Volume 32, Number 4, August 30, 2024

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 161-193

Reports of Decisions of:
THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **TAXATION—AD VALOREM—ASSESSMENT—YEARLY INCREASE. Section 193.1555 provides an assessment limitation that caps the yearly increase in the assessed value of a property to 10%, but those benefits continue only if there is no change in ownership or control of the property. A circuit court judge held that the transfer of a 50% non-controlling interest in the assessed property to a limited liability company does not result in the reset of the 10% assessment limitation.** *GARCIA v. PIPER INDUSTRIAL COMPLEX, LLC. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade county. Filed June 10, 2024. Full Text at Circuit Courts-Original Section, page 164a.*

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FLW SUPPLEMENT

CASES REPORTED.

FLW Supplement includes reports of decisions of Florida circuit and county courts, and miscellaneous reports of the proceedings of other public agencies. Sections are divided as follows:

CIRCUIT COURT - APPELLATE	Opinions in those cases in which circuit courts were reviewing decisions of county courts or administrative agencies.
CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
MISCELLANEOUS	Other proceedings.

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Florida Statutes and Rules of Procedure construed in opinions reported in this issue.

FLORIDA STATUTES

RULES OF CIVIL PROCEDURE

* * *

TABLE OF CASES TREATED

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* * *

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CIRCUIT COURTS—APPELLATE

Municipal corporations—Zoning—Code enforcement—Conducting social events on agricultural property—Due process— Notice— Property owner's procedural due process rights were violated where investigating officer found no violation of town ordinance on the single date specified in the notice of violation, but special magistrate allowed town to present evidence of five additional dates of alleged violations of which property owner received no notice and imposed fines for those violations

ATLAS INVESTMENTS, LLC, Appellant, v. TOWN OF SOUTHWEST RANCHES, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-001548. L.T. Case No. 2022-439. February 21, 2024. Appeal from Atlas Investments, LLC, Eugene M. Steinfeld, Special Magistrate. Counsel: Robert C. Volpe, Holtzman, Vogel, Baran, Torchinslcy, and Josefiak, PLLC, Tallahassee, for Appellant. Keith M. Poliakoff, Government Law Group, PLLC, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Atlas Investments, LLC, ("Atlas"), appeals an Order Imposing Municipal Code Enforcement and Administrative Fine in favor of the Town of Southwest Ranches, (the "Town"). Having carefully considered the briefs, the record, and the applicable law, this Court concluded with oral argument on January 26, 2024, and the January 3, 2023 Order is hereby **REVERSED** as set forth below.

In the proceedings below, Atlas is the owner of a 4.95 acre plant nursery and sheep farm doing business as Cielo Farms. On the property there is a barn used as a showroom for indoor plants. Atlas maintains that both the barn and outdoor areas of the property are sometimes used to hold agritoursim-qualifying events, such as birthdays, weddings, and parties. Atlas further maintains that all sections of the property support these uses, including areas for customer parking, travel lanes, and an office with staff parking. In 2021, the Broward County Property Appraiser designated the entire property as "agricultural" for the tax year, and then renewed this designation for the 2022 tax year over a substantial portion of the property. Atlas also registered the property as a nursery with the Florida Department of Agriculture and Consumer Services.

On November 15, 2022, the Town issued a Notice of Violation to Atlas for an event that allegedly occurred at the property on November 10, 2022. The Notice alleged that Atlas infringed the Town of Southwest Ranches ("T.S.W.R.") Code §035-080(D), and stated that "assembly shall be deemed accessory use of an occupied single-family detached residence". On December 20, 2022, a Notice of Hearing for the alleged code violations was issued. The Notice of Hearing cited violations for T.S.W.R. Code §035-080(D), §045-050, and §045-060.

The hearing for the violation took place on January 3, 2023. The same day, the Special Magistrate issued an Order Imposing Municipal Code Enforcement and Administrative Fine ("Order"). The Special Magistrate found that the events held on the property could not be considered agricultural related. Furthermore, that Atlas could not hold events on its property unless there was also a detached single-family residence. The Special Magistrate issued a fine of $1,000.00 per event that was held on the property for a total of $6,000.00. The Special Magistrate also held that a fine of $2,500.00 would be issued for any future violations. On January 13, 2023, Atlas filed a Motion for Rehearing. On January 17, 2023, the Special Magistrate denied the motion.

On appeal Atlas alleges that the Special Magistrate failed to acknowledge that the Town's code enforcement power was preempted in this case because it interferes with "agritourism activity" on a property designated as agricultural by the local property appraiser. Atlas further alleges that the Special Magistrate (1) misinterpreted the Town's Code and applied it arbitrarily; (2) did not hold the Town accountable for failing to issue Notices of Violation for each of the events that were raised and fined for at the January 3, 2023 hearing; (3) mischaracterized the nature of the violations for which Atlas was cited and provided no guidance to comply with the January 3, 2023 order; and (4) denied Atlas' Motion for Rehearing without even considering the arguments raised therein.

"An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed." § 162.11, Fla. Stat. (2022); *see also, Cent. Fla. Invs., Inc. v. Orange Cnty.,* 295 So. 3d 292, 293-94 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. "This Court has described the nature of such an appeal as plenary." *Cent. Fla. Invs., Inc*., 295 So. 3d at 294. "That is, on appeal, all errors below may be corrected: jurisdictional, procedural, and substantive; and judgments below may be modified, reversed, remanded with directions, or affirmed." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995) [20 Fla. L. Weekly S318a].

Atlas argues that the Notice of Violation dated November 15, 2022 was based on an alleged event that occurred on November 10, 2022. The Town presented the police incident report as evidence in support of Atlas' violation of the ordinances. However, the police incident report indicates that no violation had occurred on that specific date. The responding officer documented that he spoke to the Assistant Town Administrator for Southwest Ranches, Mr. Russell Muniz, and "advised him that there were *no* town ordinance violations for the property on November 10, 2022." For this, Atlas argues that its procedural due process was violated because it has the right to be noticed of the correct date of an alleged violation. Moreover, that the Special Magistrate violated its procedural due process when issuing a fine where no violation took place.

" 'Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.' Procedural due process requires both fair notice and a real opportunity to be heard." *Keys Citizens For Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (quoting *Department of Law Enforcement v. Real Property,* 588 So.2d 957, 960 (Fla.1991)).

In the instant matter, Atlas is correct in that it should have been afforded procedural due process regarding the initial Notice of Violation on November 15, 2022. Notwithstanding, that Atlas received a Notice, the notice failed to specify a *valid date* for the alleged town ordinance violation, thus rendering the notice defective and the corresponding fines unwarranted.

Additionally, the January 3, 2023 Order contained $6,000 in fines. The Special Magistrate issued a $1,000 fine for six different violations. The record reflects that Atlas only received a Notice of Violation on November 15, 2022 for the above referenced November 10, 2022 date for violating §035-080(D). Thereafter, on December 20, 2022, a Notice of Hearing was issued by the Town now citing violations for §035-080(D), §048-050, and §045-060. Then at the January 3, 2023 hearing, the Special Magistrate allowed the Town to present surveillance photographs of five (5) additional dates of alleged violations Atlas did *not* receive notice of. As such, the issuance of each of the six fines from the Special Magistrate violated Atlas'

procedural due process rights.

Accordingly, the Order Imposing Municipal Code Enforcement and Administrative Fine dated January 3, 2023 in favor of Appellee is hereby **REVERSED** consistent with this Opinion. (BOWMAN, LEVENSON, and GAMM, JJ., concur.)

* * *

Municipal corporations—Confession of error—Placement of lien on appellants' real and personal property pursuant to final orders of special magistrate—In accordance with partial confession of error, lien imposed and recorded pursuant to final orders is void ab initio

ROGER and TRUDIE JONES, Appellants, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE-23-017525 (AP). L.T. Case No. CE23-050186. April 18, 2024. Appeal from the City of Fort Lauderdale Special Magistrate Rose-Ann Flynn. Counsel: Frank Anzalone, Anzalone Law Firm, Davie, for Appellants. Thomas J. Ansbro, City Attorney for City Fort Lauderdale, for Appellee.

OPINION

(**PER CURIAM.**) Having carefully considered the briefs, appendixes, the record, and the applicable law, this Court dispenses with oral argument, and the City of Fort Lauderdale Special Magistrate's July 27, 2023, Final Order and August 2, 2023, Final Order, in L.T. Case No. CE23-050186, are hereby **REVERSED**.

In this cause, the Appellee, City of Fort Lauderdale, filed a Confession of Error and consent that the final orders appealed from should be reversed. The Confession of Error admitted generally that the Fort Lauderdale Special Magistrate departed from the essential requirements of law by entering both of the challenged Final Orders including a lien which was recorded against all of Appellants' real and personal property. Further, Appellee requested that the cause be remanded for the specific purpose of "releas[ing] the lien and clos[ing] the underlying administrative proceeding." In Appellants' response to Appellee's Confession of Error, Appellants did not oppose Appellee's confession that the Special Magistrate departed from the essential requirements of law by entering the challenged Final Orders, to wit: "To be clear, the Appellants do not oppose acceptance of the partial confession of error [that the Special Magistrate departed from the essential requirements of law], [but] only the relief sought."

Therefore, our conclusion is to accept Appellee's Confession of Error, and reverse the said Final Orders upon said Confession of Error without expressing any opinion as to the extent of the error or errors. See *Gulf Power Co. v. Illinois-Florida Land Co.,* 100 Fla. 1594 (Fla, Div. A 1931); *see also Clark v. Caldwell*, 95 So. 754 (Fla. Div. B 1928); *Cameron v. Baker, Gieb & Schaub Motors, Inc.,* 96 Fla. 389 (Fla. Div. B 1928); *Magua v. HSBC Bank USA, etc.,* 197 So. 3d 1274 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1914a]; *UP Apartments, LLC v. Baldera*, 361 So. 3d 954 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D1125a]; *Indian Harbor Estates, Inc. v. Wagner,* 148 So. 2d 757 (Fla. 1st DCA 1963). Further, as the result of the lien being imposed through an admitted departure from the essential requirements of law, this Court finds that the lien imposed and recorded pursuant to the challenged Final Orders is void *ab initio.*

The challenged Final Orders are therefore **REVERSED**, and the cause is **REMANDED** for such proceedings as are consistent with this Opinion. (BOWMAN, TOBIN-SINGER, and USAN, JJ., concur.)

* * *

BLUE ZEN, LLC, Appellant, v. CITY OF WILTON MANORS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-013353 (AP). L.T. Case No. 2022-000911. April 18, 2024. Appeal from the City of Wilton Manors; Thomas Ansbro, Esq., Special Magistrate. Counsel: Ryan A. Abrams, Abrams Law Firm, P.A., Fort Lauderdale, for Appellant. Aylin Ruiz, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record and the applicable law, this Court dispenses with oral argument and **AFFIRMS** the Special Magistrate's Order Imposing Fine and Lien. (BOWMAN, TOWBIN-SINGER, and USAN, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Mortgages—Foreclosure—Conditions precedent—Pre-foreclosure interview—Where lender did not send borrower letter soliciting pre-foreclosure interview or send anyone to mortgaged property to attempt to arrange interview until six months after first missed payment on FHA-insured mortgage, lender did not substantially comply with interview requirement of HUD regulations—Court cannot disregard failure to comply with requirement to offer interview within three months of first missed payment because borrower has not shown prejudice—To extent prejudice is required, borrower was prejudiced by fact that she was in deeper financial hole when interview was offered six months after initial default than if it had been offered within three months—Foreclosure action is dismissed

PENNYMAC LOAN SERVICES, LLC, Plaintiff, v. AMY GREFSKI, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023 11879 CIDL. June 10, 2024. Michael S. Orfinger, Judge. Counsel: Heather L. Fesnak, Akerman LLP, Tampa, for Plaintiff. Malcolm E. Harrison, Law Office of Malcolm E. Harrison, P.A., Wellington, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR SUMMARY JUDGMENT AND FINAL JUDGMENT DENYING FORECLOSURE

THIS CAUSE came before the Court on Defendant's Amended Motion for Summary Judgment, which was heard before the Court on May 14, 2024. The Plaintiff was represented by attorney Heather L. Fesnak, Esq., and the Defendant was represented by attorneys Malcolm E. Harrison, Esq. and Michelle C. Moore, Esq. The Court has reviewed Defendant's Motion, Plaintiff's Opposition to the Motion, the summary judgment evidence presented to the Court, the court file, and heard the argument of counsel. Being otherwise duly advised in the premises, the Court now FINDS as follows:

1. The Court has jurisdiction over the parties and the subject matter.

2. The following material facts are undisputed:

a. The Defendant's loan is insured by the Federal Housing Administration ("FHA"), an agency of the Department of Housing and Urban Development ("HUD").

b. Paragraph 22 of the subject mortgage ("Mortgage") permits the lender to accelerate the debt due under the promissory note "except as limited by regulations issued by the Secretary. . . ." Paragraph 22(d) of the Mortgage goes on to state:

> (d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's right, in the case of payment defaults, to require immediate payment in full and foreclosure if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

c. The quoted language from the Mortgage specifically incorporates HUD regulations into the Mortgage. In such circumstances, controlling case law from the Fifth District Court of Appeal holds that the lender's compliance with those regulations is a contractual condition precedent to foreclosure. *See Palma v. JPMorgan Chase Bank,* 208 So. 3d 771 (Fla. 5th DCA 2017) [41 Fla. L. Weekly D2694d]; *Delacruz v. Wells Fargo Bank, NA.,* 208 So. 3d 336 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D213c].

d. The HUD regulation at issue in the instant case, 24 C.F.R. § 203.604, provides in pertinent part that "[t]he Mortgagee must have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting **before three full monthly installments due on the mortgage are unpaid.**" (Emphasis added.)

e. It is undisputed that a pre-foreclosure interview never took place in the instant case.

f. Plaintiff argues it was excused from the requirement to conduct the interview because it made a "reasonable effort" to arrange the pre-foreclosure interview. *See* 24 C.F.R. § 203.604(c)(5). "A reasonable effort to arrange a face-to-face meeting with the mortgagor" includes "at a minimum . . . one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and "at least one trip to see the mortgagor at the mortgaged property." 24 C.F.R. § 203.604(d).

g. In the instant case, the Plaintiff stated in its Verified Complaint that Ms. Grefski defaulted on her September 1, 2022 payment and all subsequent payments. Based on the September 1, 2022 default date, the Plaintiff was required to make a "reasonable effort" (as defined by 24 C.F.R. § 203.604(d)) to arrange pre-foreclosure counseling with her by no later than November 2, 2022. However, according to the Plaintiff's Affidavit in Opposition to the Defendant's Motion for Summary Judgment, the Plaintiff did not send Defendant the pre-foreclosure solicitation letter until May 1, 2023. Further, Plaintiff did not send anyone to the property to attempt to arrange pre-foreclosure counseling until May 12, 2023.

h. The Court finds that Plaintiff did not substantially comply with the HUD regulation.

i. Substantial compliance or performance is "that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny" the other party the benefit of the bargain. *Linda Tile & Marble Installers, Inc. v. Highlands Place 1981 Ltd.,* 642 So. 2d 766, 768 (Fla. 4th DCA 1994). The Court finds that under the terms of the Mortgage, Ms. Grefski bargained for Plaintiff to comply (or at least substantially comply) with the HUD regulations, which required Plaintiff to offer her a pre-foreclosure meeting, or to make a reasonable effort to arrange a pre-foreclosure meeting, before she missed three payments.

j. The Court finds that Plaintiff's effort to comply with the regulation six months after Ms. Grefski's September 1, 2022 default does not constitute substantial compliance with the HUD regulations. If Plaintiff had complied with the regulation, then upon a timely interview Defendant would have been behind by approximately $3,207.30. By the time Plaintiff actually did try to organize the pre-foreclosure counseling, Defendant's delinquency had grown to some $10,989.08. The Court finds that the Defendant did not receive the benefit of her bargain, and therefore the Plaintiff's claim of substantial compliance is unavailing.

k. Plaintiff argues that the Court can disregard its failure to comply with 24 C.F.R. § 203.604 because Defendant has not shown prejudice from its failure to comply with its contractual conditions precedent to foreclosure. This Court does not agree. To the extent that a finding of prejudice is necessary, the Court finds Defendant was prejudiced by the timing of Plaintiff's efforts to comply with 24 C.F.R. § 203.604(b) because her arrearage increased during that time. Stated differently, while it is true that Defendant would have been in arrears even if Plaintiff had timely complied with its obligation to offer pre-foreclosure counseling, by the time it finally extended the offer, Defendant had a much deeper financial hole from which to extricate herself.

3. Based upon the foregoing, the Court finds that there is no genuine dispute as to any material fact, and that the Defendant is entitled to a judgment as a matter of law. It is therefore,

ORDERED AND ADJUDGED that:

A. Defendant's Motion for Summary Judgment shall be, and the same is hereby GRANTED.

B. The Court finds in favor of the Defendant, AMY GREFSKI, and against Plaintiff, PENNYMAC LOAN SERVICES, LLC, on the basis that the Plaintiff failed to comply or substantially comply with 24

C.F.R. § 203.604, which was a condition precedent to the foreclosure of the Defendant's FHA-insured mortgage.

C. Summary Final Judgment is hereby entered in favor of Defendant AMY GREFSKI and against Plaintiff, PENNYMAC LOAN SERVICES, LLC.

D. This action is hereby INVOLUNTARILY DISMISSED.

E. The Court retains jurisdiction for the purposes of determining entitlement to and the amount of attorney's fees and costs, upon timely motion therefor.

