salit* illustrate that interference liability based on improper methods does not apply to agents of a party. The court held a corporate employee's interference claim against the corporation's general counsel for inducing the termination of his employment

was not adequately pleaded unless the employee added allegations that the general counsel was not acting in the corporation's interests, even though the general counsel allegedly engaged in fraudulent misrepresentation. *Salit*, 742 So. 2d at 383, 385-86; *see also Hurchalla v. Lake Point Phase I, LLC*, 278 So. 3d 58, 67 (Fla. Dist. Ct. App. 2019) (noting fraudulent misrepresentation is "ordinarily a wrongful means of interference").

M&M's improper-methods claim is effectively an attempt to impose tort liability on Mazzoni for the Trust's breach of its own contract. This effort is in direct contradiction to the principle that a party to a contract cannot tortiously interfere with that contract. Subjecting a contracting party to interference liability would convert breach of contract into a tort, which is clearly impermissible. *See Am. Int'l Land Corp. v. Hanna*, 323 So. 2d 567, 569 (Fla. 1975) ("[A] breach of contract cannot be converted into a tort merely by allegations of malice"). Tort damages cannot be given for conduct in violation of a contract with the plaintiff unless that conduct constitutes an independent tort. *Nicholas v. Miami Burglar Alarm Co.*, 339 So. 2d 175, 178 (Fla. 1976) ("Punitive damages are not recoverable for breach of contract, irrespective of the motive of defendant except where the acts constituting a breach of contract also amount to a cause of action in tort").

In this case, there is no independent tort for which the Trust or Mazzoni could be held liable. The allegedly improper nature of Mazzoni's interfering acts is based entirely on the claim that those acts violated the Trust's contractual obligations to M&M. Mazzoni allegedly refused to sign approval documents for M&M's permits, removed "for lease" signs from the property, and told people that the sale would never close, but none of these actions were criminal or contrary to any non-contractual right of M&M. Indeed, M&M could not even prove that the Trust breached its contract by these actions. Imposing tortious interference liability on Mazzoni, therefore, would be even more illogical than holding a breach of contract tortious—it would hold actions tortious that did not even amount to a breach.

III.

For the foregoing reasons, we agree with the decision of the district court granting summary judgment in favor of William Mazzoni and the Mazzoni Trust. If the result seems formalistic, that is only because the court is bound to give effect to the corporate forms through which the plaintiff and its privies chose to contract. The judgment is, therefore,

AFFIRMED.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PERSAUD PROPERTIES FL INVESTMENTS, LLC, Appellant, v. TOWN OF FORT MYERS BEACH, Appellee.	)	Case No. 2D19-1282

Opinion filed December 11, 2020.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Jennifer R. Cowan, Kevin S. Hennessy, and Richard P. Green of Lewis, Longman & Walker, P.A., St. Petersburg; and Nicole J. Poot of Lewis, Longman & Walker, P.A., St. Petersburg (substituted as counsel of record), for Appellant.

Hudson C. Gill and Jeffrey L. Hochman of Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., Fort Lauderdale, for Appellee.

BLACK, Judge.

Persaud Properties FL Investments, LLC, owns beachfront property in the Town of Fort Myers Beach. The property includes a restaurant and bar with a license to

sell alcohol on the premises, including permitting alcohol sale on the part of the property which extends into the Environmentally Critical zone—the beach. The property, by virtue of the ability to allow the sale and consumption of alcohol in the Environmentally Critical (EC) zone, had been a nonconforming use under the Town's municipal code of ordinances until a 2019 determination by the Town that Persaud had abandoned the nonconforming use of the property. Upon the abandonment determination, the property lost its status as a grandfathered nonconforming use and was required to comply with current zoning regulations, which prohibit alcohol sales in the EC zone. The trial court ruled in the Town's favor in Persaud's action for declaratory relief, inverse condemnation, deprivation of due process rights, and injunction and entered a judgment finding that the Town had properly determined that Persaud had abandoned the nonconforming use of the property. We reverse.

Persaud's property is located in two zoning districts in the Town: downtown, which permits the sale of alcohol and its consumption on premises, and EC, which prohibits alcohol sales. The Town adopted the ordinance at issue in 1995. At the time of the adoption, the property in question operated with a liquor license and sold and served alcohol in what was later zoned as EC. The prior owner of the property had a valid liquor license and when Persaud purchased the property it obtained the license, transferring it to the company. In October 2014, Persaud closed the bar and restaurant to begin extensive renovations. The Town was well aware of the renovations as various construction permits had to be issued and inspections had to occur; additionally, during the renovation period, multiple stop-work orders were issued by the Town. Upon completion of the renovations in October 2015, Persaud sought the necessary approval

to reopen and begin selling alcohol on the premises, including in the EC zone. During the one-year period of closure and at the request of Persaud, the property's liquor license had been held in escrow or "inactive status" by the Department of Alcoholic Beverages and Tobacco, a fact which had been known to the Town and which was important to a Town planner for purposes of the abandonment issue. Nonetheless, the Town advised Persaud that it could not sell alcohol in the EC zone because the nonconforming use had been abandoned pursuant to a provision of the Town's land development code. Persaud then filed suit against the Town.

The operative complaint included a count for declaratory relief, as well as counts alleging a taking under state law and deprivation of due process under the Florida Constitution and a count seeking a mandatory injunction. Both Persaud and the Town moved for summary judgment. After a hearing, the court entered judgment in favor of the Town on all counts.

The parties agree that there are no factual issues in dispute. Because our conclusion as to the entry of judgment in favor of the Town on the declaratory relief count renders moot the remaining issues on appeal, we address only the issue of whether the trial court incorrectly determined, as a matter of law, that Persaud had abandoned the nonconforming use of its property pursuant to the Town's land development code. "We review de novo the trial court's determination that the [Town] was entitled to—and that [Persaud] was not entitled to—a judgment as a matter of law." See Highlands-In-The-Woods, L.L.C. v. Polk County, 217 So. 3d 1175, 1178 (Fla. 2d DCA 2017); see also Harkless v. Laubhan, 278 So. 3d 728, 732 (Fla. 2d DCA 2019) (stating that review of the legal conclusions in a declaratory judgment is de novo (citing

Reed v. Honoshofsky, 76 So. 3d 948, 951 (Fla. 4th DCA 2011))). "Municipal ordinances are subject to the same rules of construction as are state statutes." Angelo's Aggregate Materials, Ltd. v. Pasco County, 118 So. 3d 971, 975 (Fla. 2d DCA 2013) (quoting Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552, 553-54 (Fla. 1973)). However, "[s]ince zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." Rinker Materials Corp., 286 So. 2d at 553; see also City of Miami Beach v. 100 Lincoln Rd., Inc., 214 So. 2d 39, 39 (Fla. 3d DCA 1968) ("Since zoning laws are in derogation of the common law, as a general rule they are subject to strict construction in favor of the right of a property owner to the unrestricted use of his property." (citing Wright v. De Fatta, 152 So. 2d 10, 14 (La. 1963))). Moreover, zoning ordinances, like statutes that are in derogation of the common law, "will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute [or ordinance] was not intended to make any alteration other than was specified and plainly pronounced." See Essex Ins. Co. v. Zota, 985 So. 2d 1036, 1048 (Fla. 2008) (quoting Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977)), superseded on other grounds by statute as recognized in Essex Ins. Co. v. Integrated Drainage Sols., Inc., 124 So. 3d 947, 951 (Fla. 2d DCA 2013). "[T]he presumption is that no change in the common law is intended unless the statute is explicit in this regard." Id. (emphasis omitted) (quoting Carlile, 354 So. 2d at 364); see also Major League Baseball v. Morsani, 790 So. 2d 1071, 1078 (Fla. 2001) ("The presumption is that no change in the common law is

intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." (quoting State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997))).

At issue is the proper interpretation of section 34-1264(h)(2) of the Town's land development code.[1] Section 34-1264 is specific to the "sale or service for on-premises consumption" of alcoholic beverages, and it provides that "[a]n establishment engaged in the sale or service of alcoholic beverages may thereafter become a nonconforming use due to a change in regulations, as provided in division 3 of article V of this chapter." Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. IV, div. 5, § 34-1264(h)(2) (2019); see Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. V, div. 3, § 34-3241(a) (2019) ("Nonconforming uses generally. . . . For purposes of this division, the term 'nonconforming use' means a use or activity which was lawful prior to the adoption of any ordinance from which this code is derived, or the adoption of any revision or amendment to this code, . . . but which fails, by reason of such adoption, revision, or amendment, to conform to the use requirements where the property is

[1]Although Persaud argues that section 34-1264(h)(2) does not apply to its property because the nonconforming use was not authorized by "special exception, administrative approval, or other approval" as defined in section 34-1264, we do not address that assertion because it was not before the trial court. We therefore resolve this case without deciding whether section 34-1264(h)(2) is applicable to nonconforming uses, like Persaud's property, that were not authorized by "special exception, administrative approval, or other approval" but were preexisting lawful uses that become nonconforming uses through changes in the code and are permitted to continue pursuant to section 34-3241(c). See Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. IV, div. 3, § 34-3241(c) (2019).

located."). Section 34-1264(h)(2) further provides that "[n]onconforming uses may continue until there is an abandonment of the permitted location for a continuous nine-month period" and that abandonment "mean[s] failure to use the location for consumption on the premises purposes as authorized by the special exception, administrative approval, or other approval." Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. IV, div. 5, § 34-1264(h)(2).[2]

Persaud contends that a correct interpretation and application of the abandonment provision of the Town's code requires an intent to have abandoned the nonconforming use. In support of this argument, Persaud cites City of Miami Beach v. State ex rel. Parkway Co., 174 So. 443 (Fla. 1937), Peters v. Thompson, 68 So. 2d 581 (Fla. 1953), Sarasota County v. Bow Point on the Gulf Condominium Developers, LLC, 974 So. 2d 431 (Fla. 2d DCA 2007), Hobbs v. Department of Transportation, 831 So. 2d 745 (Fla. 5th DCA 2002), and Lewis v. City of Atlantic Beach, 467 So. 2d 751 (Fla. 1st DCA 1985). Persaud argues that the trial court erred in refusing to apply the common law as discussed in these cases to the issue of abandonment.

In City of Miami Beach, the supreme court concluded that the word "discontinued," as used in the city's nonconforming use ordinance, did not mean "a temporary cessation for the purpose of making repairs or extensions"; rather, it meant

[2]Section 34-3244, governing nonconforming uses generally, similarly provides that "[w]hen a nonconforming use is discontinued or abandoned for nine consecutive months, the use shall not thereafter be carried out or reestablished except in conformance with all current regulations." Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. V., div. 3, § 34-3244 (2019). However, section 34-3244 does not define discontinue or abandon.

"a discontinuance of business of that sort at that place." 174 So. at 445. Peters similarly addressed a nonconforming use zoning regulation that included an "abandonment, or discontinuance" provision. 68 So. 2d at 582. In Peters, the court upheld the county's finding that the nonconforming use, the sale of alcoholic beverages within 1500 feet of another establishment selling alcoholic beverages, had been discontinued. Id. In reaching its conclusion, the court "noted that no effort [had been] made to renew the [liquor] license" during the period in which the property was closed. Id. This court, in Bow Point, very clearly held that the trial court had applied the correct law when it determined "that the suspension of Bow Point's motel operation for sixteen months during necessary repairs and renovations did not constitute a discontinuance of the nonconforming use." 974 So. 2d at 433.[3] Lewis expressly states that "[a]bandonment occurs when the landowner intentionally and voluntarily foregoes further nonconforming use of the property" and that "[t]emporary cessation of a

[3]Although City of Miami Beach, Peters, and Bow Point address "discontinuance" as applied to nonconforming uses, discontinue is defined as "to abandon or terminate," see Discontinue, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/discontinue (last visited Oct. 15, 2020), and discontinuance provisions and abandonment provisions have been interpreted without distinction, compare Bow Point, 974 So. 2d at 432 ("[A] discontinuance provision is one of the methods by which nonconforming uses may be gradually eliminated over the course of time. Other methods include attrition, destruction, and obsolescence."), with Crandon v. State ex rel. Uricho, 28 So. 2d 159, 160 (Fla. 1946) ("[W]e are not required to determine whether 'discontinuance' as used in the resolution contemplates an intent to abandon the use of the property."), and Lewis, 467 So. 2d at 754-55 ("The general rule is that nonconforming uses may be eliminated by attrition (amortization), abandonment, and acts of God as speedily as is consistent with proper safeguards and the rights of those persons affected." (first citing Bixler v. Pierson, 188 So. 2d 681, 683 (Fla. 4th DCA 1966); and then citing 82 Am. Jur. 2d Zoning and Planning § 179 (1985))). But cf. Crandon, 28 So. 2d at 160 (noting that the court was not "required to say that discontinuance is synonymous with abandonment"). Moreover, it is clear in each of these cases that the intent of the property owner was considered when determining whether the nonconforming use had been discontinued.

nonconforming use or the temporary vacancy of buildings used for the nonconforming use does not operate to effect abandonment of the nonconforming use." 467 So. 2d at 755 (first citing 82 Am. Jur. 2d Zoning and Planning § 216 (1985); then citing City of Miami Beach, 174 So. at 445); and then citing Quinnelly v. City of Prichard, 291 So. 2d 295, 299 (Ala. 1974)). The final case cited by Persaud, Hobbs, reiterates the state of the law with regard to abandonment provisions in zoning ordinances. Citing both Peters and Lewis, as well as Crandon v. State ex rel. Uricho, 28 So. 2d 159 (Fla. 1946), Hobbs reaffirms that a nonconforming use is abandoned by the property owner only when there is an intent to do so. 831 So. 2d at 748-49; see also Abandon, Black's Law Dictionary (11th ed. 2019) (defining "abandon" as "[t]o relinquish or give up with the intention of never again reclaiming one's rights or interest in"); Abandon, Black's Law Dictionary (5th ed. 1979) ("[Abandon] includes the intention, and also the external act by which it is carried into effect."); Abandonment, Black's Law Dictionary (5th ed. 1979) ("In determining whether one has abandoned his property or rights, the intention is the first and paramount object of the inquiry, for there can be no abandonment without the intention to abandon.").

The zoning regulations in each of the cases cited by Persaud are indistinguishable from the ordinance at issue here in that each provided that a grandfathered nonconforming use would lose its grandfathered status upon the discontinuance or abandonment of the use for a set period of time. And like those ordinances, the abandonment provision of the Town's code does not explicitly and unequivocally announce that the common law does not apply to it; in fact, the Town's code of ordinances provides as a general rule that "[a]ll words and phrases shall be

construed and understood according to the common and approved usage of the language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning." Town of Fort Myers Beach, Fla., Code of Ordinances ch. 1, § 1-2.(a) (2019).

Further supporting our conclusion that abandonment as used in the Town's ordinance includes an intent element is the definition of "used for" in section 1-2. of the code: "The term 'used for' includes the term 'arranged for,' 'designed for,' 'maintained for,' and 'occupied for.' " Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 1, § 1-2.(c) (2019). The evidence unequivocally supports the conclusion that Persaud was both maintaining and occupying the property for the sale of alcoholic beverages on the premises, including within the EC zone, as it had done previously and as the Town was fully aware.

Strictly construing the Town's ordinance in favor of the property owner, as we must, abandonment of a nonconforming use requires more than the passage of nine months while the property was closed for renovations; it requires voluntary cessation of the nonconforming use with the intent that the cessation of such use be permanent. The trial court erred in failing to apply the common law and in determining, as a matter of law, that Persaud had abandoned the nonconforming use of its property where there was no evidence that Persaud intended to discontinue selling alcohol in the EC zone.

Persaud did not abandon or discontinue the nonconforming use of the property during the one-year period of closure where renovations and construction were ongoing. Persaud is therefore entitled, under the applicable provisions of the Town's

municipal code, to maintain the property's status as a grandfathered nonconforming use. Our conclusion with regard to the declaratory action requires a reversal of the judgment as to all other counts. Cf. Lewis, 467 So. 2d at 755-56. Accordingly, we reverse the judgment in favor of the Town and remand for entry of a judgment in favor of Persaud on the declaratory relief count.

Reversed and remanded.

SMITH, J., and CASE, JAMES R., ASSOCIATE SENIOR JUDGE, Concur.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SHAWNA SCHLECHTER, Appellant, v. COMMUNITY HOUSING TRUST OF SARASOTA COUNTY, INC., a Florida not for profit corporation; and LUTHY FAMILY LLC, a Florida limited liability company, Appellees.	)	Case No. 2D19-3619

Opinion filed December 11, 2020.

Appeal from the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Morgan R. Bentley of Bentley & Bruning, P.A., Sarasota, for Appellant.

Susan J. Silverman and Henry W. Haskins, Sarasota, for Appellee Luthy Family, LLC.

No appearance for remaining Appellee.

KHOUZAM, Chief Judge.