* * *

Taxation—Ad valorem—Yearly increase—10% assessment limitation—Transfer of 50% non-controlling interest in property to limited liability company does not result in reset of 10% assessment limitation cap under section 193.1555(5)(b)

PEDRO J. GARCIA, as Property Appraiser of Miami, Plaintiff, v. PIPER INDUSTRIAL COMPLEX, LLC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-020067-CA-01. Section CA30. June 10, 2024. Reemberto Diaz, Judge. Counsel: Ileana Cruz, Assistant County Attorney, Miami, for Plaintiff. Stanley H. Beck, Law Office of Stanley H. Beck, Hallandale Beach, for Piper Industrial Complex, LLC and Carsco Group LLC, Defendants. D. Jason Harrison, Senior Assistant Attorney General, Tallahassee, for Department of Revenue, Defendant.

SUMMARY FINAL JUDGMENT

THIS CAUSE came before the Court on Piper Industrial Complex, LLC's and Carsco Group, LLC's Motion for Final Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment with incorporated Memorandum of Law and Response in Opposition to Defendant's Motion for Summary Judgment. The Court is also aware of the Notice of Joinder filed by Defendant, Jim Zingale, as the Executive Director of the State of Florida Department of Revenue, joining in and adopting the position and filings of the Property Appraiser. The Court held a special set hearing on the motions on May 28, 2024, via zoom. Counsel for all of the parties appeared. The Court having reviewed the record, heard argument of counsel, and being otherwise fully advised in the premises finds as follows:

This dispute involves the application of section §*193.1555, Florida Statutes,* which provides a tax benefit known as the "10% Assessment Limitation". The 10% Assessment Limitation caps the yearly increase in assessed value of the property to 10%. However, those benefits only continue if there is no change in ownership or control of the property.

In 2021, Richard E. Zeeman and H. Barbara Zeeman, his wife, transferred their interest in the Subject Property to Defendant, Carsco Group LLC, via a Quit-Claim Deed recorded in the public records. Accordingly, Defendants, Piper Industrial Complex, LLC and Carsco Group LLC were the legal title holders of record of the Subject Property as of January 1, 2022.

Plaintiff argues that the Subject Property loses the benefit of the 10% assessment limitation and "shall be assessed at Just Value as of January 1 of the year following a . . . change of ownership or control." Section §*193.1555* (5), *Florida Statutes.* The Plaintiff relies upon the language in Section §*193.1555*(5)(b) which provides that a change of ownership or control is defined to include "any sale, foreclosure, transfer of legal title or beneficial title in equity to any person. . .". Plaintiff further argues that the definition captures the transfer of a 50% interest in the Subject Property from the Zeemans to Defendant Carsco Group LLC.

Defendants argue that a 50% interest does not constitute a transfer of control. They relied upon the statutory language set forth in Section § *193. 1555*(5)(b) which includes the words "or the cumulative transfer of control. . .". A 50% interest, as owned by the Zeemans and transferred to Defendant, Carsco, is not a controlling interest, as argued by the Defendants and is confirmed by the following language in the Statute which says "or of more than 50% of the ownership of the legal entity that own the property. . .". Accordingly, the Defendants argue that the transfer from Zeeman to Carsco Group LLC, does not result in a reset of the 10% assessment limitation, under the applicable Statute.

A court must enter summary judgment where "the pleadings, depositions, answers to interrogatories, admissions in the file together with affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c). Effective May 1, 2021, "[t]he summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett,* 477 U.S. 317," and its progeny. *In re Amendments to Fla. R. Civ. P. 1.510*, 309 So.3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a].

The undisputed material facts in this action are set forth by Richard Zeeman, in his affidavit, which reads as follows:

BEFORE ME, the undersigned authority, personally appeared RICHARD ZEEMAN, a/k/a RICHARD E. ZEEMAN, who first being duly sworn, deposes and says, as follows:

1. My name is RICHARD ZEEMAN. My wife, H. BARBARA ZEEMAN, and I are the owners of fifty percent (50%) the above referenced property. The other fifty percent (50%) is separately owned by PIPER INDUSTRIAL COMPLEX, LLC, our partner in the property.

2. This Affidavit is provided in support of a petition for reinstatement of the tax assessment cap for the real property described under the Miami-Dade Property Appraiser's Folio Number, as follows:

Folio No. 06-2221-019-0010

(Hereinafter referred to as the "Subject Property")

3. The undersigned is personally familiar with the identity of the Grantors and Grantee of the one half of the Subject Property referred to herein, as set forth in that certain Deed for the Subject Property dated 02/18/2021.

4. The Grantors of one half of the Subject Property as set forth in the above-described Deed (hereinafter referred to as the "Grantors") are RICHARD E. ZEEMAN and H. BARBARA ZEEMAN. Said Grantors are individuals who have been fifty percent (50%) owners of the Subject Property until the time that said half of the Property was conveyed by the Grantors to CARSCO GROUP LLC (hereinafter referred to as the "Grantee").

5. The Grantee is a Florida Limited Liability Company organized with the Secretary of State, Division of Corporations, on 02/02/2021. The Managers of the Grantee upon its organization were RICHARD ZEEMAN and H. BARBARA ZEEMAN. Additionally, the Members of the Grantee upon its organization were the Grantors, each owning fifty percent (50%) of the equity of the Grantee.

6. As a result of the Deed for their half of the Subject Property, legal title to their half of the Property transferred between the Grantors and the Grantee and equitable ownership of their half of Subject Property remain one hundred percent (100%), in the Grantors as a result of the Grantor's sole ownership of the Grantee. No consideration was received by the Grantor from the Grantee.

7. At the time that the Deed for the Subject Property was delivered and recorded, the Grantors owned their entire half of the Subject Property and also owned all of the equity of the Grantee. Thus, the Grantors received nothing from the Grantee that the Grantors did not already own as a result of the transfer.

8. Consistent with the foregoing and the applicable provisions of the Internal Revenue Code, all of the income and expenses continues to be reported for Federal Income Tax purposes on the Grantor's Income Tax Return and the Grantee is treated as a "disregarded entity" for Federal Tax purposes.

9. Based upon the foregoing, this Affiant asserts that the Deed to the Subject Property represented a mere book transaction and transfer between legal and equitable title.

10. Further, Affiant sayeth naught.

The facts set forth in the Affidavit of Richard Zeeman have not been disputed by the Plaintiff. Said Affidavit was attached as Exhibit A to the Motion for Summary Judgment filed by the Taxpayers herein.

Florida Statute Section 193.1555(5)(b), reads as follows:

(b) A change of ownership or control means any sale, foreclosure, transfer of legal title or beneficial title in equity to any person or the cumulative transfer of control or of more than 50% of the ownership of the legal entity that owned the property when it was most recently assessed at just value. . . .

The Plaintiff argument that this action is governed by *S & A Prop. Inv. Servs., LLC v. Garcia,* 360 So. 3d 432, 435 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D560a], Reh'g denied (May 22, 2023), however, it is clear that that case dealt with the transfer of a 100% interest by the Andersons to their LLC, S & A. That is a distinguishing fact which precludes its application in the subject action, since in the subject action, merely a 50% non-controlling interest was transferred to Defendant, Carsco Group, LLC.

As to the other arguments raised by Defendants that the action should be dismissed because the Tax Collector is an indispensable party under *Section 194.181 Florida Statutes;* and that the Plaintiff failed to timely comply with the recertification requirements of *Section 193.122(3), Florida Statutes.* Those arguments are rejected by Court.

For the reasons stated above, **IT IS ORDERED AND ADJUDGED** that:

1. Piper Industrial Complex, LLC and Carsco Group LLC's Motion for Summary Judgment is **GRANTED**. **FINAL JUDGMENT** in favor of said Defendants on all claims is hereby entered.

2. Pedro J. Garcia, as Property Appraiser shall take nothing by this action. Piper Industrial Complex, LLC and Carsco Group LLC shall recover costs from Pedro J. Garcia, as Property Appraiser, in an amount to be fixed by the Court, attorney's fees in an amount to be fixed by the Court, for which let the execution issue.

3. This is a **FINAL ORDER** in accordance with *Section §194.192, Florida Statutes.* All costs are hereby assessed in favor of the Taxpayers, and this Court reserves jurisdiction solely to fix the dollar amount of such costs.

* * *

Criminal law—Sentencing—Resentencing—Presentence investigation—Defendant who has been sentenced to probation as habitual felony offender following consideration or waiver of PSI is not entitled to reconsideration of PSI when, as result of probation violation, he is resentenced to habitual offender sentence following probation revocation—Even if there were merit to defendant's argument that PSI is required before resentencing, defendant waived PSI at both original sentencing and resentencing

STATE OF FLORIDA, v. CHRISTOPHER HATCHER, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F11-20254. Criminal Division. May 30, 2024. Ramiro C. Areces, Judge. Counsel: Santiago Aroca, Miami-Dade State Attorney's Office, for State. Nicholas Lynch, Miami-Dade County Public Defender's Office, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO CORRECT SENTENCING ERRORS IN PART, AND GRANTING THE MOTION IN PART

THIS MATTER having come before the Court on Defendant's Motion to Correct Sentencing Errors (the "Motion") and this Court having read the Motion, read the State's Response in Opposition, examined the case file and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Defendant's Motion is denied in part and granted in part.

Defendant raises several purported illegalities with his sentence. First, Defendant contends his sentence is illegal because this Court failed to review a pre-sentence investigation (or "PSI") prior to sentencing Defendant as a habitual felony offender ("HO") *following* the revocation of his probation. Defendant's argument lacks merit and his reliance on section 775.084, Fla. Stat. is misplaced.

A defendant who has been sentenced to probation as a habitual felony offender is not entitled to a pre-sentence investigation when, as a result of some violation, he is resentenced following a probation revocation. *See, e.g., Barber v. State,* 288 So. 2d 281, 282 (Fla. 3d DCA 1974) ("Probation is usually granted on the basis of a presentence report which suggests that a given defendant is not likely to repeat his criminal conduct. By the violation of probation, the defendant has proved himself unworthy of leniency by the court.").

Section 775.084, Fla. Stat., upon which Defendant relies, defines "habitual felony offender" and explains the procedure a court must follow in determining (1) whether a defendant qualifies as an HO; and, (2) whether it should impose an HO sentence. *See* Fla. Stat. § 775.084(3)(a). Following a determination that a defendant qualifies as an HO, the statute gives a trial court judge two options: (1) sentence Defendant as an HO or (2) make written findings that an HO sentence is not necessary to protect the community. *Id.* The statute is quite obviously concerned with that moment when the trial court judge has those two options from which to choose. The PSI is used at *that* moment to assist the Court in determining *whether or not* to impose an HO sentence.

Following a probation revocation, however, a trial court's options are considerably different and often vary from case to case. For example, while the plain language of section 775.084(3)(a) anticipates that a judge will engage in the required analysis and determine that, at least in some instances, a defendant should be sentenced as a habitual offender, it is well-settled that a court has no such discretion in instances where a defendant who perhaps qualified as an HO at his original sentence was nevertheless not sentenced as an HO. Other defendants, like Mr. Hatcher, may qualify as violent felony offenders of special concern, which require "dangerousness" findings. If a defendant is found to be a danger to the community, Florida law mandates his probation be revoked. A finding of dangerousness under the VFOSC statute would appear antithetical to the written findings a trial court would then need to make pursuant to section 775.084(3)(a) if it wished to sentence an HO defendant to something other than an HO sentence.

Simply put, section 775.084 is inapplicable to a re-sentencing following a probation revocation. To hold otherwise would be contrary to section 775.084's plain meaning. Worse, Defendant's interpretation would have the effect of applying a statute to proceedings over which many of its terms would be irrelevant in some cases but not others, leaving trial courts to determine on a case-by-case basis how established case law and other statutory requirements fit within the rubric of an inapplicable statute stretched far beyond any reasonable interpretation.

The Florida Supreme Court has, moreover, discussed the purpose and interplay of a PSI and probation and found the need for a PSI following a probation revocation unnecessary. *See Barber v. State,* 293 So. 2d 710 (Fla. 1974). In *Barber,* the Florida Supreme Court compared the rule at issue in that case with the "similarity of purpose of a pre-sentence investigation and that of the granting of probation," and stated as follows,

The requirement of CrPR 3.710 does not continue or revive upon a second, future occasion of an Adjudication of guilt and sentencing for violation of the probation earlier granted which had already fulfilled the mandate of the rule. Once probation has been granted, and its conditions have been violated in such manner as to lead to a revoca-

> tion of probation, the offender's own acts may have shown, better than an investigation might do, that he is not a 'good risk' for probation to be granted again at that time.
>
> ...
>
> The wording of CrPR 3.710 mirrors the similarity of purpose of a pre-sentence investigation and that of the granting of probation. Either a granting of probation [sic] Or a pre-sentence investigation is required. Probation may be used to give the offender a chance to show by his deeds that he will live within the law; a pre-sentence investigation is used to determine if there is a substantial likelihood that the offender will do so. A favorable pre-sentence report is generally the basis for granting probation; the two serve the same function. . . .That is why no pre-sentence investigation is required where probation is granted; it presumes the result which such pre-sentence investigation would support; you might say it becomes a useless act when the purpose is fully conceded.

Id. at 711.

Additionally, both the Florida legislature and Florida's district courts of appeal mandate that following the revocation of probation, a Court "shall. . .impose any sentence which it might have originally imposed before placing the probationer on probation." Fla. Stat. §948.06(2)(b); *see also Cozza v. State,* 756 So. 2d 272, 273 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1132a] ("A violation of probation is not itself an independent offense punishable at law in Florida. Instead. . .the court resentences the offender on the original charge and may impose any sentence which it might have originally imposed before placing the probationer. . .on probation. . . .") (cleaned up); *see also e.g. State v. Valera,* 75 So. 3d 330 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2390a] ("As a result of the unsuccessful termination of probation, the trial court was required to sentence appellee to the minimum mandatory sentence that could have been 'originally imposed before placing the probationer on probation.' "); *Mann v. State,* 851 So. 2d 901, 903 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1570b] ("Here, the defendant was adjudicated to be an HVO[1] in 1997; thus the 1998 sentence upon revocation of probation would likewise be as an HVO.");[2] *State v. Orr,* 866 So. 2d 611 (Fla. 2002) [27 Fla. L. Weekly S708b] ("the trial court did not err in imposing habitual offender sentences after [defendant] violated probation because [defendant] entered a negotiated plea agreeing to habitualization at the time of his original sentencing.").

It necessarily follows that if a PSI was considered or waived prior to the imposition of an HO sentence that includes probation, the trial court need not once again consider a PSI to determine whether the imposition of an HO sentence is appropriate or desirable. On the contrary, this Court is charged with imposing "any sentence which it might have originally imposed before placing the probationer on probation." Fla. Stat. §948.06(2)(b). In this case, as explained below, that includes an HO sentence.

On September 5, 2013, Defendant was sentenced to 10 years imprisonment followed by five years of reporting probation as an HO. Defendant does not allege that a PSI was not then considered or otherwise waived as part of a plea deal. The requirements of section 775.084 were at that time, therefore, satisfied.

Defendant served his prison sentence and began his probation. Defendant, however, was later alleged to have violated his probation and he faced the possibility of a considerable amount of time in prison. Specifically, Defendant was facing the possibility of life imprisonment on count 2 (with *or without* the HO designation), up to 30 years in state prison as an HO on count 1, and up to 10 years in state prison as an HO on Count 3.

Following a finding that Defendant did, in fact, violate his probation and was *a danger to the community,* this Court revoked his probation. At that time, this Court expressly stated its intent that Defendant maintain the HO designation. *See* Transcript of Proceedings at 54:7-8 ("He will keep his HO designation."); *see also Brownlee v. State,* Case No. 3D19-551, 2023 WL 5730087 (Fla. 3d DCA Sept. 6, 2023) [48 Fla. L. Weekly D1779a].

Defendant's HO sentence is a sentence that could have been originally imposed at the time Defendant was found to be a habitual offender and sentenced to probation. Nothing more is required.[3]

Even if Defendant's argument had any merit, Defendant waived PSI both at the original sentencing *and* following the probation revocation. *Likely v. State,* 583 So. 2d 414 (Fla. 1st DCA 1991) ("a defendant's knowing waiver of the procedural rights accorded by § 775.084, the habitual offender statute, precludes any relief from the trial court's failure to strictly follow the statute."). Defendant not only failed to request a presentence investigation, something which, for argument's sake, could perhaps be cured through the filing of the instant Motion, but also expressly argued in favor of a 23-year sentence followed by probation and stated such a sentence would be an appropriate sentence. *See e.g. Gilano v. State,* 724 So. 2d 1226 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D160b]. This Court agreed with Defendant, found said sentence to be a fair sentence and gave Defendant exactly what he asked for.[4]

Additionally, the Court's 23-year sentence was not, in any event, dependent on an HO designation. This Court did not need to sentence Defendant as an HO to sentence him to 23-years state prison. As stated above, Defendant was facing life imprisonment on Count 2.

Defendant's first claim is, therefore, without merit.

Defendant's remaining arguments will be addressed in order.

First, this Court declines the invitation to reconsider its finding that Defendant poses a danger to the community.

Second, this Court agrees that, as it pertains to Counts 1 and 2, Defendant should be on regular, reporting probation and *not* on "drug offender" probation. Defendant's sentence, therefore, will be corrected to clarify that he is on regular reporting probation, not drug offender probation. Defendant shall otherwise be required to comply with the same standard and special conditions set forth in the Court's sentence.

Third, this Court should have previously awarded Defendant all prior jail and prison credit. If this Court neglected to do that as part of its sentence, then the sentence is hereby corrected, or clarified, to ensure Defendant receives any and all jail *and* prison credit to which he is entitled.

Finally, this Court has already filed its written findings of dangerousness, so Defendant's final claim is moot.

Accordingly, Defendant's Motion is granted in part. Specifically, this Court has (1) clarified that his probation should not be "drug offender" probation and (2) awarded Defendant all prior jail and prison credit. Defendant's Motion is, in all other respects, DENIED.

Defendant is hereby notified that he has the right to appeal this Order to the Third District Court of Appeal within thirty (30) days of the signing and filing of this Order. If Defendant takes an appeal of this Order, the Clerk of Court is hereby Ordered to transport the following documents, with all their attachments, to the appellate court:

1. Defendant's Motion to Correct Sentencing Errors;
2. State's Response in Opposition with its attachments; and,
3. This Order.