Shawna Schlechter timely appeals an order denying her motion to set aside a settlement agreement filed pursuant to Florida Rule of Civil Procedure 1.540(b) and granting Luthy Family LLC's competing motion to enforce the same agreement. We

affirm the order on appeal to the extent it denies Ms. Schlechter's motion but reverse to the extent it grants Luthy Family LLC's motion to enforce the settlement agreement.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Ms. Schlechter filed this action against Community Housing Trust of Sarasota County, Inc. (CHT), and Luthy Family LLC (Luthy), raising two counts for declaratory judgment and one count for specific performance. The subject matter of the lawsuit concerns interests in real property in Sarasota.

After two years of litigation, the parties engaged in mediation, which resulted in all parties entering into a Mediated Settlement Agreement (MSA). One term of the MSA required the parties to execute a "Stipulation for an Order of Dismissal with Prejudice." All parties thereafter executed and submitted to the trial court a "Joint Stipulation for Entry of an Order of Dismissal with Prejudice." The one-sentence stipulation states simply that the parties "hereby stipulate to the entry of an Order of the Court, dismissing this matter, with prejudice, and with each side to bear their own attorney's fees and costs."

A proposed order approving the stipulation and dismissing the case with prejudice was also submitted. The ruling in the order reads in full: "The stipulation is approved, and this matter is hereby dismissed with prejudice, with all parties to bear their own attorney's fees and costs." The order does not reserve jurisdiction to the trial court for any purpose. The trial court signed the proposed order as submitted.

Neither the stipulation nor the order mentions the existence of the MSA or otherwise incorporates the agreement. In fact, our record does not reflect that the trial court was presented with the MSA at all before it entered the order dismissing the case

with prejudice.

Less than a month after the dismissal order was entered, Ms. Schlechter filed a "Motion to Set Aside Mediated Settlement Agreement," citing rule 1.540(b) and attaching the MSA. The motion alleges that "[e]ither through mutual mistake, or impossibility of performance, the [MSA] cannot be performed through no fault of the parties and should be set aside." The stated basis was that certain Federal Housing Administration rules, unknown to the parties at the time they entered into the MSA, prevented performance. The motion also asserts, without further elaboration, that "[i]f there exists fraud in the inducement, then the [MSA] should be set aside." Luthy filed a response opposing Ms. Schlechter's 1.540(b) motion.

Luthy also filed its own motion "to Enforce Settlement Agreement and to Issue Writ of Possession Within 90 Days of Execution of Settlement Agreement." Luthy's motion does not cite to rule 1.540(b) or any other legal authority. Instead, it simply asserts that the MSA's terms should be enforced.

The trial court held a nonevidentiary hearing on the competing motions. Despite having filed the rule 1.540(b) motion, Ms. Schlechter's counsel questioned the court's jurisdiction to rule on either motion in light of the dismissal with prejudice. The trial court reviewed the dismissal order and acknowledged that "sometimes the order will say the Clerk is directed to close the file but the Court retains jurisdiction to enforce settlement, and it doesn't here." Luthy's counsel asserted that the court "always" has jurisdiction to enforce a settlement agreement, but maintained that the court lacked jurisdiction to set aside the MSA here.

The court reserved ruling on the motions and issued its order the following

day. The order granted Luthy's motion to enforce the MSA and denied Ms. Schlechter's motion to set it aside. This appeal followed.

ANALYSIS

Ms. Schlechter contends that the trial court lacked jurisdiction to rule on the competing postdismissal motions because the case had previously been dismissed with prejudice. She argues in the alternative that, if the court did have jurisdiction, it should have granted her motion and denied Luthy's.

We conclude that the court had limited jurisdiction to consider Ms. Schlechter's rule 1.540(b) motion. But because the motion did not establish a colorable entitlement to relief, the trial court correctly denied it without an evidentiary hearing. By contrast, the trial court lacked jurisdiction to order enforcement of the settlement agreement and reversibly erred in doing so.

I. Ms. Schlechter's Rule 1.540(b) Motion

"[V]oluntary dismissals . . . are acts of finality that deprive the trial court of jurisdiction over the dismissed case." Pino v. Bank of N.Y., 121 So. 3d 23, 32 (Fla. 2013) (citing Randle-Eastern Ambulance Serv., Inc. v. Vasta, 360 So. 2d 68 (Fla. 1978)). The only recognized exception to this rule of "absolute finality" is "the existence of grounds justifying relief under rule 1.540(b)." Cottrell v. Taylor, Bean & Whitaker Mortg. Corp., 198 So. 3d 688, 690-91 (Fla. 2d DCA 2016) (quoting Miller v. Fortune Ins. Co., 484 So. 2d 1221, 1223 (Fla. 1986)). As this court has explained:

> Because a trial court necessarily has jurisdiction to determine whether it has jurisdiction, the filing of a rule 1.540(b) motion after a case has been voluntarily dismissed vests the trial court with the limited authority to determine whether the grounds asserted by the movant justify relief under the rule.

Id. at 691.

If the motion sets forth a colorable entitlement to relief, then the trial court should conduct an evidentiary hearing to determine whether such relief should be granted. Id. However, "where the allegations of a rule 1.540(b) motion do not give rise to a right to relief, an evidentiary hearing on those allegations is not required and the trial court's jurisdiction is limited to the entry of an order denying the motion." Id.

Ms. Schlechter's motion was timely and cited rule 1.540(b). Thus, the trial court was vested "with the limited authority to determine whether the grounds asserted" justified relief under rule 1.540(b). Id. However, the relief Ms. Schlechter sought in her motion is not cognizable under rule 1.540(b), which "authorizes motions seeking relief only from 'a final judgment, decree, order, or proceeding.' " Bennett's Leasing, Inc. v. First St. Mortg. Corp., 870 So. 2d 93, 97 (Fla. 1st DCA 2003) (first emphasis added) (quoting Fla. R. Civ. P. 1.540(b)). Ms. Schlechter's rule 1.540(b) motion does not seek relief from any judgment, decree, order, or proceeding. It does not mention, much less seek relief from, the dismissal order. Instead, it expressly asks the court to set aside an agreement between the parties, which had not been presented to the trial court and was not mentioned in any of the dismissal papers.

Even if the motion had sought relief from the dismissal order, it would not have presented a colorable entitlement to relief because rule 1.540(b)(1) is not an appropriate vehicle for a party to vacate a "dismissal of a suit based on its assertion that investigation conducted after the dismissal notice was filed revealed information the party wished it had known before filing it." Cottrell, 198 So. 3d at 693. The basis for relief alleged in Ms. Schlechter's rule 1.540(b) motion was that "none of the parties to

the Agreement were aware that the FHA lending regulations would bar the Luthy Mortgage." As this type of mistake is not a basis for relief under rule 1.540(b), Ms. Schlechter's rule 1.540(b) motion failed to set forth a colorable entitlement to relief and was properly denied.

II. Luthy's Motion to Enforce the MSA

Ms. Schlechter also argues that the trial court erred by granting Luthy's motion to enforce the MSA. She argues that, by virtue of the prior dismissal with prejudice—which did not incorporate the MSA or reserve any jurisdiction to the trial court—the court lacked jurisdiction to enforce the agreement. We agree.

As set forth above, when the trial court entered the parties' proposed order dismissing the case with prejudice, the court lost jurisdiction over the dismissed case. See Pino, 121 So. 3d at 32. Unlike Ms. Schlechter's motion, Luthy's motion to enforce the MSA did not cite to or purport to seek relief under rule 1.540. Luthy's motion thus falls outside the "one exception" to the "absolute finality" of a voluntary dismissal. Cottrell, 198 So. 3d at 690 (quoting Miller, 484 So. 2d at 1223).

Moreover, neither of the conditions for enforcing a settlement agreement has been met. "[A] court has jurisdiction to enforce a settlement agreement where the court has either incorporated the agreement into a final judgment or approved the agreement by order and retained jurisdiction to enforce it[s] terms." Paulucci v. Gen. Dynamics Corp., 842 So. 2d 797, 799 (Fla. 2003). Here, there was no final judgment below because the case was voluntarily dismissed with prejudice by order. And the order accepting the parties' stipulation neither referred to the MSA nor retained jurisdiction for any reason. Indeed, the record does not establish that the MSA or its

terms were ever presented to the trial court before the postdismissal proceedings. Accordingly, the trial court did not have jurisdiction to enforce the MSA.

We affirm the order on appeal to the extent it denies Ms. Schlechter's rule 1.540(b) motion but reverse to the extent the order grants Luthy's motion to enforce the settlement agreement.

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

VILLANTI and SMITH, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAK CAPITAL, LLC, Appellant, v. KATRINA ADAMS, JOHN ADAMS, and MARKETKING, LLC, Appellees.	)	Case No. 2D19-4371

Opinion filed December 9, 2020.

Appeal from the Circuit Court for Lee County; Robert J. Branning and Joseph C. Fuller, Judges.