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[1]"HVO" = Habitual Violent Felony Offender.

[2]While the facts and issues in *Mann,* are different than the specific issues before this Court, *Mann* reflects an understanding by all parties and the Third DCA that a habitual felony offender who violates probation would, of course, receive a habitual felony offender sentence upon revocation. *See e.g. Id.* at 902 ("both the State and the defense acknowledged that the defendant would be sentenced as an HVO, with the State arguing for a longer sentence and the defense arguing for a shorter sentence."). Like

Mann, and indeed like every other probation violation hearing this Court has ever presided over, the Parties acknowledged, explicitly or implicitly, that upon revocation Defendant would be sentenced as a habitual felony offender.

[3]To the extent Defendant contends there are things that have happened since his original sentence that this Court should consider, nothing prevented Defendant from addressing the Court or even calling witnesses.

[4]This Court would briefly note that even if Defendant was entitled to an additional PSI following a probation revocation, which he was not, this Court made specific findings that Defendant posed a danger to the community. There was, therefore, *no scenario* under which this Court could have made the written findings necessary to avoid imposing a habitual felony offender sentence. *See* Fla. Stat. § 775.084(3)(a)(6) ("the court *must* sentence the defendant as a habitual felony offender. . . unless the court finds that such sentence is not necessary for the protection of the public.") (emphasis added).

* * *

Civil procedure—Summary judgment—Affidavit in support of motion—Corrected supporting affidavit filed 21 days before hearing on motion for summary judgment was untimely and could not be considered by court—Further, motion for summary judgment was filed after expiration deadline for filing dispositive motions—Defendant's motion for summary judgment denied—Sanctions awarded to plaintiff for having to respond to motion for summary judgment filed after deadline set by court

JANETE MORAN, et al., Plaintiffs, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-024641-CA-01. Section CA07. June 11, 2024. Daryl E. Trawick, Judge. Counsel: Frantz Nelson, Levin Litigation, PLLC, Hollywood, for Plaintiffs. Alexis Calleja, Hudson & Calleja, LLC, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause having come before the Court on 6/7/2024 on the Defendant's Motion for Final Summary Judgment as well as the Plaintiff's Cross-Motion for Summary Judgment, the Court having reviewed the file (including but not limited to the Defendant's Motion for Summary Judgment filed 6/23/2023, the Defendant's Notice of filing Affidavit of Asher Cohen, P.E. in support of Defendant's Motion for Final Summary Judgment filed 10/10/2023, Defendant's Notice of Withdrawal of Affidavit of Asher Cohen filed 10/17/2023, Plaintiff's Response and Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment filed 5/16/2024, Defendant's Amended Notice of Filing Affidavit of Asher Cohen In Support of Defendant's Motion for Final Summary Judgment filed 5/17/2024, Defendant's Notice of Filing Affidavit of Asher Cohen in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment filed 5/17/2024 and the Defendant's Response in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment and Memorandum of Law filed 5/17/2024), the Court also having considered the motions, the arguments presented by counsel, the applicable law, and otherwise being fully advised, finds as follows:

1. The Defendant's Motion for Final Summary Judgment is DENIED. The Defendant initially filed the affidavit of Asher Cohen, P.E. in support of its Summary Judgment Motion on 10/10/2023. However, the affidavit referenced the wrong date of loss (May 18, 2021), wrong insureds (Vladislav Rusakov and Janet Chavez) and wrong insured risk ([Editor's note: Address redacted], Davie, Florida, 33325). As a consequence, on 10/17/2023, the Defendant filed a Notice of Withdrawal of said affidavit. The Defendant did not file a corrected affidavit in support of its summary judgment motion until 5/17/2024 (21 days before the hearing). It is required that at the time of filing a motion for summary judgment, the movant must also serve the movant's supporting factual position. Fla. R. Civ. P. 1.510(c)(5). In addition, a movant must serve the motion for summary judgment at least 40 days before the time fixed for the hearing. Fla. R. Civ. P. 1.510(b). The Defendant's Amended Notice of Filing Affidavit of Asher Cohen in Support of Defendant's Motion for Final Summary Judgment was therefore clearly untimely to be considered in support of the Defendant's Motion. Furthermore, the Court finds that the affidavit of Alfredo Brizuela, P.E. filed by Plaintiff in opposition to the Defendant's Summary Judgment Motion creates a genuine issue of material fact.

2. Additionally, on 3/7/2022 this Court issued its Case Management Order, and in so doing, set the deadline for dispositive motions as 8/9/2022. Subsequent thereto, on 8/12/2022, this Court entered an Order extending the case management deadlines by 6 months, thereby setting the new deadline for dispositive motions as 2/9/2023. Defendant did not file its summary judgment motion until 6/23/2023, did not have the matter Noticed for Hearing until 4/9/2024 and did not file any admissible supporting evidence until 5/17/2024, in clear violation of this Court's Case Management deadlines. The Court therefore awards sanctions to the Plaintiff for having to respond to the Defendant's untimely summary judgment motion, prepare for and attend the subject hearing. Plaintiff is awarded sanctions for 1.5 hours of work at a rate of $500.00 per hour for a total of $750.00, to be paid to Plaintiff's counsel's firm within thirty (30) days of the execution of this Order.

3. The Plaintiff's Cross-Motion for Partial Summary Judgment is DENIED.

* * *

Torts—Negligence—Premises liability—Restaurants—Slip and fall—Transitory foreign substance in business establishment—Defendant entitled to summary judgment where there is no evidence that restaurant had actual knowledge of dangerous condition; there was insufficient evidence that transitory substance was actually on floor or was on floor for sufficient period of time that restaurant, in exercise of ordinary care, should have known that it was there; and there was no evidence that transitory substance occurred with such regularity that it was foreseeable

CHRISTOPHER SHAFFER, Plaintiff, v. ANNA MARIA OYSTER BAR, INC., Defendant. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2023-CA-3137. March 6, 2024. Edward Nicholas, Judge. Counsel: Benjamin L. Crawford, Brandon, for Plaintiff. Catherine V. Arpen, Jacksonville, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on for hearing pursuant to the Defendant's Motion for Final Summary Judgment, said motion having been filed on November 6, 2023, and the Court having reviewed and considered said Motion, having reviewed and considered, as well, the Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, said Response having been filed on February 6, 2024, having considered the deposition transcript of the Plaintiff, Christopher Shaffer, and the Plaintiff's interrogatories, having considered the argument of counsel and the case law provided and being otherwise fully advised in the premises, finds as follows:

Standard of Review

In 2021, the Florida Supreme Court revised Florida Rule of Civil Procedure 1.510, saying in effect, that Florida's summary judgment standard should be construed and applied in accordance with the Federal summary judgment standard as spelled out in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The Court indicated that it agreed with the Supreme Court that "[s]ummary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole." *Celotex,* 477 U.S. at 327. The

Court explained that "embracing the Celotex trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state". *See In re: Amends. to Fla. Rule of Civ. Pro. 1.510*, 2021 WL 1684095 at 2 (Fla. April 29, 2021) [46 Fla. L. Weekly S95a]. The Court found the Supreme Court's reasoning compelling, saying, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose". *Id.* at 323-324.

Analysis

Applying the above-referenced standard, while certainly recognizing the high burden that attaches to a motion of this nature and with a clear understanding that a motion for summary judgment is not a substitute for the trial of disputed facts, the Court does hereby find that the Plaintiff's claim is, in fact, one of those "factually unsupported" claims contemplated by revised Rule 1.510. Said another way, as will be explained herein, while the determination of whether a transitory foreign substance was on a floor for a sufficient period of time such that a Defendant "should have known" of its existence is generally a jury question, there is simply no evidence here that the Defendant had any actual or constructive knowledge of the presence of any substance on the floor. Indeed, based upon the Plaintiff's own deposition testimony there is no evidence that there was, in fact, a liquid on the floor at the time of his fall. In other words, the Plaintiff's claim is not supported by the facts, nor the law, and, as indicated, is, in fact, one of those "unsupported claims' contemplated by the revised Rule 1.510. As will be explained herein, there is no genuine issue of material fact, no evidence to indicate how "transitory" the transitory substance was here or even if there was a transitory substance, and the Defendant's Motion for Summary Judgment is well taken and must be granted.

The Plaintiff's cause of action arises as a result of the Plaintiff's claim that he slipped on an alleged substance on the floor of Anna Maria Oyster Bar. The Plaintiff argues "the record evidence shows that the defendant had at least constructive knowledge of a substance being on the ground right in front of the hostess station. At all times there was an employee at the hostess station and any spill should have been observed immediately as it happened in front of the hostess if the hostess was exercising ordinary care. Under these facts, summary judgment should fail" (*see* Response).

The Defendant argues that "[H]ere, plaintiff wants to infer there was a transitory foreign substance on the ground despite admitting that he did not know what made him fall. This inference then asks the court to draw additional inferences to the exclusion of all other possible inferences which is prohibited" (*see* Motion). The Defendant goes on to suggest that "there is no evidence from which a factfinder could find that Anna Maria Oyster Bar, Inc. was negligent without impermissibly stacking inferences, and Anna Maria Oyster Bar, Inc. is entitled to entry of final summary judgment" (Again, *see* Motion).

When a premises liability action is grounded on an individual's slip and fall on a transitory foreign substance in a business establishment, Section 768.0755, Florida Statutes (2010), applies and controls. *Encarnacion v. Lifemark Hospitals of Florida,* 211 So.3d 275 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D304a]. Section 768.0755 reads:

> **768.0755. Premises liability for transitory foreign substances in a business establishment**
>
> (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
>
> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> (b) The condition occurred with regularity and was therefore foreseeable.
>
> (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.[1]

Thus, in every slip and fall case involving a negligence claim, the plaintiff must prove that the establishment had actual or constructive knowledge of the dangerous condition. There is no evidence of actual knowledge here. The question, then, is whether the Defendant had constructive knowledge of a liquid on the floor prior to the Plaintiff's fall.

When the Legislature enacted § 768.0755, it indicated that proof of such constructive knowledge can be established by circumstantial evidence that the "dangerous condition" existed for such a length of time that, in the exercise of ordinary care, store personnel should have known of its existence, or (2) Plaintiff may prove by circumstantial evidence that the "dangerous condition" occurred with such regularity that it was foreseeable. Section 768.0755, Florida Statutes (2010).

Ultimately, based upon the Plaintiff's own deposition testimony, there simply is insufficient evidence that a wet substance was on the floor, or that the substance was on the floor for a sufficient length of time that the Defendant, in the exercise of ordinary care, should have known that it was there. Additionally, there is no evidence that established that the transitory substance occurred with such regularity that it was foreseeable. This conclusion is, indeed, as indicated, largely based upon the Plaintiff's own testimony. This is, indeed, one of those few instances wherein there is simply no evidence to indicate that there was definitively a substance on the floor or that the condition existed for such a period of time sufficient to put the Defendant on notice of its existence. The Plaintiff's theory of liability is quintessential speculation, and, as such, summary judgment is appropriate.

The Court points specifically to page 15, lines 4-7 and page 16, line 25, and page 17 through line 7:

> "I walked back in, came around the hostess station. Next thing I knew, I was on the floor. So I immediately jumped up feeling embarrassed and went to the table clutching my shoulder."
>
> "Q. Did you look down at the floor prior to you falling?
> A. No, ma'am.
> Q. Did you see any substance on the floor prior to you falling?
> A. No, ma'am, not that I recall.
> Q. Do you know what caused you to fall?
> A. No, ma'am, I'm not a hundred percent certain."

The Court points, as well, to page 17 lines 11-20:

> "Q. All right. And did your arm catch your fall, or attempt to catch your fall?
> A. Honestly, I really don't know. It happened so quickly, I just—down I went and—
> Q. Okay. When you got back up—or once you collected yourself on the floor, did you look around and see anything wet on the floor?
> A. No, ma'am, I wasn't looking. My shoulder was killing me. I just went back to the table, sat down and was talking with my parents."

As indicated, at no time did Mr. Shaffer state during his deposition that there was a liquid on the floor or that his clothes were wet. Nothing in his testimony establishes that there was a liquid on the floor and, as such, the Plaintiff has failed to establish the necessary prerequisite of constructive notice on the part of the Defendant.

The Court points, as well, to page 17, lines 6-7, wherein the Plaintiff, himself, did not know what caused him to fall:

> "Q. Do you know what caused you to fall?
> A. No, ma'am, I'm not a hundred percent certain."

The Plaintiff argued at the hearing that there "could have been employees" that could have corrected the condition or warn patrons

of the condition. This, like the Plaintiff's theory generally, is pure speculation. Plaintiff's counsel argued at the hearing that the failure of the Plaintiff to say that he slipped on a liquid substance is of no consequence. This Court does not agree, particularly in light of the revised summary judgment standard. At the risk of repetition, simply stated, there is no circumstantial evidence from which a conclusion can be reasonably drawn that the Defendant had constructive notice of a liquid, a liquid that the Plaintiff failed to state existed at his deposition, was on the floor of the Anna Maria Oyster Bar.

Generally, issues regarding proof of constructive knowledge typically come down to the presence of some proof as to how long the liquid or substance was on the floor. Courts have consistently held that while proof that the substance was on the floor for 15 to 20 minutes or more was sufficient to survive summary judgment, direct evidence that the substance was on the floor for less than 10 minutes often entitled a defendant to summary judgment. See *Hernandez v. Sam's East, Inc.,* 2021 WL 1647887 (S.D. Fla. 2021); see also and compare *Thomas v. NCL (Bahamas) Ltd.,* 203 F. Supp. 3d 1189, 1193 (S.D. Fla. 2016); with *Pussinen v. Target Corp.,* 731 F. Appx. 936, 938 (11th Cir. 2018) and *Hill v. Ross Dress for Less, Inc.,* 2013 WL 6190435 (S.D. Fla. 2013).

Hernandez, supra, is particularly persuasive. In that case, the plaintiff slipped and fell on a foreign substance on the floor of the produce department. 2021 WL 1647887 at 1. She had no knowledge as to how the substance got on the floor, the length of time it was on the floor, the source of the substance or whether Sam's employees knew it was on the floor prior to her accident. *Id.* A Sam's employee testified that he walked through and inspected the area where Ms. Hernandez fell approximately 10 minutes prior to the accident and the floor was clear. *Id.* at 3. The surveillance video also confirmed the employee's inspection, establishing that the substance that caused Plaintiff's fall must have been on the floor less than 10 minutes. *Id.* The Southern District, applying Florida law and the Federal summary judgment standard of review now employed by Florida trial courts, held that where there is direct evidence that the substance was on the floor less than 10 minutes, there is no constructive notice as a matter of law and summary judgment is proper. *Id.* In its reasoning, the Court cited and compared a host of other cases in which proof the substance was on the floor at least 15 to 20 minutes was sufficient to show constructive knowledge but that evidence the substance was on the floor less than 10 minutes was insufficient as a matter of law to charge the defendant with constructive knowledge. *Id.* citing to (*Thomas v. NCL (Bahamas) Ltd.,* 203 F. Supp. 3d 1189, 1193 (S.D. Fla. 2016); with *Pussinen v. Target Corp.,* 731 F. Appx. 936, 938 (11th Cir. 2018) and *Hill v. Ross Dress for Less, Inc.,* 2013 WL 6190435 (S.D. Fla. 2013). See also *Jenkins vs. Brackin,* 171 So. 2d 589 (Fla. 2nd DCA 1965), which held that "[T]here was sufficient circumstantial evidence presented, regarding how long the green bean was on the floor to preclude summary judgment. Fifteen minutes prior to the accident, the defendant store had not examined the floor where the green bean was located", *id*. at 590. In this case, there is a fatal lack of evidence as to how long the alleged liquid was on the floor and, indeed, whether such transitory liquid actually was present. See also *Encarnacion v. Lifemark Hospitals of Florida,* 211 So. 3d 275, 277 (3rd DCA 2017) [42 Fla. L. Weekly D304a], wherein the Third District granted summary judgment because "there was no indication in the record suggesting the existence of a foreign substance on the floor was known to the hospital, and the record did not establish how long the substance had been on the floor".

In paragraph eight (8) of his complaint, the Plaintiff alleges that the negligent conditions (i.e. the liquid on the floor) "were known to Anna Maria or had existed for a sufficient length of time so that they should have corrected or warned of said conditions". Problematic, however, is that there is a woeful lack of evidence to support same.

This Court certainly recognizes that, by entry of this Order, Mr. Shaffer is unable to seek redress for the injuries he sustained when he slipped in Anna Maria Oyster Bar on June 12, 2018, due to the alleged negligence of Defendant's employees. The evidence, however, to support his theory of negligence simply does not exist.

Ultimately, although revised, Rule 1.510 indicates that summary judgment must be granted only "if the pleadings and summary judgment evidence on file shows that there is no genuine [dispute] as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fla. R. Civ. P. 1.510(c); *In re: Amendments to Fla. Rule of Civil Procedure 1.510*, No. SC20-1490, 2020 WL 7778179 at *4, 309 So.3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a] (*amending language to replace "genuine issue" with "genuine dispute"). Based upon the foregoing, there is no "genuine dispute" here. Therefore, the Defendant's Motion for Summary Judgment is GRANTED.

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[1]See *Woodman v. Bravo Brio Restaurant Group, Inc.,* 6:14-cv-2025-Orl-40TBS; 2015 WL 1836941 (M.D. Fla. Apr. 21, 2015). The *Woodman* court held Plaintiff's argument "that [§ 768.0755](2) of the statute is construed to allow claims based on mode of operation theory would effectively read subsection (1) out of the statute. 'A basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.' *State v. Goode,* 830 So.2d 817, 824 (Fla. 2002) [27 Fla. L. Weekly S860a]. Rather than reading subsection (2) to effectively repeal subsection (1), the Court concludes that subsection (2) means that the duty owed by premises owners to invitees is the same as it has always been under Florida law: "to exercise reasonable care to maintain their premises in a safe condition." (citing *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315, 332 (2001) [26 Fla. L. Weekly S756a]).

* * *

Civil rights—Prisoners—Torts—Complaint brought by prisoner against correctional institution and warden—Dismissal without prejudice—Failure to state claims with particularity and specificity required by rule 1.110(b)

KEYON LEONARD RICHARDSON, DOC# M68704, Plaintiff, v. ROBERT FLORES, HOLMES CORRECTIONAL INSTITUTION, Defendant. Circuit Court, 14th Judicial Circuit in and for Holmes County, Civil Division. Case No. 23-318 CA. May 28, 2024. Russell S. Roberts, Judge. Counsel: Keyon Leonard Richardson, Pro se, Plaintiff. Mason V. Petrosky, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Defendant.

DENYING PLAINTIFF'S MOTION TO STRIKE ORDER GRANTING DEFENDANT'S MOTION TO ADOPT DEFENDANT'S PREVIOUSLY FILED MOTION TO DISMISS, ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE STATEMENT OF CLAIMS, ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE AND WITH LEAVE FOR PLAINTIFF TO FILE AMENDED COMPLAINT; AND ORDER

THIS MATTER is before the Court on the Plaintiff and Defendant's Motion hearing heard May 16, 2024. Having reviewed said Motions for consideration within the Notice of Hearings filed April 17, 2024 and April 30, 2024, court file and records, the Defendant's Motion to Dismiss the Complaint pursuant to Rule 1.140, Fla. R. Civ. P. filed March 18, 2024, the Plaintiff's Motion to Strike Defendant's Motion to Dismiss filed April 9, 2024, the Plaintiff's Motion for Leave to Amend his Complaint Statement of Claims filed April 9, 2024, the Defendant's Motion to Adopt his Previously filed Motion to Dismiss pursuant to Rule 1.100, Fla. R. Civ. P. filed April 16, 2024, the Plaintiff's Motion to Demand Jury Trial filed April 30, 2024, the Hearing held May 16, 2024, the argument of parties, and being otherwise fully advised, the Court hereby finds as follows:

1. Plaintiff initiated this action on October 20, 2023, by filing his original Civil Rights Complaint with supplemental state tort claims. Plaintiff has also filed numerous ancillary affidavits, exhibits and

attachments to the complaint throughout the duration of the case after Plaintiff's filing of the initial complaint.

2. On March 18, 2024, the Defendant filed his Motion to Dismiss. Since then, Plaintiff filed a Motion for Leave to Amend the Statement of Claims to the Complaint pursuant to Rule 1.190, Fla. R. Civ. P. April 9, 2024. Plaintiff also filed on the same day (April 9, 2024) a Motion to Strike Defendant's Motion to Dismiss. Thereafter, on April 16, 2024, the Plaintiff filed a Motion to Adopt Defendant's previously filed Motion to Dismiss in response to and in light of Plaintiff's Motion for Leave to Amend the Statement of the Claims should this Court adopt the amendment to the Plaintiff's statement of claims to his complaint. Finally, the Plaintiff filed a Motion to Demand for Jury Trial pursuant to Rule 1.430, Fla. R. Civ. P. on April 30, 2024.

3. On May 16, 2024, the Court held a hearing on both the Plaintiff and Defendant's motions noticed for consideration. The Defendant was represented by counsel, Mason V. Petrosky, Esq., Assistant Attorney General, and the Plaintiff was represented in a pro se capacity. Both parties appeared for the hearing via zoom.

Plaintiff's Motion for Leave to Amend the Statement of Claims to the Complaint

4. At the hearing, the Defendant had no objection to granting the Plaintiff's motion for leave to amend the complaint. In fact, the Plaintiff is entitled to an amendment to his Complaint before the Defendant files an Answer to the Complaint under Rule 1.190, Fla. R. Civ. P. Therefore, the Court shall grant the Plaintiff's motion for leave to amend the statement of claims to the complaint.

Defendant's Motion to Adopt Defendant's Previously Filed Motion to Dismiss

5. After a review of the Plaintiff's Motion for Leave to Amend and the attached amendment to the statement of his claims, the Defendant moves this Court to adopt his originally filed Motion to Dismiss and the arguments raised therein as grounds now to dismiss Plaintiff's Complaint with the Amended Statement of Claims. Upon review of the arguments of the parties, the Court shall grant the Defendant's request to adopt the Defendant's previously filed motion to dismiss in response to and considering Plaintiff's Motion for Leave to Amend the Statement of Claims to the Complaint.

Defendant's Motion to Dismiss

6. Defendant's motion raised ten (10) arguments as reasons to dismiss the Plaintiff's Complaint as amended: (I) Plaintiff failed to exhaust administrative remedies as is required by the Prison Litigation Reform Act ("PLRA"), (II) Plaintiff's Complaint does not conform to proper pleading requirements, (III) Plaintiff fails to state a cause of action for a Religious Land Use and Institutionalized Persons Act ("RLUIPA") violation, (IV) Plaintiff's claim under the Religious Freedom Restoration Act (RFRA) must be dismissed with prejudice, (V) all official capacity claims against Defendant for damages must be dismissed, (VI) Plaintiff fails to state a cause of action against Defendant in his individual capacity for his Federal Constitutional claims because Defendant is entitled to Qualified Immunity, (VII) Plaintiff fails to state a cause of action for a First Amendment Retaliation claim because he fails to properly allege sufficient causation, (VIII) Plaintiff fails to state a cause of action for negligence and assault because he fails to plead ultimate facts entitling him to relief, (IX) Plaintiff fails to state a cause of action because he has failed to comply with his pre-suit notice obligations under Section 768.28, Florida Statutes, and (X) Plaintiff is not entitled to compensatory or punitive damages for failure to allege a physical injury.

7. At the hearing, the Defendant primarily focused on two (2) arguments in support of the motion. First, the Plaintiff failed to exhaust his administrative remedies; and second, Plaintiff's complaint does not conform to the proper pleading requirements. In response, the Plaintiff in the hearing addressed and replied to the two arguments raised above and in addition Plaintiff addressed some of the other arguments raised within the Defendant's motion to dismiss.

8. The Court finds that the Plaintiff complaint fails to comply with the pleading requirements. *See* Rule 1.110(b), Fla. R. Civ. P. (which requires that a pleading set forth a claim for relief. . .must state a cause of action and shall contain. . .(1) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."). Further, the Court finds that the Plaintiff has continued to file re-iterations of the underlying facts and claims whether they are through amendments, affidavits, exhibits, or motions. *See* e.g., (Doc. 6); *see* (Doc. 14); *see* (Doc. 21); *see* (Doc. 22); *see* (Doc. 26); *see* (Doc. 33); *see* (Doc. 34); *see* (Doc. 36); *see* (Doc. 42). Additionally, the Plaintiff has listed certain statements of law as his claims without identifying which pleaded facts support each claim as if incorporating his only statement of facts into every single claim he lists. Thus, this prevents the Defendant from adequately responding to the complaint. Finally, the Plaintiff does not adequately identify which causes of action pertain to each ultimate fact pleaded as to put the Defendant on notice of which allegations to respond to for each claim.

9. Thus, the Court finds that the Defendant's Motion to Dismiss is due to be granted without prejudice and the Plaintiff's amended complaint shall be dismissed and any motions, exhibits and amendments to his complaint shall be stricken for Plaintiff's failure to state his claims in one filing with sufficient particularity and specificity as is required by Florida law. Plaintiff shall be afforded an opportunity with leave to file an amended complaint within sixty (60) days and the amended complaint must comply with the applicable Rule 1.110, Florida Rules of Civil Procedure.

Plaintiff's Motion to Strike

10. The Plaintiff's Motion to Strike Defendant's Motion to Dismiss does not raise any colorable ground to strike the Motion to Dismiss. Instead, the Plaintiff's Motion to Strike is best construed as a response to the Defendant's Motion to Dismiss. Accordingly, the Court shall deny the Plaintiff's Motion to Strike Defendant's Motion to Dismiss.

Plaintiff's Motion to Demand for Jury Trial

11. At the hearing, the Defendant articulated and submitted that the defense do not oppose the Plaintiff's motion if the Defendant's Motion to Dismiss is granted, or it may be a moot point. Considering the Court's ruling upon the Defendant's Motion to Dismiss as articulated above, the Plaintiff's motion is determined to be moot.

Therefore, it is

ORDERED AND ADJUDGED as follows:

1. The Defendant's Motion to Dismiss complaint is hereby GRANTED WITHOUT PREJUDICE and with leave for the Plaintiff to file an Amended Complaint within sixty (60) days of the date of this Order.

2. The Plaintiff's Motion to Demand for Jury Trial is hereby moot based upon the granting of the Defendant's motion to dismiss.

3. The Plaintiff's Motion to Strike is hereby DENIED.

4. Defendant's Motion to Adopt Defendant's Previously Filed Motion to Dismiss is hereby GRANTED; and

5. Plaintiff's Motion for Leave to Amend the Statement of Claims to the Complaint is hereby GRANTED.

* * *

Contracts—Construction—Deceptive and unfair trade practices—Contractor's action against homeowners for unpaid amounts related to home renovation and homeowners' counterclaim for construction defects and deficiencies—Homeowners did not breach contract where parties had enforceable unambiguous contract that provided for set allowances and an agreed payment schedule and required written change orders and advance payment for any additional work; contractor exceeded allowances and failed to comply with payment schedule without taking any action to modify contract or execute change orders; and homeowners paid contractor in excess of allowances and contractor fee specified in contract—Homeowners' pretrial stipulation that contract was on cost plus 25% basis will not be interpreted as abandonment of their position that contract provisions prevail and they did not agree to pay for costs that were not subject to written change order and advance payment—Further, contract is unenforceable against co-homeowner who did not sign contract or act as if contract were ratified—Unjust enrichment—Claim for unjust enrichment fails where homeowners paid almost double the amount agreed to in contract, and contractor has no reliable evidence of "benefit conferred"—Contractor is not entitled to recover based on equitable principles where it breached contract by failing to comply with allowances or obtain change orders and failing to comply with payment schedule, and contractor presented no evidence from which any equitable damages could be determined—There is no evidence to support existence of oral contract for additional contractor fees—Contractor negligently performed renovations—Consumer law—Contractor's failure to adhere to payment schedule, failure to provide accurate accounting for expenditures, and treatment of work in excess of allowances as expansions to scope of project without providing change orders constituted deceptive and unfair trade practices—Damages are awarded to homeowners for defective construction and breach of contract

VULETIC GROUP L.L.C., d/b/a CONCEPT CONSTRUCTION, a Florida limited liability company, Plaintiff/Counter-Defendant, v. SPENCER MALKIN, an individual, and FRAN MALKIN, an individual, Defendants/Counter-Plaintiffs. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2020-CA-001095. Final Judgment entered May 22, 2024. Order Granting final Judgment filed March 5, 2024. Rehearing denied May 22, 2024. Luis Delgado, Judge. Counsel: Benjamin E. Olive, Olive | Judd P.A., Ft. Lauderdale, for Plaintiff/Counter-Defendant. Craig M. Oberweger, Palm Law Partners, P.A., Boca Raton; and Mark R. Osherow, Osherow, PLLC (as of Counsel to Palm Law Partners, P.A.), Boca Raton, for Defendants/Counter-Plaintiffs.

FINAL JUDGMENT AGAINST VULETIC GROUP L.L.C. d/b/a CONCEPT CONSTRUCTION

THIS CAUSE having come before the Court on the Court's direction contained in the Order Granting Final Judgment, dated March 5, 2024 (D.E. 287), to submit a "final judgment reserving jurisdiction to address any other pending matters including an award of attorney fees and costs," and otherwise being fully advised in the premises, the Court issues this Final Judgment as follows:

1. The Considerations, Findings and Conclusions, and directives of the Court, set forth in the in the March 5, 2024, Order Granting Final Judgment, are incorporated herein by reference for all purposes.

2. The Court renders a Judgment and Award as follows:

Damages Awarded			**Total**
DAMAGES			**$414,272.00**
Pre-Judgment Interest[1] (*Beginning May 24, 2021*)			**$84,978.00**
GRAND TOTAL (DAMAGES and INTEREST)			**$499,250.00**
Attorney Fees and Costs			TBD

Accordingly, it is ORDERED AND ADJUDGED as follow:

(a) That Judgment is issued in favor of Defendant/Counter Plaintiffs SPENCER MALKIN, and FRAN MALKIN and against Plaintiff/Counter Defendant, VULETIC GROUP L.L.C. d/b/a CONCEPT CONSTRUCTION, in the amount of FOUR HUNDERED NINTY NINE THOUSAND TWO HUNDERED FIFTY dollars and 00/00 cents (**$499,250.00)**, inclusive of interest, with interest accruing at the statutory rate pursuant to, FLA. STAT. 55.03, from the date of this Final Judgment, ***ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH***.

(b). Defendant/Counter Plaintiffs SPENCER MALKIN, and FRAN MALKIN shall recover the amount specified in paragraph 3(a) above from Plaintiff/Counter Defendant, VULETIC GROUP L.L.C. d/b/a CONCEPT CONSTRUCTION.

(c) The address of the Defendant/Counter Plaintiffs SPENCER MALKIN, and FRAN MALKIN, is [Editor's note: Address redacted] Boca Raton Florida 33496.

(d) The address of the Plaintiff/Counter Defendant, VULETIC GROUP L.L.C. d/b/a CONCEPT CONSTRUCTION, is 7050 WEST PALMETTO PARK RD 15-813 BOCA RATON, FL 33433.

(e) It is further ordered and adjudged that the judgment Debtor VULETIC GROUP L.L.C. d/b/a CONCEPT CONSTRUCTION shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the Plaintiff's attorney, Palm Law Partners, PA. at 2101 NW Corporate Blvd. suite 410 Boca Raton Florida, 33431, within forty-five (45) days from the date of this Final Judgment, unless the Final Judgment is satisfied in full.

(f) Jurisdiction over this case is retained to address any other pending matters including an award of attorney fees and costs, to enter further orders that are proper for Execution and/or Garnishment, and to compel the Judgment debtor to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney at the address above.

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[1]Per diem 0.0249041%

[Editor's note: Order Granting Final judgment, Filed March 5, 2024]

FINAL JUDGMENT

Plaintiff/Counter-Defendant, VULETIC GROUP L.L.C. d/b/a CONCEPT CONSTRUCTION ("Concept" or "Plaintiff"), filed this action against Defendants/Counter-Plaintiffs, SPENCER MALKIN and FRAN MALKIN (collectively "Malkins" or "Defendants"), for Breach of Contract, Breach of Oral Contract, Foreclosure of Lien, and Unjust Enrichment.

The Malkins filed an Amended Counterclaim for Breach of Contract, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness, Negligent Construction, Breach of Implied Covenant of Good Faith and Fair Dealing, and Florida's Deceptive and Unfair Trade Practices Act.

Plaintiff dismissed its Foreclosure of Lien claim pursuant to Plaintiff's Notice of Voluntary Dismissal dated March 29, 2022. Pursuant to this Court's Order dated October 28, 2022, on Plaintiff's Motion for Summary Judgment, the Court entered judgment in favor of Plaintiff and against Defendants on Defendants' Counterclaim Count II, Breach of Implied Warranty of Merchantability, and Count III, Breach of Implied Warranty of Fitness. The Court conducted a bench trial on January 24, 2023 through January 27, 2023 and additionally on February 21 and 22, 2023 regarding the remaining claims in the action between the Parties. The Court considered the evidence and issues raised during trial.

OVERVIEW

This is a construction case in which the contractor ("Concept") asserted claims for unpaid amounts related to the renovation project and the homeowner counterclaimed related to deficiencies and defects in the construction.

Concept sued the Malkins for payment. The Malkins counterclaim sought damages related to the home's deficiencies. Concept claims the Malkins agreed to the construction and the adjustments and did not pay Concept the amount due and thus the Malkins are the wrongdoers, but Malkins disputed these claims and asserted a host of construction deficiencies and related damages such as water intrusion and unlevel flooring.

The Malkins signed a proposal for renovations on their home with Concept on August 31, 2018. The agreed upon budget for materials and labor was the amount of $309,000.00, and a Contractor Fee of $77,250.00 (D2V1 137:810-12), for a total of $386,250.00. Malkin Tr. Ex 4; D1V1 137:8-12; 152:5-12; D5V1 25:12-19.

The $309,000.00 was made up of seventeen (17) specific line item amounts, given to Concept as what the Malkins claim were "limits" agreed to by Concept as an amount that it could and would complete the renovation (D5V1 25: 1-2) pursuant to the plans—**unless compliant "change orders" were executed.** D5V1 26:1-17. Concept claims that items were added to the contract, **although no such change orders ensued** (D2V1 135:20-23), and that it is entitled to be paid a 25% fee for these items. (D2V1 137:9)

The contract (Pl. Tr. Exh. 4) specifically references change orders. Concept claims no change orders were necessary as there was "an expansion" to the work which are not change orders. There is no reference to "expansion" to the scope of work under the contract, other than through change orders. (D2V1 138:17-22) The Court heavily considered and weighs in favor of the Malkins the lack of a compliant change order.

The Malkins assert that Mr. Vuletic was their friend and was not expecting to be paid for any additional fee (D5V2 120:22-121:2) (unless a change order was agreed to, signed and paid in advance), and thus Concept never created or requested change orders because there was an agreement not to be paid for any additional items unless a change order was specifically agreed to and paid. D5V2 121:12-22. While not necessarily typical, this view is entirely consistent with the manner in which the contract is drafted. It is also consistent with the testimony that the parties were friends. The Court finds they were indeed very close friends and even went on vacation together.

The Malkins delivered a check for 10% of the price, $40,000.00, to Concept. Malkin Tr. Exh. 3. It is undisputed that Concept invoiced the "Malkin initial deposit for permit application," drafted the permit, and paid the City of Boca Raton $3,862.50. The contract references a "cost-plus" fee model and the Malkins agreed to a twenty-five percent (25%) contractor fee added on top of the dealer/vendor invoiced costs—the actual cost incurred by Concept for the materials, products, fixtures, labor and/or services, subject to a change order procedure.