Ryan W. Owen and David L. Boyette of Adams and Reese LLP, Sarasota, for Appellant.

Robson D.C. Powers and Alvaro C. Sanchez of Burandt, Adamski, Feichthaler & Sanchez, PLLC, Cape Coral, for Appellees Katrina and John Adams.

No appearance for Appellee MarketKing, LLC.

VILLANTI, Judge.

JAK Capital, LLC, appeals the amended final judgment that stripped its mortgage from a house owned by Katrina Adams, quieted title to the house in favor of

the Adamses, and denied JAK Capital's claim for foreclosure of the mortgage. Because the trial court misapplied the law in entering the amended final judgment, we reverse and remand for entry of a foreclosure judgment in favor of JAK Capital.

Background

The record before this court shows that in July 2010, Katrina Adams inherited a home in Lee County from her father. She and her husband, John Adams, moved into the home shortly thereafter. At that time, there was a relatively small mortgage remaining on the property in favor of HSBC, which the Adamses assumed.

In early 2015, Katrina[1] met Thomas Errico, who was a regular at the restaurant where Katrina worked. Over the course of several discussions, Katrina learned that Errico owned and operated a business called MarketKing, LLC, that flipped houses, and she expressed an interest in learning about that business. Ultimately, the two discussed going into business together, with Katrina contributing capital while Errico taught her the ins and outs of running that type of business.

As part of the process of "going into business together," Errico requested various documents from Katrina, allegedly to show her creditworthiness and her ability to contribute capital. The documents he requested—and that she produced without question in early 2016—included insurance information on her house, a payoff statement from HSBC, and some other financial information. In addition, Katrina obtained a survey of her home and had it appraised, and she provided the survey and appraisal to Errico as well. Katrina testified at the bench trial that she provided all of this

[1]We identify the Adamses by their first names only for clarity when they took actions independent of each other.

information to Errico to show him that she had equity in her house from which she could make her capital contribution and also to show that she was financially responsible.

After receiving all of this information from Katrina, Errico provided the Adamses with a packet of documents to review and sign. Both Katrina and John testified that they understood these documents to be a "draft" of the business plan for the new business. However despite the documents allegedly being only a "draft" rather than the final version, both Katrina and John signed the documents and returned them to Errico. One of these documents turned out to be a mortgage on Katrina's house.

Errico, through MarketKing, then used the mortgage signed by the Adamses to obtain a $150,000 loan from JAK Capital. MarketKing gave a promissory note to JAK Capital for $150,000 and secured that note with the mortgage on Katrina's house.[2] As part of the closing on that loan, which occurred in mid-March 2016, JAK Capital paid off the existing HSBC mortgage loan on Katrina's house in the amount of $15,928.41. After various other closing costs were paid, the remainder of the funds were paid to MarketKing.

The loan in question was a two-year, interest-only loan with a balloon payment of the principal due in April 2018. During 2016 and 2017, JAK Capital received only sporadic interest payments on the loan from MarketKing. In late 2017, JAK Capital sent a letter to MarketKing and the Adamses stating its intent to begin foreclosure

[2]JAK Capital's principal testified at trial that JAK Capital was in the business of making business loans that were secured by Florida real property. When asked whether it was unusual to have a note signed by one party and a mortgage provided by another, he testified: "[T]hat's not unusual. I mean, we make business loans, and sometimes there's, you know, people that are involved in the business that are willing to, you know, put up some real estate as collateral for the loan."

proceedings on the house. In response, the Adamses filed a single-count complaint against JAK Capital seeking to quiet title to the house. In their complaint, the Adamses alleged that they had never signed the mortgage and that their signatures on the mortgage were forged by Errico.

JAK Capital filed a counterclaim for foreclosure of the mortgage.[3] In the Adamses' affirmative defenses to this counterclaim, they alleged only that their signatures on the mortgage were forgeries. Nowhere in either their complaint or their affirmative defenses to the counterclaim did they allege that they were tricked, fooled, deceived, or otherwise defrauded into signing the mortgage by either Errico or JAK Capital.

During the bench trial, however, both Katrina and John admitted that they signed the "draft" business plan documents from Errico without knowing what they were, claiming that the mortgage must have been included in the "draft" business plan without their knowledge. While Katrina continued to assert that she had not signed the mortgage, John testified that he might have signed the mortgage by mistake while they were signing all the other "draft" business plan documents. JAK Capital presented testimony from a handwriting expert that the Adamses' signatures on the mortgage were authentic.

After hearing the testimony and reviewing all of the documents admitted into evidence, the trial court found that the mortgage was the product of fraud and deceit by MarketKing through Errico and that the Adamses' signatures, and therefore

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[3]JAK Capital's counterclaim also alleged alternative counts for an equitable lien and equitable subrogation. Given our resolution of this appeal, we need not address those counts.

the mortgage to which they were affixed, were not given "knowingly, intelligently and voluntarily." Thus, while the trial court did not find that the Adamses' signatures were forgeries, it refused to enforce the mortgage on the basis that it was procured by fraud. Having made this ruling, the trial court entered final judgment in favor of the Adamses and denied relief to JAK Capital on its counterclaim for foreclosure. JAK Capital now appeals this final judgment.

Analysis

In this appeal, JAK Capital contends that the trial court erred by stripping its mortgage from the house, quieting title in the Adamses' favor, and denying its claim for foreclosure of the mortgage for two separate reasons. We conclude that both of these reasons require reversal of the amended final judgment.

First, because the Adamses never pleaded fraud as a defense to the mortgage, the trial court erred as a matter of law by providing them with relief on this unpleaded basis. Florida Rule of Civil Procedure 1.110(d) identifies fraud as an affirmative defense that must be specifically pleaded or it is waived. In addition, "the circumstances constituting fraud . . . shall be stated with such particularity as the circumstances may permit." Fla. R. Civ. P. 1.120(b); see also Morgan v. W.R. Grace & Co.–Conn., 779 So. 2d 503, 506 (Fla. 2d DCA 2000); Zikofsky v. Robby Vapor Sys., Inc., 846 So. 2d 684, 684 (Fla. 4th DCA 2003) ("[T]o raise an affirmative defense of fraud, the 'pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated.' " (quoting Cocoves v. Campbell, 819 So. 2d 910, 912 (Fla. 4th DCA 2002))). When a defense listed in rule 1.110(d) is not pleaded, or is not pleaded with sufficient specificity,

it is deemed waived and cannot form the basis for relief. See, e.g., Derouin v. Universal Am. Mortg. Co., LLC, 254 So. 3d 595, 601 (Fla. 2d DCA 2018) (providing that "[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are" and thus "[a]n issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination" (first quoting Bank of Am., N.A. v. Asbury, 165 So. 3d 808, 809 (Fla. 2d DCA 2015); and then quoting Gordon v. Gordon, 543 So. 2d 428, 429 (Fla. 2d DCA 1989))). In short, the trial court cannot award relief on the basis of a defense that has not been pleaded. Id.

Here, the only allegation made in the Adamses' complaint to quiet title and raised in their affirmative defenses to JAK Capital's counterclaim was that their signatures on the mortgage were forged. They specifically alleged that they never signed the mortgage. They did not allege in any pleading at any time that they signed the mortgage by mistake or because Errico misled them into believing that they were signing some other documents or because Errico hid the mortgage in a stack of other documents to trick or deceive them into signing it. The specific fraud that they alleged—but did not prove—was that Errico forged their signatures on the mortgage without their knowledge. Since the Adamses never alleged that they were defrauded into signing the mortgage, the trial court erred by providing them with relief on that basis.

In this appeal, the Adamses argue that their allegations of forgery were sufficient to allege a claim of fraud, and they cite several cases for their theory that forgery is a species of fraud. See, e.g., Padilla v. Padilla, 278 So. 3d 333, 335 (Fla. 3d

DCA 2019). However, rule 1.120(b) requires that the circumstances comprising the fraud be alleged with particularity. While forgery may be a species of fraud, the Adamses never alleged that Errico defrauded them into signing the mortgage. Their only allegation was that they did not sign the mortgage at all. Having failed to prove the allegations they made, the Adamses may not save the judgment by claiming that they could have alleged something else but did not.

Moreover, the record is clear that the issue of fraud—rather than forgery—was not tried by consent. "An issue is tried by consent 'when there is no objection to the introduction of evidence on that issue.' " Derouin, 254 So. 3d at 603 (quoting Fed. Home Loan Mortg. Corp. v. Beekman, 174 So. 3d 472, 475 (Fla. 4th DCA 2015)). Here, when the Adamses moved at the close of evidence to "conform the pleadings to the evidence," JAK Capital objected, and the trial court denied the motion. Further, JAK Capital objected in its written closing argument to the court's consideration of any claim of fraud other than forgery. Hence, it is clear from the record that the issue of fraud by any means other than forgery was neither pleaded nor tried by consent. The Adamses were not entitled to a judgment in their favor on the basis of a fraud they failed to allege, and the amended final judgment in their favor must be reversed on this basis.