Concept seeks an award of $302,867.02 for its claims (including interest) and the Malkins seek an award of $414,372.00 on their counterclaims for defects and deficiencies in the construction.

The Malkins assert that the fee was agreed to be the specific amount stated in the contract, ($77,250.00) with any additional fee would **only paid on any agreed change orders**. D5V2 122:19-123:17. Again, there are no change orders.

Recognizing that the contract's procedure was not followed by Concept, Concept claims it is entitled to be paid a 25% management fee on all costs incurred for materials and services, even though this is not explicit in the contract. This also includes payments related to the generator, audio installation and equipment, the pool, and the garage installation, although these items were handled directly by the Malkins, and not included within the 17 line items under the contract.

The agreed costs (subject to the contractor fee of 25%) are referred to, by Concept, as "allowances" within the proposal. Pl. Tr. Exh. 4. The contract contains seventeen (17) specific material terms, "allowances" as agreed to by the parties. All things being equal, the agreed seventeen (17) "allowances," or cost of the materials, products, fixtures, labor and/or services to complete the renovation, along with the procedure upon which those costs can change (i.e., "Change Orders") along with a payment (draw) schedule were a significant reason for the Malkins in moving forward with Concept. D5V2 120:1317; Pl. Tr. Ex 4. The Court finds credible and reliable the testimony from the Malkins that the payment draw schedule was a significant factor in hiring their friend and contractor Concept.

Starting November 1, 2018, Concept sent its first set of invoices. The Malkins assert that Concept did not provide any proof of payments until May, June, and September 2019.

The Malkins assert that Concept provided no appropriate accounting of its work through QuickBooks or any other specialized software or platform. Instead, Concept worked with a rudimentary paper system of keeping a running tally of what it claimed were its expenses and then supplemented this system with invoices or estimates. The Malkins demanded the financial information and Concept begin to put together financial documents to substantiate its payment demands. Mr. Vuletic claimed that no prior client ever requested this level of detail. The Malkins assert that they have a high degree of attention to detail and expected that here.

The Malkins assert that Concept's invoices were for the full amount of the dealer/vendor cost, plus the contractor fee, regardless of the level of completion and in direct contradiction with the signed proposal's draw schedule.

In fact, despite the draw schedule's requirements appearing in the contract in two places, the Court does not find any reliable evidence that the draw schedule was followed. See Makin Tr. Exh. 3; Testimony of Fran Malkin at D6V1 33:32-44:23

The Malkins eventually paid $165,256.40 in complete satisfaction of the "invoices" and contractor fees on November 18, 2018. D6V1 38:14-19.

On February 21, 2019, Concept sent its second set of 22 "invoices" including invoices for vendors that the Malkins already paid for and handled separately. Still, that same day, at the request of Concept, the Malkins paid Concept $243,313.16. (D6V1 40:8-16).

On May 29, 2019, Concept sent its third set of 29 "invoices"—with, yet again, no proof of payments.

On May 30, 2019, according to the Malkins, Petar Vuletic demanded another payment, and the Malkins paid $50,000.00, while the Concept had $147,777 on hand from the Malkins, resulting in a balance of $193,777 in Concept's unsegregated "client account." D6V1 42:2-11.

Finally, between May and September 2019, the Malkins attempted to clarify progress and payment information. See Malkin Tr. Exh. 2. On June 22, 2019, the Malkins requested Concept provide proof of payments and an explanation of payments that had been made to date. Malkin Tr Exh. 2. On July 2, 2019, Concept's provided its fourth set of "invoices." As before, the Malkins assert that Concept did not include proof of payments or explanations, as requested. Nevertheless, the Malkins paid $112,856.61 on July 3, 2019. Malkin Tr. Exh. 3; D6V1 42:23-43:11. As a result according to the Malkins' analysis, which was not refuted, there remained $77,374.32 in the account as of November 25, 2019, the date of the invoice that Concept prepared to attach to the Complaint. D6V1 43:22-24.

These determinations were made by Fran Malkin based on a calculation from all the invoiced contained in Plaintiff's Exhibit2

(Composite 1 through 109—Pl. Exh "B") and Exhibit 15 (Pl. Exh. "V")(composite), by adding up the payments and subtracting the amounts supplied by Concept that were paid out to vendors. D6V1 27-37. That amount does not reflect any additional fees claimed by Concept but is more than the amount owed for the Contractor fee of $77,250 specified in the Contract (Pl. Tr. Ex. 4).

The Malkins terminated Concept on November 25, 2019. D2V1 70:1-2. A few days later, on December 2, 2019, Concept filed a construction lien in the amount of $202,360.50 out of an asserted total claim amount of $945,139.69. *See* Complaint. The lien claim was ultimately withdrawn.

The project was based on a contractual arrangement, in which the parties agreed the total amount of the project, inclusive of allowances and contractor fees, would be $386,250.00, plus any additional management fees for additional costs if the parties agreed to a change order. D5V1 26-26.

The Malkins assert that absent compliance with the executed contracts "Change Order" provision, the Malkins had already paid $611,456.37 (Malkin Tr. Exh. 3), well in excess of the agreed total compensation agreed for this project. D6V1 43-44. In addition, the Malkins paid $277,950.22 to subcontractors which is undisputed. (Pl. Tr. Exh. 2 (Pl. Exh B), listing slightly more paid by the Malkins of $ 280,640.00 directly to subcontractors. The Malkins claim that the full fee has been paid to Concept, and that nothing more is owed, as all additional costs have been satisfied or disputed with the subcontractors due to overcharges or defective work.

The Malkins assert that Concept is paid in full based on the payments made and its interpretation of the contract. The Court agrees. **The Concept failed to obtain the change orders it was required to obtain prior to modification of the terms of the contract**. Indeed, the deficiencies in the construction raise other issues which the Court addresses below.

CONSIDERATIONS

Concept's claims can be resolved based on the applicable law applied to the written contract and based on the sequence of events established at trial.

As to the Malkin's counterclaim, the Malkins presented reliable evidence of installed **walls that were neither plumb nor square**, and **uneven floors** that exceed specifications with deficiencies visible to the eye.

Concept claimed the Malkins did not pay to have reasonably level floors, and that level floors are not included in the architectural plans or the contract terms. The Court does not find this position supported by any documentary evidence or consistent with the reasonable expectations of the homeowners.

The Malkins also presented evidence of defective installation of kitchen appliances and cabinets, and also supported by testimony the Court found credible and reliable of David Riddle P.E., MBA, Esq., an expert with over twenty years of experience in identifying construction defect causes and labilities.

The court finds and summarizes as follows. In late 2018, the Malkin's met Petar Vuletec, the principal of Plaintiff, Concept Construction. They had mutual friends, became friends and the families vacationed together on at least one occasion. At around the same time, the Malkins were finalizing the purchase of a home to be renovated which they were planning to live in for many years. The Malkins wanted to make this house into what they described as "forever home," with their teenage children.

To renovate the home, the Malkins were looking for a skilled general contractor they could trust to build well and cost-effectively. The Court finds the Malkins trusted Concept and likewise Concept trusted the Malkins. The finds this mutual trust is the basis for the lackadaisical noncompliance with the contract terms—The parties assumed it would work out because they were friends.

In July 2018, the Malkins met with Mr. Vuletic to discuss his ability to be the general contractor for their complete home renovation of both the interior and exterior of the home, originally built in 1988, essentially down to a shell to be reconstructed.

Mr. Vuletic held himself out to the Malkins not only as a friend, but also an "expert" in this kind of construction, and that he could and would do this in an efficient, expedient, low-cost manner, based on his relationship with vendors of construction materials and supplies.

According to the testimony of both Mr. Vuletic and Spencer Malkin their meetings, and the representations of Mr. Vuletic, formed the basis of the proposal, and eventually, acceptance of the proposal as the contract—drafted and presented by Concept to Spencer Malkin.

The cost projected (the budget) to be spent by the Malkins was discussed, negotiated through at least one prior iteration of the agreement, and then translated into "line items"—identified by Concept, with set amounts or "Allowances" relative to each "allowance" "line items" the parties agreed to. These amounts, according to Spencer Malkin, were agreed upon as the allowed top expenditures for each item, and the contract does not express anything to the contrary. The agreement was memorized into the proposal that became the contract price. Pl. Tr. Exh. 4. Concept claims these allowances were not maximums but were subject to being exceeded without the necessity of change orders, as "expansions" to the project rather than exceeded allowances, which would require a written agreement generally called a change order, although called an "Additional Work Order" in the Contract.[1] Pl. Tr. Exh. 4. Spencer Malkin rejected a first proposal sent only to him, by Concept because, according to the testimony of both Spencer Malkin and Mr. Vuletic—though Mr. Vuletic claims for different reasons, the price was based on essentially what Malkin was willing to pay for budgetary reasons. In response to Spencer Malkin's rejection of an initial proposal, less than two hours after the first proposal was sent and rejected, Concept sent to Spencer Malkin, a second proposal—this one reflecting the agreed to "line Item" amounts (allowances) within the aligned budget.

Spencer Malkin executed the proposal that became the contract. Notably the testimony of all the parties agree that Fran Malkin did not execute the contract, played little to no part in the administration of any aspect of the either the contract, work performed or obligations of the parties, and in fact based on her testimony expressed despair over the entire process and relationship between Spencer Malkin and Concept. As discussed further below, Florida law is clear on this point—when a party does not sign an agreement and does not act as if the agreement is ratified, the party shall not have the agreement enforced against it. Additionally, a contract cannot bind one who is not a party thereto, because in order to create an enforceable contract, there must be reciprocal assent to a certain and definite proposition.

Analogously, several issues surrounding the contract price and/or final bill from Concept are disputed by the Malkins. The Malkins seek to have the contract interpreted as written.

Concept seeks to have this Court interpret the contract based on terms that Concept clams exist in the contract but cannot be found within the actual document. Concept seeks to have this Court interpret the term "allowance" in a manner that suits its interests, although the contract Concept drafted does not reflect such an interpretation.

Moreover, Concept seeks to have this Court insert a definition for "expansion of the work" **contrary to the change order provision of the contract**.

Pursuant to Florida law, as discussed further below, the actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls. Moreover, courts must take care not to alter or go beyond the express

terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself. Indeed, Concept seems to want this Court to enforce the contract as written while at the same time asking this Court not to do so but to supply terms that simply do not exist and are inconsistent with the contract as written. Contracts will as a general principal of Florida law, be interpreted against the drafter, which was without dispute, Concept. Indeed, the term "allowance," is reasonably interpreted as the amount allowed, as testified to by Spencer Malkin. Any additional amount over and above the allowance would be subject to the change order procedure specified in the contract.

The contract is relatively simple to understand. The 17 "line items," as identified by Concept encompass not only the work offered and accepted, but the cost of that work. Concept claims the plans changes after the contract was signed and therefore the costs increased and that it is entitled to be paid additional management fees due to additional costs.

The Malkins do not dispute they are responsible for "all costs associated with this project." The "Contractor fee" is specified as $77,250, which equates to 25% of the specified "Renovation Quote" "Subtotal" of $309,000. Under the "Payments and Conditions" provisions of the contract, a "25% Contractor Management Fee" may be added under specified terms. "Additional Work Orders" are subject to payment of "costs of the work," and if an Additional Work Order (i.e., a change order) is approved and accepted, and paid for, in such event, an additional "25% Contractor Management Fee" will be owed on "all additional work orders or changes" which are "*signed and agreed upon, and paid in full prior to the order, by the Homeowner prior to the start of such work*." While Concept claimed a scope "expansion," the allowance items specifically reference that at least some of those items would be determined in the future "per plans."

Thus, from Concept's perspective, the dispute centers on the claim for the additional management fee that Concept claims is owed, and, on the other hand, the defects and deficiencies claimed by the Malkins. But this Court will not alter the express agreement by alleged custom or usage where the agreement is clear. Moreover, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself.

The contract states:

> -**ANY ADDITIONAL WORK ORDERS SHALL** BE ADDED TO THE TERMS AND CONDITIONS OF THIS CONTRACT.(**25% CONTRACTOR MANAGEMENT FEE ON ALL ADDITIONAL WORK ORDERS OR CHANGES**) ADDITIONAL WORK ORDERS **SHALL** SIGNED AND AGREED UPON, AND PAID IN FULL **PRIOR** TO ORDER, BY THE HOMEOWNER **PRIOR** TO START OF SIUCH WORK
>
> -ADDITIONAL WORK ORDERS **SHALL** BE SIGNED AND AGREED UPON BY THE CONTRACTOR AND HOMEOWNER **PRIOR** TO STAR OF SUCH WORK

Emphasis added.

Notwithstanding the above condition, appearing twice in the contract, it remains **clear and undisputed that no additional work order or change order occurred**. Rather, Concept claims that an expansion in the work occurred due to an increase in its "scope of work" by Spencer Malkin and his designer.

Concept is asking this Court to accept with no competent substantial evidence that the Malkins had knowledge that that the proposal Concept presented, the proposal that Spencer Malkin executed is a "cost plus" contract for 25% of any cost incurred, including those which the Malkins believed were outside of the contract, such as the generator, audio equipment, and garage; which were never the subject of an "Additional Work Order.".

Specifically, the words "cost plus" only appear in the "Payment and Condition" section as found on page 3 of the contract. The first pages have clear, delineated and specific terms and costs associated with each item. There is a line titled "Contractor Fee" as discussed above, but that too has a specific amount assigned to it, with no indication that it would fluctuate. The only items that fluctuate under the contract, as written, are the responsibility to pay all costs incurred, and an "Additional Management Fee, under a pre-paid written agreement.

Florida law has addressed this issue in predominately two differing contexts. The first, contract construction:

- language is interpreted most strictly **against the party who prepared the writing** and chose its wording. (In this case that is Concept.)
- A clear and unambiguous agreement is not subject to the process of construction, nor is oral testimony properly considered in such an agreement's interpretation.
- The actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls. (This contracted required additional work orders)
- Courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself. (The Court finds the existence of a contract and the sentiments of Concept—while understandable—are insufficient as they seek to modify express terms)
- Implied terms of custom and usage may not be added or used to modify a clear agreement. One cannot seek to modify an express agreement by custom and usage where the agreement is clear.

The second context is that of "extras":

- A contractor on a cost-plus contract has a duty to monitor costs and to notify the owner of any anticipated overruns.
- Though a contract was titled a cost-plus contract, in fact the wording of the contract communicated that it was a unit price contract based on defined units.
- As a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended.
- If extras (things/services/items/work etc. . . .) to the written agreement if required to be in writing, are to be in writing, and as a subset of this, its [partly] for the protection of the Contractor. If these extras are not on writing, the Contractor hasn't looked after its own interests, and they are likely to be disallowed.

Concept was so concerned about certain conditions that they appear in the contract in two places. One of these is the payment schedule Concept set out for Spencer Malkin to follow for the "work" or "services" provided by Concept. This condition provides:

> -10% UPON CONTRACT SIGNING//20% DEPOSIT UPON PERMIT/25% UPON FRAMING/20% UPON ROUGH/15% UPON DRYWALL /%5 UPON COUNTKRTOP/5%UPON COMPLETION . . .

And again,

> Payment schedule
> Contact signing 10%
> Deposit Upon Permit 20%
> Upon Framing 25%
> Upon Rough in 20%
> Upon Drywall 15%
> Upon countertop 5%
> Upon Completion 5%

The evidence is not convincing that Concept complied with the payment schedule or that it made any effort to specify how it was doing so to the Malkins. The Malkins made payments as requested by

Concept. Concept requested payments while at failing follow schedule and failing to providing an accounting of claimed expenses, payments to third parties, and fees. If Concept intended to alter the terms and include additional items in the payment schedule it could have done so through a change order as required by the agreement.

It is clear that Concept never sought to modify the payment schedule through any contract based means. On its face the contract required payments of $386,250 and satisfaction of all vendor costs, and the amounts paid by the Malkins covered these amounts.

The Malkins paid Concept $611,456.37, and satisfied vendor and subcontractors directly in the amount of $277.950.77. According to the numbers alone, Concept had a "Sub Total" for "allowances" of $309,000.00, but billed the Malkin's $557,503.00. But even assuming these were for additional costs, there remained enough in the "client account" to pay the $77,250.00 Contractor Fee, from the unallocated amount remaining.

The Malkins contend the following deviations from the contract allowances:

- Demolition: additional **$32,491.00 over contract**—with no "additional work orders" or changes"
- Framing: additional **$61,8876.00 over contract** - no "additional work orders" or changes"
- Stucco: additional **$19,887.03 over contract** - no "additional work orders" or changes"
- Plumbing: additional **$14,250.00 over contract** - no "additional work orders" or changes"
- Cabinets: additional **$29,210.67** over contract - no "additional work orders" or changes"

Further, in addition to the alleged overages, The Malkins also claim that Concept billed the Malkin's for "extras" not in the contract at all as follows:

- First Priority Audio: **$48,122.33**
- AAA Driveway & Backyard pavers: **$92,500.00**
- Shell work: **$30,249.00**
- Tile work: **$33,651.70**
- Ferguson Fixtures: **$22,668.01**

Based on a reconciliation of the invoices and payments conducted by Fran Malkin, Concept still has $77,973.56 in its "client fund account." This amount exceeds the $77,250.00 "Contractor Fee" under the contract. To this day, the Malkins assert that Concept never provided an objective, quantifiable reconciliation or accounting so that the progress payments could be paid as agreed and they could determine what was actually owed to Concept, if anything.

Concept also adds its management fee to every cost, none are the subject of a change order. Concept subtracts all of the Malkin's payments including for vendors the Malkins contracted and/or paid directly and claims it is owed $202,360.50, as set forth in its November 25, 2019 invoice submitted with its Complaint.

Recognizing all the above, in response to Concept's claim of breach, the Malkins assert Spencer Malkin paid, the contractual amount of $386,250, inclusive of the $77,250.00 Contractor's Fee, when he tendered $611,456.37 to Concept, and also paid $277,950.00 to vendors and subcontractors directly and that no additional amounts are owed to Concept.

The Malkin's counterclaim seeks an award of damages of $414,372.00 for remedial costs. They seek this award both based on a breach, negligent construction and other theories. Both Spencer and Fran Malkin testified to the existence of substantial defects they all live with daily, based on the documentary evidence in the record (inclusive of numerous pictures) and the largely unchallenged testimony of David Riddle P.E., MBA, Esq.— an expert with over twenty years of experience in identifying construction defect causes and labilities. Mr. Riddle testified to substantial defects in an array of areas for which Concept was responsible.

Mr. Riddle testified credibly that the newly erected walls are out of plumb and not square to varying and substantial degrees. Mr. Riddle also testified that the reason put forth by Concept for this, that the substrate is 30 years old and nether plumb nor square itself, could only be applied to the walls in contact with the shell of the existing structure.

The Court notes that this was a complete renovation, in which the majority of the walls were new interior walls, the defective condition of which was substantiated by the expert. Mr. Riddle also testified to the excessive slope of the floors installed by Concept that violate applicable installation standards in the construction industry, as well as the general conditions contained in the architectural plans.

Mr. Riddle also testified to the improper installation of the hurricane proof windows, due to lack of flashing as well as the failure to be installed straight within their frames. Mr. Riddle testified that the windows were not installed correctly, and that no flashing was installed in the windows to prevent water intrusion. This testimony was unrefuted, including from the window installers who were called to testify. The Malkins also assert that Concept is engaged in deceptive and unfair trade practices, which are addressed below. This is supported by the testimony of the Malkins and the Court resolves this construction defect evidence in favor of the Malkins.

Pretrial Stipulation

Concept has made certain assertions concerning stipulations contained in the Joint Pretrial Stipulation are adverse to positions taken by the Malkins at trial. Indeed, Concept has taken this position to seek to counteract a number of contentious issues at trial. Specifically, the Malkins have contested the scope of the stipulation that the contract is on a cost plus 25% basis asserting that the stipulation can be interpreted as the Malkins intended. That is, the Malkins contend the stipulation applies as set forth in the contract and no further stipulation was intended. The Court believes the law to favor the Malkins on this issue.

Ambiguous, vague, or loose statements may not satisfy the clarity test and therefore may not be enforceable as valid stipulations. *Becker v. Becker*, 433 So. 2d 597 (Fla. 4th DCA 1983). When construing a stipulation, a court should attempt to interpret it in line with the apparent intent of the parties. As explained by the court in *Travelers Insurance Co. v. VES Service Co.*, 576 So. 2d 1349, 1350 (Fla. 1st DCA 1991):

> A stipulation. . .must be carefully examined to determine whether the language used actually discloses a clear, positive, and definite stipulated act. The statement should not be vague or ambiguous. Nevertheless, it should receive a construction in harmony with the apparent intention of the parties. It is not to be construed technically, but rather in accordance with its spirit, in furtherance of justice, in the light of the circumstances surrounding the parties, and in view of the result that they were attempting to accomplish.

Confronted with an ambiguous pretrial statement in *Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, LLC*, 196 So. 3d 557 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1747a], the court determined that the trial court should have interpreted it in light of *Travelers*' admonition to examine the language in dispute "in accordance with its spirit, in furtherance of justice, in the light of the circumstances surrounding the parties, and in view of the result that they were attempting to accomplish." *Id.* at 1350. The trial court failed to do so, however, and erred in granting a judgment notwithstanding the verdict.

The Malkins have taken the position that the contract provisions control and that they did not agree to pay for costs that were not

subject to a written agreement and paid in advance.

Indeed, the position taken by Concept seems by design to achieve exactly what the *Traveler's* admonition directed the courts not to do, specifically, to enforce the stipulation in accordance with its spirit, in furtherance of justice, and in light of the circumstances and the result they were seeking to accomplish. The Court finds that the Malkins were seeking in good faith to streamline the issues for trial, not give up a position in this litigation that they have pursued in good faith since early in the litigation.

Indeed, Courts are not required to enforce stipulations regarding substantive law, such as stipulations that purport to frame the applicable questions of law for the court. *Swift & Co. v. Hocking Valley Railway Co.,* 243 U.S. 281, 37 S. Ct. 287, 61 L. Ed. 722 (1917); *Kester v. Tewksbury*, 701 So. 2d 443 (Fla. 4th DCA 1997) [24 Fla. L. Weekly D2175b]; *Massachusetts Bonding & Insurance Co. v. Bryant ex rel. American Oil Co.*, 175 So. 2d 88 (Fla. 1st DCA 1965), *aff'd* 189 So. 2d 614. For example, in *King v. United States*, 641 F.2d 253 (5th Cir. 1981), the parties attempted to stipulate to who bore the burden of proof. In that instance, the court held unequivocally that "[a] court is not bound by the parties' stipulations of law." *Id.* at 258. But see *Dania Beach Boat Club Condominium Association, Inc. v. Forcier*, 290 So. 3d 99 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D346a] (party could not disavow its stipulation that prior version of statute controlled parties' dispute and amendment to Condominium Act did not have retroactive effect).

Here, the Malkins are seeking to have the Court properly determine the application of the law to the contract as written and subject to the determination of what it means and how that applies by this Court.

FINDINGS AND CONCLUSIONS

Twenty-Five Questions Issues of Pretrial Stipulation for Court's Determination

1. **Whether the document attached to Plaintiff's Complaint, Exhibit "B," is a binding and enforceable contract between the parties.**

The court concludes that an enforceable written contract existed between Spencer Malkin and Concept.

The status of the alleged contract with Fran Malkin is addressed below. It is a rudimentary rule of contract formation that the material terms of an offer and acceptance must mirror each other. This is referred to as a "meeting of the minds." *Suggs v. Defranco's, Inc.*, 626 So. 2d 1100, 1101 (Fla. 1st DCA 1993). A disagreement as to an essential or material term will prove fatal for a contract. *See Jacksonville Port Auth. v. W.R. Johnson Enters.*, 624 So. 2d 313, 315 (Fla. 1st DCA 1993) ("While it is not necessary that all details of an agreement be fixed in order to have a binding agreement between the parties, if there has been no agreement as to essential terms, an enforceable contract does not exist"); *see also David v. Richman*, 568 So. 2d 922, 923 (Fla. 1990) ("Mutual assent is an absolute condition precedent to the formation of the contract. Absent mutual assent, neither the contract nor any of its provisions come into existence."). Here, the Court concludes that an enforceable unambiguous contract existed between the signatories, Concept and Spencer Malkin.

While not overtly stated, Concept seeks to have this Court enforce the contract contrary to its specified terms. The Court declines to do so. It is a well-established rule that contracts are construed against the drafter. *Bouden v. Walker*, 266 So. 2d 353, 354 (Fla. 2d DCA 1972). Further, the rule on ambiguities, if there were any, is that is that the more specific item controls the general item. *Raines v. Palm Beach Leisureville Community Ass'n*, 317 So. 2d 814 (Fla. 4th DCA 1975); § 7:11. Scope of work, 8 Fla. Prac., Constr. Law Manual § 7:11 (2022-2023 ed.); *Cypress Gardens Citrus Products, Inc. v. Bowen Bros., Inc.*, 223 So.2d 776 (2d DCA Fla.1969) (In construing a contract in favor of the plaintiffs condominium unit owners, the court applied the rule directing that a specific clause takes precedence over a general clause.); *Aetna Life Ins. Co. v. White*, 242 So.2d 771, 773 (4th DCA Fla.1970)(where there are general and special provisions in a contract relating to the same thing, the special provisions will govern in its construction over matters stated in general terms.

Therefore, for Plaintiffs to claim a specific word meant anything other than its standard definition necessarily means that there was no meeting of the minds between the parties at the time of formation. The Court concludes that there in fact was a meeting of the minds, the terms are clear and unambiguous, and that any additional costs and charges were to be charged, if at all, under the specified terms of the Payment and Conditions terms of the contract. The total sum of the allowances provided for in the Proposal is $309,000.00. The Defendants paid a total of $611,456.37, far exceeding the allowances and the total proposal of $386,250.00 as well as directly paid vendor and subcontractor costs of at least $277,950.22. There is no dispute that additional costs were paid to vendors, or are disputed, and no additional amounts are owed to Concept for additional charges and fees, which the Court declines to award.

The contract indicates that any additional work orders "shall be signed and agreed upon, and paid in full prior to the order, by the homeowner prior to the start of such work". (Pl.'s Compl. Exhibit "B", Pl. Tr. Ex 4.). Concept admits that no additional work orders were signed and agreed upon by the homeowners, which while not a breach, prevents any additional recovery other than for costs incurred, none of which have been shown to be outstanding to Concept.

The Malkins also defend on the basis that Concept failed to comply with the contract's terms by billing in accordance with the specified draw schedule. Since the evidence is essentially undisputed, and Mr. Vuletic admitted that the draw schedule was not complied with, Plaintiff cannot bring a breach of contract claim because the Court finds Concept first breached. *N. Tr. Invs., N.A. v. Domino*, 896 So. 2d 880 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D614a] ("Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability.") (citation omitted).

The Court concludes that the Plaintiffs did not comply with the specific line item budget delineated in the proposal—the "allowances," and they did not comply with the agreed payment dates and draw schedule set forth in the contract. The evidence showed that **Concept took no action to modify the contract or enter into any change order modifying the terms on which Concept would be paid**.

The Malkins did not breach the contract. The Malkins performed under the contract.

As to the claim for breach against Fran Malkin, the Court notes, after further consideration of the evidence, that in any event, Concept could not enforce the contract against her.

The Court declines to enforce the written contract against Fran Malkin for the following reasons. When a party does not sign an agreement and does not act as if the agreement is ratified, the party shall not have the agreement enforced against it. *Etienne Dupuch, Jr., Publications, Ltd. v. Leissering*, 730 So. 2d 348 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D704c]; *Gwen Fearing Real Estate, Inc. v. Wilson*, 430 So.2d 589, 591 (4th DCA Fla.1983) (holding broker not a party to a purchase contract, and therefore not liable for attorney's fees, even though provision providing for payment of the broker's commission was contained in the contract). Likewise, seeking its own affirmative relief in the Complaint does not make it a party to the Contract. "A contract cannot bind one who is not a party thereto," because in order to create an enforceable contract, there must be "reciprocal assent to a certain and definite proposition." *Donner v.*

Anton, 364 So.2d 742, 749 (3d DCA Fla.1978)(*citing Strong & Trowbridge Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92 (Fla.1910)). Further, A contract will be held binding only against those who did sign where signing is understood to be a prerequisite to liability. *Preve v. Albert*, 578 So. 2d 33 (Fla. 4th DCA 1991); *Craig W. Sharp, P.A. v. Adalia Bayfront Condo., Ltd.*, 547 So. 2d 674 (Fla. 2d DCA 1989). Here, Fran Malkin was not a signatory to the contract, did not become liable under a written contract by operation of law or otherwise, and cannot be deemed a contracting party, as a matter of law.

2. **Whether the Malkins breached the document attached to Plaintiff's Complaint, Exhibit "B," by failing to pay Concept pursuant to the terms set forth thereto.**

Breach

Both Malkins testified they complied with the contract by making various payments as requested and then seeking confirmation of Concept's compliance with the payment schedule and of the amounts paid to vendors. Indeed, Fran Malkin presented evidence that more than $77,250 was left "on account" with Concept to satisfy the Contractor's fee of $77,250, under the terms of the contract.

In *Branam v. Aqua-Clear Pools, Inc.*, 672 So.2d 69, 69-70 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D916b], the contractor sued the owner for money claimed due. The owner counterclaimed against the contractor for unworkmanlike performance. The jury found for the contractor. On appeal, the judgment was reversed in favor of the homeowner due to photographs showing that the verdict was against the manifest weight of the evidence. The court stated:

> The record, including photographic evidence, clearly and unequivocally demonstrates flawed workmanship by Aqua-Clear. The interlocking bricks of the patio were installed without the proper foundation, causing gaps; the patio was not pitched, causing drainage problems (the only drainage available being through the gaps in the interlocking bricks); the border of the patio was a non-matching cement finish; the pool pump room was built so as to lean over; the spa was built out of round; etc. . . .
>
> We are unable to reach into the jurors' minds to determine what swayed them in arriving at a verdict in favor of Aqua-Clear. However, the verdict was " 'manifestly against the weight of the evidence [and] contrary to [its] legal effect,' [thus] [i]n conscience we could not allow this result to stand." *See State v. Moses,* ___So.2d ___ [1996 WL 82673], 21 Fla.L.Weekly D525, D526 n. 1 (Fla. 3d DCA February 28, 1996) (*citing Florida Nat'l Bank of Gainesville v. Sherouse*, 80 Fla. 405, 86 So. 279 (1920)), and cases cited therein.

Substantial Completion

"Under Florida law, a contractor will have substantially performed, and not materially breached the contract when the construction is nearly equivalent to what the owner contracted for originally." *In re Sunshine-Jr. Stores, Inc.*, 240 B.R. 788, 794 (Bankr. M.D. Fla. 1999) citing *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971) (citing 3A Corbin on Contracts § 702). However, a failure to remedy the deficiencies constituted a material breach justifying termination of the contract and the award of damages against the contractor. *See City of Miami Beach v. Carner*, 579 So.2d 248, 251 (Fla. 3dDCA 1991)(holding a party to a contract confronted with a material breach by the other party, may treat the contract as totally breached and stop performance). Thus, "[The] doctrine [of substantial performance] is not applicable . . . where a contractor has willfully breached the terms of his contract or has intentionally failed to comply with specifications. In such case, the owner is entitled to be awarded the cost of making the work conform to the contract and specifications") (citing 13 Am.Jur.2d, Building and Construction Contracts § 81 (1964)).

Based on all of the evidence submitted, The Court finds the Malkins did not breach their obligations to Concept.

3. **Whether the Malkins have been unjustly enriched based on retaining the benefit and value of Concept's labor, services, and materials without paying the reasonable value thereof.**

Normally, when an express contract exists, a plaintiff cannot pursue the quasicontract theory of unjust enrichment. *Ocean Communs., Inc. v. Bubeck*, 956 So. 2d 1222 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1344a]. In order to prevail on an action for unjust enrichment a plaintiff must prove that: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff. *Hillman Constr. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. 4th DCA 1994).

Additionally, "Unjust enrichment is equitable in nature and cannot exist where payment has been made for the benefit conferred." *Gene B. Glick Co. v. Sunshine Ready Concrete Co*., 651 So. 2d 190, 190 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D509c]; see also *Am. Safety Ins. Serv., Inc. v. Griggs*, 959 So. 2d 322, 331-32 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1299a] ("When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails.").

Moreover, pursuant to *Bromer v. Florida Power & Light Co.,* 45 So.2d 658, 660 (Fla. 1949), "a greater burden should be placed upon a [P]laintiff who relies on an implied contract then one who uses reasonable care and foresight in protecting himself by means of an express contract. To hold otherwise would be to encourage loose dealings and place a premium upon carelessness."

Here, Malkins paid nearly double of what the original agreement stated (not including direct payments to vendors and subcontractors) Moreover, Plaintiff reduced the agreement to writing and Spencer Malkin, executed the contract. Fran Malkin received no benefit other than those that were contracted for by Spencer Malkin, and therefore could not be unjustly enriched. Concept's claim for unjust enrichment also falls short of the burden outlined in *Bromer v. Florida Power & Light Co.,* 45 So.2d 658, 660 (Fla. 1949).

Also, Concept produced no evidence whatsoever (other than vague references to what Mr. Vuletic claims to have done) from which this Court could conclude that Concept sustained any damages to which an unjust enrichment claim might apply.

Concept maintained no work logs, daily diary, daily work journals, daily work summaries, vendor or subcontractor logs, time sheets, time logs, sign in sheets, or any type of records or reports of the services or other work it allegedly provided, or those provided by vendors or subcontractors with whom Concept claims to have performed services as the general contractor, when they were provided, by whom they were provided, or the actual time spent to provide those services.

Concept has no reliable evidence of the "benefit conferred" from a damages perspective that might support an unjust enrichment theory of recovery. Consequently, Concept is not entitled to relief under the equitable theory of unjust enrichment.

4. **Malkins requested additions and changes to the "scope of work" thereby amending and/or Whether the Malkins requested additions and changes to the scope of the work, thereby amending and/or modifying the document attached to Plaintiff's Complaint, Exhibit "B."**

As has been stated the record evidence does not support that there were any change orders or "Additional Work Orders" for any additional scope of work to trigger any contractual right to additional payments to Concept. There is no record evidence that the contract

was modified, or that any modification was agreed to by the parties. *See Len Hazen Painters, Inc. v. Wood-Hopkins Const. Co.*, 396 So. 2d 1233 (Fla. 1st DCA 1981) (Where one filed a complaint seeking payment for extras which were not in writing, and the contract between the parties required extras to be in writing, the pleading must allege a legal reason to avoid the writing requirement, or the claim will be subject to dismissal). Indeed, a contractor cannot recover for additional expense items where there were no change orders that included the items of expense being claimed. *Indian River Const. Co., Inc. v. City of Jacksonville,* 350 So. 2d 1139 (Fla. 1st DCA 1977). The *Indian River* court reasoned that the contractor should have looked after its own interest and seen that such details were included in the change orders. "Having failed to do so, appellant may not now attempt to rewrite a contract properly executed." *Id. citing Jacksonville and A. R. Co. v. Woodworth*, 26 Fla. 368, 8 So. 177 (1890). This exact reasoning applies here.