Second, even if the issue of fraud had been properly before the court, the Adamses did not prove that they were entitled to relief on that basis against JAK Capital. To be entitled "[t]o set aside a mortgage on the ground of fraud or duress practiced or exercised in its procurement," the party seeking to avoid the mortgage carries the burden to prove that "such fraud or duress [was] participated in to some extent by the mortgagee." Sheppard v. Cherry, 159 So. 661, 662 (Fla. 1935) (citing

Smith v. Commercial Bank, 81 So. 154, 155 (Fla. 1919)); see also Baron v. Estate of Clare, 372 So. 2d 1005, 1006-07 (Fla. 4th DCA 1979). In the absence of evidence of such fraud by the holder of the mortgage, the mortgage will be valid and enforceable.

For example, in Baron, Ronald Baron loaned $7500 to Granville Clare, who provided a mortgage on real estate he owned as security. 372 So. 2d at 1006. After Clare died, his heirs attempted to invalidate the mortgage, arguing that Clare had been incompetent and "unable to transact any business" at the time he purportedly signed the mortgage. Id. The heirs produced evidence that showed that two individuals who had been caring for Clare at the time had obtained Clare's signature on the mortgage by fraud and had converted the proceeds received from Baron for their own use. Id. However, the evidence showed that Baron was completely unaware of the actions of Clare's caretakers and had not participated in the fraud in any way. Id. Despite no evidence that Baron had been involved in the scheme, the trial court refused to enforce the mortgage, finding that it was "permeated with fraud." Id. The Fourth District reversed this ruling, holding that the trial court erred in refusing to enforce the mortgage held by Baron "because there is simply no evidence that [Baron] was engaged in any fraudulent conduct to the detriment of [Clare]." Id. at 1007. In the absence of such evidence, Baron was entitled to enforce the mortgage against Clare. Id. at 1006-07.

Like the trial court in Baron, the trial court here erred in refusing to enforce the mortgage held by JAK Capital when there was no evidence that JAK Capital engaged in any fraud or deceit. The trial court in this case refused to enforce the mortgage because it found that the Adamses had been defrauded into giving the

mortgage. However, the trial court did not find that the holder of the mortgage—JAK Capital—had participated in the fraud to any extent, nor would there have been any evidence to support such a finding had it been made. Instead, all of the evidence showed that if any fraud occurred, it was perpetrated by Errico. In the absence of any evidence whatsoever that JAK Capital participated in committing the fraud, it was entitled to enforce the mortgage, and the trial court erred by holding otherwise.

In this appeal, as they did in the trial court, the Adamses argue that JAK Capital should not be entitled to enforce the mortgage because it never took any steps to confirm that the Adamses had actually consented to the mortgage. However, on the facts here, JAK Capital had no such obligation. When faced with a mortgage that is regular on its face—such as the mortgage here—a bank or other lender has no obligation to question the legitimacy of that document. See Dines v. Ultimo, 532 So. 2d 1131, 1132 (Fla. 4th DCA 1988) (finding that the bank could enforce its mortgage despite the fraud perpetrated on the homeowners by their son in obtaining their signatures when the mortgage was in the proper legal form and there was nothing to alert the lender to anything out of the ordinary). Given the facial regularity of the mortgage, the Adamses' only avenue of relief would be to prove that JAK Capital "deliberately refused to examine that which it was his duty to examine, or made representations as to a condition which had not been examined without knowing whether it was true or false, and it proved to be untrue." Ocean Bank of Miami v. Inv-Uni Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992). But the Adamses offered no such evidence in this case, and the trial court made no finding that JAK Capital had deliberately refused to investigate a document the authenticity of which it knew or

should have known was questionable. Simply put, JAK Capital had no obligation to go behind the Adamses' signatures on the mortgage when the document was regular on its face.

In sum, the trial court erred by entering final judgment in favor of the Adamses on a claim of fraud that they neither pleaded nor proved. We therefore reverse the amended final judgment, reverse the corresponding judgment for attorney's fees and costs entered in favor of the Adamses, and remand for the trial court to enter final judgment granting foreclosure in favor of JAK Capital. On remand, the trial court should consider the evidence presented at the bench trial concerning the amount of the Adamses' indebtedness to JAK Capital, taking such other evidence as is necessary to enforce the terms of the mortgage.

Reversed and remanded with directions.

BLACK and ATKINSON, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed December 9, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1782
Lower Tribunal No. 13-00808

Bank of America, N.A.,
Petitioner,

vs.

Lisa S. Dulberg De Morales, et al.,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Carlos M. Guzman, Judge.

McGuireWoods LLP and Sara F. Holladay-Tobias (Jacksonville), for petitioner.

Jacobs Legal, PLLC and Bruce Jacobs, for respondents.

Before SCALES, LINDSEY and LOBREE, JJ.

LOBREE, J.

Bank of America, N.A. (the "bank"), petitions for a writ of certiorari to quash the lower court's orders deferring ruling on its motion to dismiss and denying its

alternative motion to stay discovery, sought against Lisa S. Dulberg De Morales (the "mortgagor"). We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(2)(A). Because the bank was entitled to a ruling on its motion to dismiss asserting immunity from suit before a ruling could be made compelling additional discovery disclosures, we agree that the trial court departed from the essential requirements of the law in deferring ruling on the motion to dismiss, compelling the discovery at issue, and failing to stay discovery.

In April 2019, the mortgagor filed the operative, third amended complaint, raising two causes of action for purported racketeering and deceptive trade practice violations by the bank. The bank immediately moved to dismiss the complaint as stemming from acts protected by litigation immunity. In July of that year, at a hearing on the bank's motion to set a hearing on its motion to dismiss, the trial court orally ruled that a future hearing would be coordinated with chambers to hear all pending motions. The mortgagor propounded discovery requests due August 22, 2019. She also amended her motion for sanctions and to issue an order to show cause against the bank for purported discovery violations and fraud the year before.

At a subsequent hearing on the bank's motion to stay discovery pending a ruling on its motion to dismiss, the bank again argued that a ruling on its motion to dismiss, based on absolute immunity, was required before further discovery and other considerations took place, unless the very immunity asserted be defeated. The

mortgagor countered that its motion for sanctions and to show cause, alleging fraud on the court by the bank in the proceedings, should be heard first or simultaneously with the motion to dismiss, and that discovery should proceed regardless, since even if the motion to dismiss was successful, "their litigation privilege says [the trial court] shouldn't let me sue them," but the court could still "handle it through [its] inherent contempt powers." The trial court made an oral ruling deferring both the motion to dismiss and the mortgagor's motion for an order to show cause at a hearing to be coordinated by the parties. The trial court reserved ruling on the motion to stay, promising a ruling by the end of the day which did not take place.

Weeks later, the mortgagor propounded more discovery requests. A week after the new discovery requests and almost a month since it reserved ruling on the motion to stay, the trial court issued an order denying the motion to stay. Because the denial of the stay arrived one day before the discovery was due, the bank moved for an extension of time to respond to outstanding discovery until twenty-eight days after the court's ruling on its motion to dismiss. The trial court instead extended the time to respond to thirty days from its denial of the stay and specifying the date in September of 2019 when they were due.

To be entitled to certiorari relief, the bank "must establish that the trial court's order . . . departed from the essential requirements of law in a way that will cause irreparable harm." Univ. of Miami v. Ruiz ex rel. Ruiz, 164 So. 3d 758, 763 (Fla. 3d

DCA 2015); Bank of New York Mellon v. Figueroa, 299 So. 3d 430, 433 (Fla. 3d DCA 2019), rev. denied, SC20-333, 2020 WL 2498181 (Fla. May 13, 2020). Although "[a] party typically cannot invoke an appellate court's certiorari jurisdiction based on the denial of a motion to dismiss," "when the motion for summary judgment hinges on the application of a complete . . . immunity from suit . . . requiring a party entitled to that immunity to continue litigating the suit constitutes irreparable harm in and of itself." Ruiz, 164 So. 3d at 763; see also James v. Leigh, 145 So. 3d 1006, 1008 (Fla. 1st DCA 2014) (same).