Further supporting the Court's reasoning, in *Century Properties, Inc. v. Machtinger*, 448 So. 2d 570 (Fla. 2d DCA 1984), a dispute involving change orders, an owner claimed that he relied on the representation of the contractor that changes would be done for cost. The contract expressly provided that changes could be made, but failed to indicate whether changes were to be in writing. The contract did not state that changes would be at cost but did state that the written agreement was the entire agreement between the parties and that other representations, agreements, or promises were not binding. The court permitted parol testimony to prove the representation about changes for cost on the basis that parol evidence is admissible to prove fraud in the inducement to contract. While the contract is clear here that change orders are required to be in writing and signed and paid in advance, the reasoning of this case is not lost on the Court: where the change order provision is specific, in writing and unambiguous, as this Court has concluded here, it must be enforced pursuant to the written contractual terms.

5. **Whether or not a "change order" pursuant to the agreed terms of the document attached to Plaintiff's Complaint, Exhibit "B", was required to change the scope of the work, thereby amending and/or modifying the document attached to Plaintiff's Complaint, Exhibit "B."**

The court concludes and incorporates by reference its findings above. The Court also supplements this finding based on this discussion about the purpose of change orders in construction contracts. Because nearly every construction project involves some changes, change-orders or change-directive mechanisms are presumably the cause of significant construction claim disputes, particularly when disagreement exists on the material terms of the change, such as effects on time and price. When the owner requires the contractor to perform extra work, the contractor is generally entitled to an increase in the contract price and, if required by the nature of the change, an extension of the construction period. *If the contractor intends to assert a claim for additional compensation for the extra work, it must comply with any procedures or conditions precedent mandated by the contract.*

In general, construction contracts require that the contractor provide written notice before performing any extra work if compensation is expected, except in an emergency endangering life or property. *Charlotte Harbor & N. Ry. Co. v. Burwell*, 56 Fla. 217, 48 So. 213 (1909); *Broderick v. Overhead Door Co. of Fort Lauderdale*, 117 So.2d 240 (Fla. 2d DCA 1959). *See also* General Conditions §§ 10.2.A.1, 15.1.4. If the contractor fails to comply with the notice provision, it generally will not be entitled to additional compensation or time for the extra work performed, unless the notice requirements are waived. *Acquisition Corp. of America v. American Cast Iron Pipe Co.*, 543 So.2d 878 (Fla. 4th DCA 1989); *Tuttle/White Constructors, Inc. v. State, Dept. of General Services*, 371 So.2d 1096 (Fla. 1st DCA 1979). The Court heard no evidence of waiver of the contractual provisions by the Malkins.

In *Shore Drive Apartments, Inc. v. Frank J. Rooney, Inc.*, 253 So. 2d 478, 479 (Fla. 4th DCA 1971) the contract provided that any changes in plans and specifications made by the contractor without the owner's prior written consent would be at the contractor's sole risk, even as to changes required by governmental authority. One such change was made without the owner's prior written consent. In that case, a fact issue existed as to whether there was a waiver of this provision. But if the contract provision was not waived, the language being clear, concise and unambiguous, the court should give effect to it. *Claughton Hotels, Inc. v. City of Miami*, 140 So.2d 608 (Fla. 3d DCA 1962). Thus, a contractor on a cost plus contract has a duty to monitor costs and to notify the owner of any anticipated overruns. *See, e.g., Jones v. J.H. Hiser Const. Co., Inc.*, 60 Md. App. 671, 484 A.2d 302 (1984). And courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself. *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999).

Thus, the specific terms of the contract required change orders in order to entitle Concept to any additional project management fees. There were none.

6. **The total amount of unpaid work for the Project.**

Based on the above, the Malkins fully paid for the work performed under the contract.

7. **The total amount paid by Concept for the Project.**

As discussed above, other than amounts that the Malkins may continue to dispute with third-party vendors, suppliers or subcontractors directly, the total amount paid by Concept to vendors has been reimbursed by the Malkins. There was no direct evidence that any amount remains outstanding to Concept that is due to any third-party.

8. **The total amount due to Concept for its Contractor's Fee.**

Concept has been paid $77,250, and no additional payment is due and owing by the Malkins for Concept's claimed fees. An amount exceeding $77,250 remains on account with Concept.

9. **Damages sustained by Concept, if any.**

None. See above.

10. **Whether Concept breached the document attached to Plaintiff's Complaint, Exhibit "B."**

The evidence supports the conclusion that Concept breached the contract by failing to comply with the line item allowances or obtain change orders to modify them; failing to comply with the payment schedule set forth in the contract and to account to the Malkins under that schedule.

Further, as addressed below, the project was wrought with unremediated and extensive defects and defective conditions that are inconsistent with the industry standards for good workmanship, resulting in damages to the Malkins which substantially exceed the alleged damages incurred by Concept

Nevertheless, this discussion raises the issue of whether Concept substantially performed such that it should nevertheless be allowed to recover in some fashion based on "equitable" principles. But as an initial consideration, Concept failed to present any evidence of any equitable basis for a recovery as discussed above, as there is no basis to determine any damages it may have otherwise suffered (and the Court has not independently determined there were any). Concept presented no evidence of work logs, daily summaries, time sheets, *etc.*, from which any equitable damages could be determined. There

is no evidence of the actual time taken by Concept to perform any of its work.

Substantial performance is essentially a rule of damages based on equitable concepts, intended to prevent unjust enrichment by allowing a contractor who has not complied with the construction contract in every minute detail to recover for acceptable and usable work that provides a benefit to owner. A contractor who has substantially performed is entitled to recover the contract price less the cost to the owner of repairing deficient, defective, or incomplete work, and less other damages sustained by the owner as a result of the contractor's failure to completely perform. *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918); *National Constructors, Inc. v. Ellenberg*, 681 So.2d 791 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2126b]; *Grant; Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd.*, 642 So.2d 766 (Fla. 4th DCA 1994); *Viking Communities Corp. v. Peeler Construction Co.*, 367 So.2d 737 (Fla. 4th DCA 1979); *Oven Development Corp. v. Molisky*, 278 So.2d 299 (Fla. 1st DCA 1973). **The doctrine is not applicable when the contractor has materially or intentionally breached the terms of the contract**. *National Constructors, Inc.; Lockhart; Viking Communities Corp.; Rousselle v. B & H Construction Co.*, 358 So.2d 614 (Fla. 1st DCA 1978); *Lazovitz, Inc. v. Saxon Construction, Inc.*, 911 F.2d 588 (11th Cir. 1990).Here, there is no basis to apply this equitable principle and the Court declines to do so.

11. **Whether there is an Oral Contract.**

The Court concludes the contract was a written contract. Concept claims in the alternative that an oral contract existed with the Malkins. Presumably, this alleged oral contract would support the additional compensation for management fees that Concept seeks. However, an oral contract is subject to the basic requirements of contract law such as offer, acceptance, consideration and sufficient specification of essential terms. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004) [29 Fla. L. Weekly S53a], *relying on W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 302 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D559a]. A party who asserts an oral contract must prove its existence by a preponderance of the evidence. *Id.*, relying on *Batista v. Walter & Bernstein, P.A.*, 378 So. 2d 1321, 1322 (Fla. 3d DCA 1980). Further, there can be no oral contract if essential terms are absent. *Jacksonville Port Authority v. W.R. Johnson Enterprises, Inc.*, 624 So.2d 313 (Fla. 1st DCA 1993), *rev. denied*, 634 So.2d 629 (Fla. 1994). There is no evidence to support a separate and distinct oral contract outside the scope of the written contract between Concept and Spencer Malkin which the Court finds controlling. Here, the parties reduced the agreement to writing and it was executed prior to the commencement of work on the Malkins' property.

12. **Which of the payments by Concept referenced above were for the benefit of the Project.**

With a few minor exceptions, the cost of the project (including the amounts paid by the Malkins directly to vendors), and the amount paid by the Malkins to Concept are not in substantial dispute. The Court does not consider the issue of whether the payments made by Concept were for the benefit of the project to directly be a significant issue in the resolution of this dispute.

13. **Whether Concept supervised Amerigas, Broten Garage Doors Sales, First Priority Audio, Inc., and Electramax during the course of the Project and whether it is entitled to its related Contractor's Fee.**

Concept claimed it supervised these vendors/subcontractors, although the Malkins claim that they contracted directly. This is not determinative of the Court's reasoning. To the extent these contractors are outside of the 17 items specified in the contract, Concept has submitted no change orders under which it would be entitled to compensation for their work and/or materials.

Thus, whether Concept supervised these vendors/subcontractors in some fashion is not the issue before the Court. Whether Concept properly or improperly sought payment of management fees for these vendors is the issue before the Court.

Based on the contractual terms and requirements, the Court concludes that Concept has no contractual basis for seeking payment for these vendors. Had Concept presented any evidence of the actual time providing any meaningful services to the Malkins related to these vendors (and the value thereof) the Court might have considered the issue but will not speculate in the absence of such evidence what might or might not have been considered.

14. **Whether Concept breached the document attached to Plaintiff's Complaint, Exhibit "B", by demanding or accepting payment for work not completed or failed to be completed.**

The Malkins assert this issue is determinative on some issues. The Malkins presented evidence of discrepancies in certain invoicing and payment requests as well as lack of adherence to the payment schedule. But these issues are not required to be determined separately at other issue determination resolve the issues. Based on the other determinations of the Court, these issues are either insignificant or subsumed within the Court's other determinations and not subject to being determined separately. Since the Court determines that the Malkins fulfilled all of their payment obligations under the contract, and that no additional payment will be owed to Concept, in the opinion of the Court the issues raised is rendered moot.

15. **Whether Concept negligently performed the renovations as part of the Project.**

Yes, there is significant evidence of negligent performance by the general contractor causing damages to the Malkins. These damages are supported by the expert testimony of David Riddle, P.E., which the court finds reliable. The court resolves Mr. Riddle's conflicts with the testimony of Plaintiffs' expert in favor of Mr. Riddle.

Mr. Riddle discussed the various damages and deficiencies in the project at length and set forth the cost to remediate in detail, based on the photographic evidence in evidence. DVD4V1/V2 44-301; Makin Tr. Exh. 18. In addition, both Spencer Malkin (D5V1 71:3-16; D5V2 100-126) and Fran Malkin (D6V1 8- 22) identified a host of defects and deficiencies in the renovation project during their testimony. The evidence was essentially unrefuted that the defects and efficiencies occurred while Concept was the general contractor and responsible for the defective work.

16. **Whether Concept has unclean hands or failed to act in good faith or deal fairly.**

The Court awards damages based on breach. Since a breach has been found, the issues of unclean hands and good faith and fair dealing have therefore been rendered moot. The Court has found that the contract was unambiguous and therefore, while a claim for unclean hands or breach of duty of good faith and fair dealing might have been considered had the Court determined there was no otherwise enforceable contract, or that the interpretation of the contract was subject to parol evidence, those findings are not necessary here.

17. **Whether Concept fraudulently induced the Malkins to enter into and/or execute an agreement.**

The Court awards damages based on breach. Since a breach has been found, the issue of fraudulent inducement has been rendered moot. The Court has found that the contract was unambiguous and therefore, while a claim for fraudulent inducement might have been considered had the Court determined there was no enforceable

contract, those findings are not necessary here.

18. **Whether the breaches alleged by the Malkins against Concept excuse the performance of the Malkins.**

Based on the other findings and conclusions of this Court, further findings are not necessary as the Court has determined the contract was breached by Concept and the Malkins have been damaged due to defective construction for which they have paid. However, where a contractor breaches by furnishing nonconforming work, the owner is excused from the contractual duty of payment. *Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc*., 569 So. 2d 845 (Fla. 1st DCA 1990). However,

19. **Whether Concept was unjustly enriched.**

Based on the above analysis, the Court awards damages to Malkins under the contract rendering further discussion of this issue moot. Where a party obtains contract damages, there is no need to award damages for unjust enrichment. *See Miracle Center Development Corp. v. M.A.D. Const., Inc.*, 662 So. 2d 1288 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2243a].

20. **Whether Concept abandoned the Project forfeiting any rights of recovery.**

The testimony demonstrated that the Malkins terminated Concept.

21. **Whether Concept breached its fiduciary duty to the Malkins, in part or whole.**

Since the issues can be determined based on the contractual terms, and based on the analysis of those issues, a separate breach of fiduciary duty analysis is not necessary to the Courts determinations on liability and damages,

22. **Whether there are any breaches of warranty under which the Malkins are entitled to recover or bar Concept's claims, in part or full.**

The Court concludes that the Malkins did not breach the written contract and have also established substantial damages based on defects in the general contractor's work. Therefore, a separate determination of breach of warranty is not necessary to the Court's evaluation. All of the damages are also awardable for the Malkins breach and negligent construction claims. Thus, the Court does not make a separate determination of those defect claims subject to a breach of warranty analysis.

23. **Whether Concept engaged in Deceptive and Unfair Trade Practices under F.S. 501.201 et seq.**

Yes, the Court determines that the manner in which Concept billed the Malkins and failed to adhere to the payment schedule without an appropriate accounting of all expenditures and payments on a reasonable schedule, and on an accurate and updated on a regular schedule without the Malkins demand that such be provided (absent a contractual term specifying the manner in which accountings were to be handled in light of the terms of the payment schedule) constitutes a deceptive and unfair trade practice based on the evidence in this case.

Indeed, Concept's assertions concerning its "allowances" without advising the client specifically how it claimed those allowances were to be handled also constitutes a deceptive and unfair trade practice. Moreover, that practice is belied by the contractual terms which mandated change orders which Concept did not provide but instead claimed that its conduct was justified based on "expansions" in the scope of the project. However, there was no provision identifying an "expansion" in the scope of work as anything other than a change in the scope requiring a change order if Concept was seeking an additional management fee.

Accordingly, the Court finds that Concept's actions under the facts of this case which are not within the specified contractual terms and contrary to the terms of the contract as written by Concept constitute unfair and deceptive practices for which the Malkins are entitled to actual damages sustained.

Since all of their damages relate to the construction project, the court finds a reasonable nexus between the damages sought on the counterclaim and the FDUTA violations to award such damages.

Under the Florida Deceptive and Unfair Trade Practices Act, sections 501.201-501.213, Florida Statutes (2018) (FDUTPA), the Florida Legislature has declared that deceptive or unfair methods of competition and practices in trade and commerce are unlawful. See §§ 501.204, 501.2075, Fla. Stat. (2018). The express legislative purpose of FDUTPA is to protect individual consumers and certain defined business activities from deceptive, unfair, or unconscionable methods of business competition and trade practice. See *id*. § 501.202. The Legislature has specifically articulated that the provisions of FDUTPA are to be construed liberally with this legislative purpose. See *id*. § 501.202.

FDUTPA was enacted to protect the public and businesses from unfair trade practices. § 501.202(2), Fla. Stat. An unfair practice " 'offends established public policy' and . . . is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) [28 Fla. L. Weekly S229a] (*quoting Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D849a]). Section 501.211(1) allows "anyone aggrieved by a violation of" FDUTPA to seek declaratory or injunctive relief, and section 501.211(2) provides that "a person who has suffered a loss as a result of a [FDUTPA] violation . . . may recover actual damages . . . ." *Stewart Ag., Inc. v. Arrigo Enters.*, 266 So. 3d 207 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D633a].

An act or practice is "deceptive" if it is likely to mislead a person or entity, acting reasonably in the circumstances, to the person or entity's detriment. An act or practice is "unfair" if it offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. An "unfair" practice or act must satisfy must produce substantial injury to the claimant); the injury must not be outweighed by a benefit to [consumers] [competition] that the practice produces; and it must be an injury that (claimant) could not have reasonably avoided. Florida SJI Business and Commercial Cases 416.50(a); F.S. 501.203(3), 501.204(1), and 501.211, (*Millennium Comm. & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1691b] (definition of deceptive); *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D849a] (definition of unfair practice); *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1096-97 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1240a] (three-pronged test for unfairness). The Court finds this test has been met by the Malkins here.

24. **Damages sustained by the Malkins, if any.**

A claim for damages must be supported by competent evidence, although uncertainty regarding the amount of damages or difficulty in proving the exact amount will not prevent recovery when it is clear that substantial damages were suffered and there is a reasonable basis in the evidence for the amount awarded. *Centex-Rooney Construction Co. v. Martin County*, 706 So.2d 20 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D94a]; *Servpro Industries, Inc. v. Spohn*, 638 So.2d 1001 (Fla. 4th DCA 1994); *Adams v. Dreyfus Interstate Development Corp.*, 352 So.2d 76 (Fla. 4th DCA 1977). A claim for damages must be supported by competent evidence, although uncertainty regarding the amount of damages or difficulty in proving the exact amount will not prevent recovery when it is clear that substantial damages were suffered and there is a reasonable basis in the evidence for the amount awarded. *Centex-Rooney Construction Co. v. Martin County*, 706

So.2d 20 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D94a]; *Servpro Industries, Inc. v. Spohn*, 638 So.2d 1001 (Fla. 4th DCA 1994); *Adams v. Dreyfus Interstate Development Corp.*, 352 So.2d 76 (Fla. 4th DCA 1977). Here, the Malkins have identified damages based on competent evidence and awards damages to the Malkins based on the defective construction and breach of contract of $414,272.00, and reserves jurisdiction to assess costs and attorney's fees as may be appropriate.

25. **Whether the Malkins are entitled to a setoff.**

Setoff analysis is not necessary as the Malkins prevailed on Concept's claims and on proof of their own damages sustained.

Based on the documentary and testimonial evidence, including that Mr. Riddle, the Malkin's have sustained damages in the amount of $414,372.00, constituting the amount of remedial costs still needing to be expended. Since Concept has demonstrated no unpaid amount still owed to it for which it could recover, there is no set-off.

Submission of Final Judgment

The Malkins are directed to submit a final judgment reserving jurisdiction to address any other pending matters including an award of attorney's fees and costs, within 20 days of the date of this Order.