Contrary to the bank's suggestion, we cannot quash the trial court's oral ruling deferring to rule on its motion to dismiss. "[T]his court lacks jurisdiction to review orders which have not been reduced to writing." Rivera v. Dade County, 485 So. 2d 17, 17 (Fla. 3d DCA 1986); see also Davis v. Heye, 743 So. 2d 1200, 1200 (Fla. 5th DCA 1999) (dismissing petition for certiorari involving only oral ruling, not written order). Nevertheless, "[w]hile postponing discovery for a short period of time pending determination of material, outstanding motions [is] within the discretion of the trial court," Deltona Corp. v. Bailey, 336 So. 2d 1163, 1169 (Fla. 1976), a trial court's order denying a stay may qualify for certiorari review, see Spacebox Dover, LLC v. LSREF2 Baron, LLC, 112 So. 3d 751, 752 (Fla. 2d DCA 2013).

The mortgagor is correct that the trial court had inherent authority to consider her motion for sanctions even after a dismissal, such as would have resulted from a

favorable ruling on the bank's motion, as part of its jurisdiction over ancillary matters. See, e.g., Cutler v. Cutler, 84 So. 3d 1172, 1173 (Fla. 3d DCA 2012) (citing Tobkin v. State, 777 So. 2d 1160, 1163-64 (Fla. 4th DCA 2001)); see also Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) ("[T]he justification behind immunizing defamatory statements applies equally to 'other misconduct occurring during the course of a judicial proceeding' . . . [and] adequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court's contempt power.") (quoting Levin, Middlebrooks, Mabie, Thomas, Mayes Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608-09 (Fla. 1994)).

Given the purpose of the immunity asserted, the potentially dispositive nature of the motion, and the circumstances, the trial court abused its discretion in failing to stay discovery until it ruled on the bank's motion to dismiss. Although the expense of continued litigation is ordinarily not a harm that warrants certiorari relief, it may lie in cases where the immunity asserted is from litigation altogether, and not just from liability. See, e.g., Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994) ("[A]n order denying qualified immunity is 'effectively unreviewable on appeal from a final judgment,' as the public official cannot be 're-immunized' if erroneously required to stand trial *or face the other burdens of litigation*.") (quoting Mitchell v. Forsyth, 472 U.S. 511, 527 (1985) (emphasis added); DelMonico v. Traynor, 116 So. 3d

1205, 1215 (Fla. 2013) (litigation immunity is "from suit" altogether); Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 353 (Fla. 2012) (litigation immunity intended to prevent party from becoming involved in lawsuit altogether); O'Brien v. Exposito, 824 So. 2d 954, 955 (Fla. 3d DCA 2002) (certiorari available where party "will effectively lose [its] entitlement to . . . immunity if the case proceeds to trial, thereby causing irreparable injury"); Fla. Fish & Wildlife Conservation Comm'n v. Jeffrey, 178 So. 3d 460, 465 (Fla. 1st DCA 2015) (certiorari available against order denying officer's assertion of qualified immunity but not against denial of state's assertion of sovereign immunity, since potentially immune individual's continued litigation is harm different from state's continued exposure to litigation).

Moreover, the same failure sufficiently shows that "the trial court departed from the essential requirements of the law." Jeffrey, 178 So. 3d at 465-67 (granting certiorari against order deferring ruling on motion asserting qualified immunity); see also James, 145 So. 3d at 1008;[1] compare Maris Distrib. Co. v. Anheuser-Busch, Inc., 710 So. 2d 1022, 1025 (Fla. 1st DCA 1998) (granting certiorari against discovery stay only because it was "premature and without good cause"), with McCabe v. Foley, 233 F.R.D. 683, 685 (M.D. Fla. 2006) ("A request to stay discovery pending a resolution of a motion is rarely appropriate unless resolution of the motion will dispose of the entire case."); and Theodore D'Apuzzo, P.A. v. United

[1] We do not express any view on the merits of the bank's pending motion to dismiss.

States, No. 16-62769-Civ, 2017 WL 3098713, at *2 (S.D. Fla. Apr. 11, 2017) ("A brief stay of discovery will not cause any prejudice to [the plaintiff], who will have sufficient opportunity to conduct discovery if his claims advance."), and Rice v. Haines, 111 So. 3d 305, 305-06 (Fla. 5th DCA 2013) (granting stay of lower court discovery during certiorari proceedings where "denial of a stay will cause irreparable harm in the form of disclosure of the very things which are the subject of the pending petition").

Because even the mortgagor's counsel correctly noted below that the motion to dismiss could dispose of the entire case, just not of other ancillary issues, a stay was not only appropriate, but required under the facts of this case. Accordingly, we grant the petition, quash the trial court's order denying a stay and requiring discovery responses, and remand for further proceedings consistent with this opinion.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BRIDGE FINANCIAL, INC., a Florida for-profit corporation, **ADAM PALAS, ALEXANDER PALAS,** and **SERGIO NATIVI,**
Appellants,

v.

J. FISCHER & ASSOCIATES, INC.,
a Florida for-profit corporation,
Appellee.

No. 4D19-348

[December 9, 2020]

Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jeffrey Gillen, Judge; L.T. Case No. 502009CA008358XXXXMB.

Leonard S. Feuer of Leonard Feuer, P.A., West Palm Beach, for appellants.

John R. Whittles and Elizabeth F. Olds of Mathison Whittles, LLP, Palm Beach Gardens, for appellee.

LEVINE, C.J.

Appellants Adam Palas, Alex Palas, and Sergio Nativi worked at appellee J. Fischer & Associates, Inc. ("JFA"). Appellants were terminated after they copied JFA's entire server, including the client list, and formed their own competing business, appellant Bridge Financial, Inc. After their termination, appellants solicited JFA's clients, allegedly causing a decrease in JFA's revenue. JFA sued, and a jury entered a verdict in favor of JFA.

Appellants appeal, raising a litany of issues. Appellants argue that the trial court erred in (1) denying their motion for new trial because the client list was not a trade secret; (2) denying their motion for new trial because they did not tortiously interfere with JFA's business relationships, (3) denying their motion for new trial because JFA's owner provided false testimony, (4) admitting expert testimony on damages, (5) striking their affirmative defense of good faith, (6) denying their motion for judgment on

the pleadings as to FUTSA preemption, and (7) prohibiting testimony on why appellants copied JFA's server. JFA cross-appeals, challenging a judgment on the pleadings in favor of Adam Palas, who is a 5% owner of JFA, for tortious interference. We affirm on all issues, but write only to address issues 1, 2, and 7 on direct appeal as well as the issue on cross-appeal.

JFA sued appellants for misappropriation of trade secrets, tortious interference with a business relationship, civil conspiracy, conversion, breach of duty of loyalty, and breach of fiduciary duty. Before trial, the trial court granted JFA's motion in limine to limit evidence accusing JFA's owner, Jay Fischer, of tax fraud. The trial court also granted a motion for judgment on the pleadings in favor of Adam Palas for tortious interference because, as a shareholder of JFA, he could not interfere with himself. At trial, the following testimony was given.

Fischer is a tax accountant and financial advisor. Fischer worked with his father for a number of years until they sold their company and client list to another firm that later became Pinnacle Taxx Advisors. Fischer stayed on as a manager. While at Pinnacle, Fischer hired Adam Palas and Alex Palas.

In 2006, Fischer formed his own company, JFA, and purchased the client list from Pinnacle, paying $140,000 to $160,000. Pinnacle had 1,500 to 2,000 clients, some of whom were the original clients of Fischer and his father. Adam Palas and Alex Palas came to work for Fischer at JFA. Fischer also hired Sergio Nativi. Fischer later sold Adam Palas a 5% share. JFA's client retention rate was over 90%. JFA prepared over 2,000 tax returns its first year.

JFA maintained its client list on the server, which was password protected. The client list consisted not only of clients' names and addresses but also copies of the clients' tax returns and all the information used to prepare those returns such as W-2 forms, 1099 forms, business records, receipts, social security numbers, dates of birth, childcare information, and health records. JFA spent a significant amount of time, effort, and money in developing the client list, which was not publicly available.

While employed at JFA, appellants set up their own corporation, Bridge Financial, and copied JFA's entire server, including the client list. Appellants also drafted a letter on JFA's computer system announcing the opening of their competing firm and offering each client a "detailed

checklist tailored to your specific account." Fischer terminated appellants upon discovering that they were planning on leaving and soliciting clients.

Appellants subsequently solicited JFA's clients, offering them a $100 flat rate fee. Approximately 420 clients converted to Bridge Financial. The year after appellants left, JFA prepared 600 less returns than the year before. The loss of clients resulted in lost revenue from both tax preparation and referrals. JFA's expert forensic accountant estimated a range of damages between $247,030, assuming a growth rate of 7.84%, and $763,242, assuming the historical growth rate of 15.86%.

The jury found appellants liable on all six counts and awarded JFA a total of $255,770 in damages. Following the denial of their motion for new trial, appellants appeal. JFA cross-appeals.

As to the first issue, appellants argue that the trial court erred in denying their motion for new trial because JFA's client list did not qualify as a trade secret. An order denying a motion for new trial is reviewed for abuse of discretion. *Izquierdo v. Gyroscope, Inc.*, 946 So. 2d 115, 117 (Fla. 4th DCA 2007). Section 688.002(4), Florida Statutes (2017), of Florida's Uniform Trade Secret Act ("FUTSA"), defines "trade secret" as follows:

> [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.

"A customer list can constitute a 'trade secret' where the list is acquired or compiled through the industry of the owner of the list and is not just a compilation of information commonly available to the public." *E. Colonial Refuse Serv., Inc. v. Velocci*, 416 So. 2d 1276, 1278 (Fla. 5th DCA 1982). As this court has explained:

> To qualify as a trade secret, there must be evidence that a customer list "was the product of great expense and effort, that it included information that was confidential and not available from public sources, and that it was distilled from

> larger lists of potential customers into a list of viable customers for [a] unique business."

Zodiac Records Inc. v. Choice Env't Servs., 112 So. 3d 587, 590 (Fla. 4th DCA 2013) (citation omitted).

We find the trial court did not abuse its discretion in denying the motion for new trial. The evidence demonstrated that JFA's client list was a trade secret. JFA purchased the client list from Pinnacle. The client list included not only the clients' names and addresses but also copies of the clients' tax returns and all the information used to prepare those returns. JFA spent a significant amount of time, effort, and money developing the client list, which was kept on JFA's password protected server and was not publicly available.

As the next issue, appellants claim the trial court erred in denying their motion for new trial as to tortious interference because the client list is not a trade secret. Because we conclude that the client list is a trade secret, appellants' argument also fails.

Finally, appellants claim the trial court erred in prohibiting testimony of why they copied JFA's server, specifically that Fischer was committing tax fraud. A trial court's ruling on a motion in limine is reviewed for abuse of discretion, as limited by the rules of evidence. *Edwards v. State*, 39 So. 3d 447, 448 (Fla. 4th DCA 2010).

We find that the trial court did not abuse its discretion in excluding allegations that Fischer committed tax fraud. Moreover, any error in excluding evidence was harmless because, contrary to appellants' contention, the jury did in fact hear testimony of why appellants copied JFA's server. *See Blanco v. State*, 89 So. 3d 933, 936 (Fla. 3d DCA 2012); *Connell v. Green*, 330 So. 2d 473, 475 (Fla. 1st DCA 1976). This testimony included evidence that Adam Palas accused Fischer of underreporting income and that, as a result of the accusation, Fischer paid additional taxes. Additionally, Adam Palas testified that he instructed Nativi to copy the server because he thought his profit distribution was low, and he wanted to independently verify the amount his 5% distribution should have been. Thus, the trial court did not abuse its discretion in granting the order in limine and, even if it did, any error was harmless.

As to the cross-appeal, JFA argues that the trial court erred in granting a judgment on the pleadings in favor of Adam Palas as to tortious interference with a business relationship because although he was a 5% minority shareholder of JFA, he was not personally a party to the

relationship between JFA and its customers. The elements of tortious interference with a business relationship are (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994).

In finding that tortious interference does not exist against one who is a party to the business relationship, the trial court relied on *Palm Beach County Health Care District v. Professional Medical Education, Inc.*, 13 So. 3d 1090 (Fla. 4th DCA 2009). In *Palm Beach County Health Care*, this court stated that "[f]or the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship." *Id.* at 1094 (citation omitted). "[A] defendant is not a stranger to a business relationship, and thus cannot be held liable for tortious interference, when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed." *Id.* "[A] cause of action for tortious interference does not exist against one who is himself a party to the business relationship with which there has allegedly been interference." *Am. Nat'l Title & Escrow of Fla., Inc. v. Guarantee Title & Trust Co.*, 810 So. 2d 996, 999 (Fla. 4th DCA 2002).

We agree with the trial court that, as a shareholder in JFA with a 5% interest in the company, Adam Palas could not interfere in a business relationship with himself. *ULQ, LLC v. Meder*, 666 S.E.2d 713 (Ga. Ct. App. 2008), is instructive. In that case, a company alleged a claim against a former officer, who still had a 10% ownership interest in the company, for tortious interference with contractual and business relationships arising out of his actions following his termination. *Id.* at 715. The appellate court found that the tortious interference claim failed because the former officer was not a stranger to the business or contractual relationships. *Id.* at 720. The court explained that "[w]here a defendant has a financial interest in one of the parties to the contract or in the contract, the defendant is not a stranger to the contract or business relationship, even though it is not a signatory to the contract." *Id.* (citation omitted). Because the former officer "was admittedly a ten percent owner in [the company] (a party to the business relationships or contracts) at the time he allegedly interfered, and therefore could not have been a stranger." *Id.*; *see also Morris v. Buvermo Props., Inc.*, 510 F. Supp. 2d 112, 120 (D.D.C. 2007) ("As a part owner of [the corporation, the defendant] is a party to the contract . . . and thus cannot be sued for tortious interference with his own contract."). Similarly, in this case, because Adam Palas was

a partial owner in JFA, he was not a stranger to a business relationship, and thus cannot be held liable for tortious interference.

In conclusion, we affirm the trial court in all respects as to the direct appeal and cross-appeal.

Affirmed.

WARNER and ARTAU, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

EDMUND ACCARDI,
Appellant,

v.

REGIONS BANK, et al.,
Appellee.

No. 4D20-0662

[December 9, 2020]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Andrea Gundersen, Judge; L.T. Case No. CACE 11-015830(11).

Mark F. Booth of Rogers, Morris & Ziegler LLP, Ft. Lauderdale, for appellant.

Starlett M. Massey and Jonathan B. Lewis of Massey Law Group, P.A., St. Petersburg, for appellee.

GROSS, J.

Does the one-year statute of limitations specified in section 95.11(5)(h), Florida Statutes (2018), apply to a motion for a deficiency judgment brought within an existing mortgage foreclosure action? We hold that such a motion for deficiency judgment is an "action to enforce a claim of a deficiency" to which the one-year statute of limitations applies.

Facts

In August 2015, the circuit court entered a final judgment of foreclosure in favor of Regions Bank against Edmund Accardi's interest in real property, specifying the outstanding indebtedness to be $2,632,518.93. The final judgment retained jurisdiction to enter a deficiency judgment, as well as other matters. Accardi appealed the final judgment to this court.

While the appeal was pending, the clerk of the circuit court issued a certificate of sale on December 3, 2015, showing that the bank acquired

the property via public sale with a bid of $300. In April 2016, the clerk of court issued a certificate of title naming the bank as the title holder.

We affirmed the final judgment in *Accardi v. Regions Bank, et al.*, 201 So. 3d 743 (Fla. 4th DCA 2016).

The bank sold the subject property on February 21, 2017. In September 2018, the circuit court granted the bank's motion to tax attorney's fees.

On March 12, 2019, the bank moved for the entry of a deficiency judgment, which included both the sale deficiency and the attorney's fees.

In September 2019, the trial court conducted a hearing on the bank's motion for deficiency. The court rejected Accardi's contention that the bank's motion was barred by section 95.11(5)(h), Florida Statutes (2018), which governs the statute of limitations for an "action to enforce a claim of a deficiency."

The trial court held a final hearing on the motion for deficiency judgment in February 2020. The court reaffirmed its prior ruling that the section 95.11(5)(h) statute of limitations did not bar the bank's claim.

The court determined that the fair market value of the subject property on the date of the foreclosure sale was $2,100,000.00. The court deducted the fair market value from the total indebtedness owed to the bank, added $25,800 in attorney's fees, and entered a final judgment in favor of the bank in the amount of $558,318.93.

Analysis

The bank's motion for deficiency was barred by a Chapter 95 statute of limitations because that motion constituted an "action to enforce a claim of a deficiency" within the meaning of section 95.11(5)(h), Florida Statutes.

Section 702.06, Florida Statutes (2020), allows a mortgagee to obtain a deficiency decree within a mortgage foreclosure action or through a separate lawsuit at common law. *See* § 702.06, Fla. Stat. (2020) (observing that a foreclosing mortgagee "shall also have the right to sue at common law to recover such deficiency, unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment"); *Royal Palm Corp. Ctr. Ass'n v. PNC Bank, NA*, 89 So. 3d 923, 931 (Fla. 4th DCA 2012) (noting that "[s]ection 702.06 binds a plaintiff to a deficiency decree once the

plaintiff sets the deficiency process in motion," but that the statute expressly provides the complainant the right to sue at common law to recover such deficiency, except in one limited circumstance).

Here, the bank obtained a deficiency decree by way of a motion within the existing mortgage foreclosure action. This case involves the application of the statute of limitations contained at section 95.11(5)(h), Florida Statutes (2018), which provides:

> Actions other than for recovery of real property shall be commenced as follows:
>
> . . .
>
> (5) Within one year.—
>
> . . .
>
> (h) An action to enforce a claim of a deficiency related to a note secured by a mortgage against a residential property that is a one-family to four-family dwelling unit. The limitations period shall commence on the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure.

Because subsection (5)(h) applies to "an action to enforce a claim of a deficiency," it is essential to focus on how Chapter 95 defines an "action." Section 95.011, Florida Statutes (2018), provides, in pertinent part:

> **A civil action or proceeding, called "action" in this chapter** . . . shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

(emphasis supplied).

If a motion for deficiency within an existing mortgage foreclosure lawsuit amounts to a "civil action or proceeding" within the meaning of section 95.011, then the one-year statute of limitations in section 95.11(5)(h) would apply in this case.

"When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules

of statutory construction to ascertain intent." *Daniels v. Fla. Dep't of Health,* 898 So. 2d 61, 64 (Fla. 2005). "In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent." *Id.*

In *Salinas v. Ramsey*, 234 So. 3d 569 (Fla. 2018), the Florida Supreme Court closely examined the meaning of the phrase "civil action or proceeding" in section 95.011. There, the court confronted a question posed by the Eleventh Circuit Court of Appeals concerning the deadline for completing post-judgment discovery in aid of collecting on a federal money judgment. *Id.* at 570–71. The court held that post-judgment discovery was permitted for a period of 20 years after a judgment was entered. *Id.* at 570.

To reach that holding, the court rejected the notion that post-judgment discovery amounted to an "action on a judgment" under section 95.11(2)(a). *Id.* at 571–72; *accord Burshan v. Nat'l Union Fire Ins. Co.*, 805 So. 2d 835 (Fla. 4th DCA 2001).

Next, the court addressed the claim, similar to the one in this case, that the post-judgment discovery qualified as a "civil action or proceeding" under section 95.011, enacted in 1974. *Salinas*, 234 So. 3d at 572–73. After quoting several definitions of "civil action" and "action," *Salinas* concluded:

> These definitions and explanations establish that a "civil action" is a process that is intended to result in a judgment or decree and, after the merging of "action" and "suit," may include execution as part of the original "action." In fact, this Court's precedent confirms that execution has long been considered a continuation of the action in which the judgment was obtained and is "a remedy, not an action."

Id. at 573.

As the Florida Supreme Court observed, this definition of a "civil action" is consistent with a long line of authority that post-judgment collection mechanisms are extensions of the original cause of action. *See Burshan*, 805 So. 2d at 843 (collecting cases).

Salinas then turned to the definition of "proceeding" in section 95.011, recognizing that it was *broader* than the definition of a "civil action":

The definitions for "proceeding," the other expression of "action" under section 95.011, are broader:

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing. 5. Bankruptcy. A particular dispute or matter arising within a pending case—as opposed to the case as a whole.

Proceeding, Black's Law Dictionary (10th ed. 2014). An explanatory quotation states that "proceeding" is a "more comprehensive" word than "action" and may cover a number of concepts, including but not limited to "all ancillary or provisional steps, such as ... garnishment," "the execution," "proceedings supplementary to execution," or "the enforcement of the judgment." *Id.* (quoting Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3–4 (2d ed. 1899)). In *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013), when determining whether arbitration is an "action" under section 95.11, this Court found that the most relevant definition of "proceeding" is "[a]ny procedural means for seeking redress from a tribunal or agency." *Id.* at 190 (quoting Black's Law Dictionary 1324 (9th ed. 2009)). "[R]edress" is "[r]elief" or a "remedy," such as money damages. Redress, Black's Law Dictionary (10th ed. 2014).

234 So. 3d at 573.

The Florida Supreme Court faced a significant interpretive problem in *Salinas*. If a post-judgment collection mechanism amounted to a section 95.011 "proceeding," then the statute of limitations for the underlying claim would apply. For example, in a legal action founded on a written contract that went to judgment, a post-judgment garnishment would have to be completed within the five-year statute of limitations period. *See* § 95.11(2)(b), Fla. Stat. (2018).

To avoid the imposition of a requirement that lawsuits would have to begin and end within the limitations period, *Salinas* declined to apply a broad definition of "proceeding" to discovery in aid of execution:

> While "proceeding" can include any step in the process of obtaining redress, even a single hearing, this understanding of "proceeding" does not fit the context in which the word "proceeding" is used in section 95.011. Section 95.011 explains that a civil action or proceeding must be "begun within the time prescribed" in chapter 95. **If "proceeding" in this context meant any step of a lawsuit, as the judgment debtor seems to suggest, then the statute would require any lawsuit to both begin and end within the limitations period, as the final hearing or trial would be barred if it occurred after the end of the limitations period, even if the action began many years earlier**. The Legislature, however, did not say that any civil action must "begin and end" within the limitations period or that any discrete proceeding within a lawsuit must occur within the limitations period. The Legislature chose the word "begun," signifying that its concern was with the initiation of a new and independent procedural means for obtaining a judgment or seeking redress.

234 So. 3d at 573 (emphasis supplied).

Salinas reaffirms the general rule that post-judgment collection efforts such as discovery, execution, garnishment, or proceedings supplementary are neither "civil actions" nor "proceedings" within the meaning of section 95.011. Rather, such collection vehicles are efforts to "effectuate" a judgment lien already in existence, so the law views them as an extension of the main case. *Burshan*, 805 So. 2d at 842–43 (quoting *B. A. Lott, Inc. v. Padgett*, 14 So. 2d 667, 669 (Fla. 1943)).

This case departs from the general rule because the Legislature has spoken through the enactment of section 95.11(5)(h). That statute clearly establishes a limitation period ***within*** an existing foreclosure action—one year from "the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure."[1] The reason

[1] The statute's reference to "the certificate" is less than precise. Although this case does not turn on the identity of the certificate, we suspect it refers to the certificate of title, which would parallel the legal effect of a "deed in lieu of foreclosure."

that the supreme court did not apply the broad definition of "proceeding" in *Salinas*—to avoid the requirement that a lawsuit, including post-judgment collection proceedings, begin and end within the limitations period of the main claim—is inapplicable here because the deficiency "proceeding" has its own, specified limitation period independent of the five-year limitation period in an action to foreclose a mortgage. *See* § 95.11(2)(c), Fla. Stat. (2018).

Also, the addition of section 95.11(5)(h) was part of a statute making a comprehensive legislative overhaul of foreclosures. *See* Laws of Florida 2013, c. 2013–137, § 1. Supporting the plain reading of the statute is the fact that limiting the new statute of limitations to only separate civil actions for deficiency makes little sense because such actions are few; the vast majority of deficiencies occur within an existing foreclosure. Reading the amendments as a whole, it is apparent that the Legislature did not intend to exclude motions for foreclosure from the impact of the statutory change to foreclosure procedure. The amendment to section 702.06 recognizes that motions for deficiency are the typical mechanism for recovery of a deficiency. That amendment stated, "The complainant shall also have the right to sue at common law to recover such deficiency, ***unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment***." Laws of Florida 2013, c. 2013–137, § 5. (Additions to statute emphasized). To decide this case differently would effectively gut the application of the statute that applied a one-year limitation to all foreclosure deficiency "civil actions or proceedings."

For these reasons, the bank's motion for deficiency fell within the broad definition of a section 95.011 "proceeding" that our supreme court identified in *Salinas*, making it an "action to enforce a claim of a deficiency" under section 95.11(5)(h), so that the one-year statute of limitations applies.

The clerk of the circuit court issued a certificate of title in April 2016. The bank did not move for the entry of a deficiency judgment until 2019, well beyond the one-year statute of limitations.

We distinguish *L.A.D. Property Ventures, Inc. v. First Bank*, 19 So. 3d 1126 (Fla. 2d DCA 2009), a case cited by the bank. That case involved primarily a question of personal jurisdiction over judgment debtors. Considering that issue, the court stated that a motion for deficiency "was a continuance of the foreclosure proceedings." *Id.* at 1128. *L.A.D. Property Ventures* was decided in 2009, prior to the 2013 enactment of section 95.11(5)(h), so the court did not have occasion to consider the statute's application to a motion for deficiency.

For these reasons, we reverse the final judgment awarding a deficiency and remand to the circuit court to enter an amended final judgment for attorney's fees and taxable costs only.

Reversed and remanded.

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

* * *

Not final until disposition of timely filed motion for rehearing.