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[1]The term "allowance" is categorically unambiguous. It is defined by Merriam-Webster as "(a) a sum granted as a reimbursement or bounty or for expenses, (b) a fixed or available amount, (c) a share or portion allotted or granted." *Allowance*, Merriam-Webster (2022). It is defined by Black's Law Dictionary as "A deduction, an average payment, a portion assigned or allowed: the act of allowing." *Allowance*, Black's Law Dictionary (2022). The definition of "allowance" is the same both in common usage and in the construction industry: "An amount established in the contract documents for inclusion in the contract sum to cover the cost of prescribed items not specified in detail, with provision that variations between such amount and the finally determined cost of the prescribed items will be reflected in *change orders* appropriately adjusting the contract sum." *Allowance*. Harris, C. M. (2006). Dictionary of architecture & construction: 2300 illustrations (Fourth). McGraw-Hill. As such, it is unreasonable for Plaintiffs to claim that the term was in any way ambiguous, or fluid, or did not attach to the plain language meaning, in their dealings.

Further, The American Institute of Architects A201-2017 General Conditions document contemplates material allowances as follows:

§ 3.8 ALLOWANCES

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

1. allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

2. Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and

3. whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

Ruff, R. E., & Mraunac, J. M. (2018, April 13). The Use and Misuse of Allowances and Contractor Contingency. Chicago; Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

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Torts—Negligence—Summary judgment is entered in favor of ride-share service

YOANIS FERNANDEZ, Plaintiff, v. JOSE SAVOURY, RASIER-DC, LLC, a Foreign Limited Liability Company and, UBER TECHNOLOGIES, INC., a Foreign For-Profit Corporation, both d/b/a UBER, Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE22001018. January 9, 2024. Fabienne E. Fahnestock, Judge. Counsel: Matthew D. Levy and Mina Grace, Kanner & Pintaluga, P.A., Boca Raton, for Plaintiff. Crystal Valencia and Veresa Jones Adams, Roig Lawyers, Miami, for Defendants Uber Technologies, Inc. and Rasier-DC, LLC. Patrick M. DeLong, Marshall, Dennehey, Warner, Coleman & Goggin, Fort Lauderdale, for Defendant Jose Savory.

ORDER GRANTING DEFENDANTS UBER TECHNOLOGIES, INC. AND RASIER-DC, LLC'S MOTION FOR SUMMARY JUDGMENT AND FINAL JUDGMENT AS TO UBER TECHNOLOGIES, INC. AND RASIER-DC, LLC

THIS CAUSE having come before the Court at a special set hearing on November 28, 2023, upon Defendants, Uber Technologies, Inc. ("Uber") and Rasier-DC LLC's ("Rasier") (collectively "Uber Defendants"), Motion for Final Summary Judgment filed on August 15, 2023, and the Court having considered the motion, after hearing argument of counsel, reviewing the case authorities, and being otherwise fully advised in the premises, it is hereupon:

ORDERED AND ADJUDGED that Defendants Uber and Rasier's Motion for Final Summary Judgment is GRANTED. As there are no genuine disputes of material fact on the remaining claims of Apparent Agency (Counts IV and IX) and Negligence (Counts V and X). Plaintiff failed to produce evidence and/or satisfy the necessary elements of each claim. The Court finds that Defendant Uber did not owe a duty to Plaintiff, as a matter of law, according to the cases cited by Uber in its Motion.

The Court also finds that, as argued by Defendants, co-Defendant JOSE SAVOURY was not an apparent agent of Defendants, UBER and RASIER.

Prior to the hearing on Defendants' Motion for Summary Judgment, Plaintiff conceded that there was no Joint Venture (Counts II and VII); Partnership (Counts III and VIII); and/or Negligent Hiring, Retention, Training and Supervision (Counts VI and XI). Defendants' Motion for Summary Judgment is GRANTED for those counts as well.

Accordingly, for the reasons stated herein and set forth on the record, final summary judgment is entered in favor of Defendants, Uber Technologies, Inc and Rasier-DC, LLC. as to counts II, III, IV, V, VI, VII, VIII, IX, X, and XI of Plaintiff's Complaint. The Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees. Plaintiff, YOANIS FERNANDEZ, takes nothing by this action and Defendants, UBER TECHNOLOGIES, INC. and RASIER-DC, LLC shall go hence without day. The Clerk of Court is hereby directed to close the Action as it pertains to Defendants UBER and RASIER only.

* * *

Mortgages—Foreclosure—Enforcement of loan modification—Statute of frauds—Where trial loan modification correspondence as clarified by recorded phone call constituted offer from lender with method of acceptance to be performance by making three trial payments, and borrowers accepted offer by making three payments, performance by borrowers is sufficient to take oral contract outside of statute of frauds—Moreover, written terms of FAQ section of trial modification offer, correspondence between parties, and proposed permanent loan modification agreement, when aggregated, satisfy statute of frauds or banking statute of frauds—Court uses equitable powers to reform proposed permanent loan modification agreement to reflect parties' agreement to fixed interest rate loan, rather than variable interest rate loan set forth in proposed agreement

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-76, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-76, Plaintiff, v. CALVIN E. AMOS, SHERRY R. AMOS, et al., Defendants. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-CA-011988. October 25, 2023. Scott Blaue, Judge. Counsel: Paul Ettori and Laura Guzman, Amerman, LLP, Orlando, for Plaintiff. Richard Shuster, Shuster, Saben & Estevez, Satellite Beach, for Defendants.

ORDER GRANTING IN PART DEFENDANTS' EMERGENCY MOTION TO ENFORCE LOAN MODIFICATION, FOR INVOLUNTARY DISMISSAL, AND FOR SANCTIONS

THIS CAUSE came to be heard on September 19, 2023 and September 26, 2023 upon the Defendants' Emergency Motion to Enforce Loan Modification, for Involuntary Dismissal and for Sanctions. The Court having reviewed the motion, written opposition to the motion filed by Plaintiff, testimony from Calvin Amos, case law submission of both Plaintiff and Defendant and having conducted extensive oral argument does hereby ORDER as follows:

I. FACTUAL FINDINGS

1. By letter dated November 8, 2022, Shellpoint Mortgage Servicing ("Shellpoint") advised defendants Calvin and Sherry Amos that they had been approved for a Trial Loan modification ("Trial Modification Offer").

2. The Trial Modification Offer required the Amoses to make trial payments as follows:

> **To successfully complete the trial period, you must make the trial period payments below.**
> **• First payment: $5,532.32 by 12/01/2022**
> **• Second payment: $5,532.32 by 01/01/2023**
> **• Third payment: $5,532.32 by 02/01/2023**

3. The Trial Modification Offer set forth that if the trial modification payments were made, the Amoses would receive a loan modification with a fixed interest rate and fixed principal and interest payment for the life of the mortgage. This language was found in the FAQ section of the offer which provided as follows:

> **Q. Will my interest rate and principal and interest payment be fixed after my loan is permanently modified?**
> Once your loan is modified, your interest rate and monthly principal and interest payment will be fixed for the life of your mortgage. Your new monthly payment will include an escrow for property taxes, hazard insurance and other escrowed expenses. If the cost of your homeowners insurance, property tax assessment or other escrowed expenses increases, your monthly payment will increase as well.

4. The FAQ also set forth that the purpose of the trial period plan was to give borrowers time to make sure they could manage the adjusted lower payment. The FAQ set forth:

> **Q. Why is there a trial period?**
> The trial period offers you immediate payment relief and gives you time to make sure you can manage the lower monthly mortgage payment. The trial period is temporary, and your existing loan and loan requirements remain in effect and unchanged during the trial period.

5. On or about November 17, 2022, the Amoses' attorney, Richard Shuster, called Shellpoint and spoke to Barbara Lewis, the designated contact person for the loan, on a recorded line. The Plaintiff produced a digital recording of the phone call from Mr. Shuster and the call, by stipulation, was provided to the Court as a .wav file and played by the Court at the start of the hearing. By agreement of counsel, the call has not been placed on any publicly accessible part of the court file to protect the parties' privacy, but such call will be part of the record should an appeal from this order be taken. Mr. Shuster called Shellpoint to find out what permanent loan modification terms the borrowers would receive if the borrowers made the three trial payments of $5,532.32. Shellpoint confirmed the terms of the modified loan would be as follows:

Old Unpaid Principal Balance:	$482,000
New Unpaid Principal Balance:	$892,477
New Interest rate:	4.125%
Loan Amortized Over	480 Months
New P&I payment:	$3,799.69

6. Following the telephone conversation with Shellpoint, Mr. Shuster sent the borrowers an e-mail outlining the terms provided by Shellpoint and Mr. Amos testified that he relied upon those terms in deciding the make the trial payments.

7. The Amoses made all three trial payments on a timely basis, and Shellpoint accepted all of the trial payments.

8. Following the Amoses' full compliance with the trial modification, Shellpoint sent a (proposed) permanent loan modification agreement to the Amoses for execution. The proposed permanent modification had the agreed 4.125% interest rate that Shellpoint promised, but it only allowed this rate for 36 months. Thereafter, the rate would increase from 4.125% to 5.125%. Then, 12 months later, the rate would increase from 5.125% to 6.125%. Then, after 12 additional monthly payments, the rate would increase from 6.125% to 7.125%, and then increase to 7.5% for the final 202 payments.

9. On March 6, 2023, Mr. Shuster e-mailed Shellpoint representative Barbara Lewis and copied Plaintiff's co-counsel at DeLuca Law Group and requested that the Amoses be provided with a permanent loan modification with a 4.125% interest rate for the life of the loan consistent with the November 17, 2022 recorded call.

10. The Amoses, as an act of good faith, attempted to make an additional payment of $5,532.32 (the trial modification amount) at the beginning of March of 2023, while the discrepancy between what Shellpoint agreed to, i.e. a 4.125% loan mod rate and the proposed permanent modification agreement (a variable rate starting at 4.125% and escalating to 7.5%), was worked out. In June of 2023 Shellpoint stopped accepting Amoses' payments.

II. ISSUES PRESENTED.

11. The Amoses contend the Trial Modification Offer was clarified the phone call of November 17, 2022, was accepted by performance (making the trial payments) thereby creating a contract. In the alternative they argue that between FAQ section that promised a fixed interest rate and fixed principal and interest payment and the November 17, 2022 phone call, the Plaintiff is equitably estopped from having a loan modification that does not have the same constant rate for the life of the loan. The Plaintiff contends that the Statute of Frauds and Florida's Banking Statute of Frauds, § 687.0304(2), Fla. Stat. (2021), require an agreement signed by both lender and borrower for a permanent loan modification to occur. The Plaintiff further contends that the phrase "your interest rate and monthly payment principal and interest payment will be fixed for the life of your mortgage" could mean an interest rate that is affixed to a pre-determined schedule rather than an adjustable rate that varies based on an underlying index.

III. ANALYSIS OF FACT AND LAW

12. The November 8, 2022 correspondence (the trial modification offer), as clarified by the November 17, 2022 recorded phone call constituted an offer. The offer was specific as to the terms, i.e. there was specificity as to the unpaid principal balance, the monthly principal and interest payment, the starting escrow payment, the term of the loan, and the interest rate. The method for acceptance of the offer was by performance. The performance required was to make three timely trial payments. It is not disputed that the Amoses made three timely trial payments, resulting in acceptance of the offer.

13. The doctrines of part and full performance take an oral contract outside of the scope of the statute of frauds. *See Demps v. Hogan* 57 Fla. 60, (Fla. 1909) enforcing oral contract for sale of real property, notwithstanding statue of frauds where purchaser performed. *See also 101 Monument Road v. Delta Property*, 993 So.2d 181, (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2592c] (full performance by one party to a contract works to remove an oral agreement from the purview of the Statute of Frauds.)

14. In *The Cape, LLC v. Och-Ziff,* Citation Pending, 5D22-1296, (Non-Final Order of September 15, 2023) [48 Fla. L. Weekly

D1852a], the Court, citing *J Square Enters. v. Regner*, 734 So.2d 565, 566 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D1334b] noted "[t]here is no logical reason. . .why the full performance doctrine should not also apply to the Bank Statute of Frauds. Moreover, [f]or purposes of the statute of frauds, several writings . . . may be aggregated to satisfy the statute."

15. Here, performance by the Amoses with Plaintiff's acceptance of, and subsequent failure to return, the trial payments is sufficient to take this matter out of the Statute of Frauds or Banking Statute of Frauds. Further, when the written terms of the FAQ of the trial modification offer, the correspondence between the parties, and the proposed permanent modification are aggregated, these writings satisfy the Statute of Frauds or Banking Statute of Frauds.

16. This is a foreclosure action, which is an action in equity. The Court has equitable powers to reform the proposed permanent modification to match the offer made by the Plaintiff and accepted by the Amoses' performance.

17. The Court finds the Plaintiff's interpretation of "fixed interest rate" as used in the FAQ of the trial modification offer is strained. It is generally accepted that fixed-rate financing means the interest rate on your loan does not change over the life of your loan.

18. The Court further notes that the trial modification offer states "It is important that you thoroughly review the Frequently Asked Questions . . .information attached." The FAQ provides that the purpose of the trial plan is to make sure a borrower can manage the new lower modified payment. Here, the trial payment of $5,532.32 would give the Amoses an appropriate experience to manage a permanent payment of $5,435.35 (representing $3,736.39 P&I at 4.125% interest plus $1,717.16 estimated escrow payment) but if the interest rate increased to 7.5% the payment would go up by $1,894.04, an increase of over 50%. The trial payment that is similar in amount to a permanent payment based on 4.125% interest does not allow the borrower to see if they can manage a payment at 7.5%, or nearly $1,900 higher.

IV. RULING.

21. The Court shall use its equitable powers to reform the proposed permanent loan modification to reflect the parties 'agreement. Plaintiff shall be equitably estopped from charging an interest rate greater than 4.125% under the terms of the modification. Paragraph C of the permanent modification shall reflect that for the duration of the modification the rate will be 4.125% and the P&I payment will be $3,736.39. The Balloon Modification agreement will likewise reflect that the rate of interest for the duration of the modification will be 4.125% and the sum due at maturity shall be recalculated to reflect the 4.125% rate per this order. Plaintiff shall provide two copies of the permanent loan modification incorporating these changes to the Amoses no later than thirty (30) days following entry of this order. The Amoses shall execute, notarize and return to the Plaintiff two copies of the permanent modification no later than (10) days following receipt of the permanent modification.

22. The permanent modification contemplated that February of 2023 would be the last trial payment and starting March of 2023 new payments of $5,453.55 shall commence. The Amoses' payments of $5,532.32 made in March, April, and May will remain credited to their account, and they will pay $5,453.55 for each of the months of June, July, August, September and October (less the difference from March-May of $236.31), a total of $27,031.44, to bring the modification current. This payment shall be due thirty days from the later of (a) the date of this order and (b) the date the Plaintiff furnishes the revised permanent modification agreement in paragraph 21.

23. The Court will reserve jurisdiction to determine if the Amoses are entitled to recover attorney's fees for the time expended by their counsel to enforce the settlement. [Editor's note: Order on Attorney Fees at 32 Fla. Law Weekly Supp. 183a].

24. The Court will reserve jurisdiction over Mr. Shuster's *ore tenus* request that Plaintiff be prohibited from assessing attorney's fees incurred subsequent to the February 27, 2023 proposed permanent modification (which included $12,039.50 for Plaintiff's legal expenses).

It is further ADJUDGED that within five days from the date of eservice of this Order/Judgment, the Petitioner shall:

1. Furnish a copy of this Order/Judgment to each self-represented party by U.S. Mail, first class, postage paid; and

2. File a certificate signed by Petitioner's counsel that delivery of this Order/Judgment has been made as set forth herein.

* * *

Mortgages—Enforcement of loan modification—Attorney's fees—Mutuality or reciprocity of obligation—Where mortgage provides that lender is entitled to attorney's fees when it takes action to enforce any covenant or agreement, borrowers are likewise entitled to fees for taking action to enforce loan modification

THE BANK OF NEW YORK MELLON, f/k/a THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-76, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-76, Plaintiff, v. CALVIN E. AMOS, SHERRY R. AMOS; UNKNOWN SPOUSE OF CALVIN E. AMOSL UNKNOWN SPOUSE OF SHERRY R. AMOS; TUCKAWAY LAKES HOMEOWNERS ASSOCIATION, INC.; SUNTRUST BANK; TOTAL HOME PROPERTIES, INC., d/b/a TOTAL HOME ROOFING; UNKNOWN TENANT #1 AND UNKNOWN TENANT #2, Defendants. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-CA-011988. June 12, 2024. Scott Blaue, Judge. Counsel: Paul Ettori and Laura Guzman, Amerman LLP, Orlando, for Plaintiff. Richard Shuster, Shuster, Saben & Estevez, Satellite Beach, for Calvin E. Amos and Sherry R. Amos, Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES FOR ENFORCEMENT OF LOAN MODIFICATION
(Modified by Court)

THIS CAUSE came to be heard on February 8, 2024, upon Defendants, Calvin and Sherry Amos' Motion for Attorney's Fees for Enforcement of Loan Modification. The Court havng reviewed the motion, the Plaintiff's written opposition to the motion, the Defendant's reply to the Plaintiff's response, case law cited by counsel, and heard argument of counsel, does hereby Order and Adjudge as follows:

PROCEDURAL HISTORY

In November of 2022, Plaintiff, through their agent, the loan servicer Shellpoint, sent a trial modification offer that promised the Defendants a fixed rate of interest if the Defendants signed the trial modification form and made three timely trial payments. On November 17, 2022, Shellpoint, on a recorded call admitted into evidence, confirmed that if the borrowers made the three trial payments, the borrowers would receive a 4.125% interest rate fixed through the date of maturity. Thereafter Plaintiff, through its agent, sent Defendants a proposed permanent loan modification that started a 4.125% interest but that over time would increase to over 7%. The Defendants filed a motion to enforce the loan modification that was vigorously opposed by the Plaintiff. The court after conducting hearings on three separate dates, including an evidentiary hearing ultimately granted the Defendant's Motion to Enforce Loan Modification and reserved ruling on attorney fee entitlement. After the Court granted the motion to enforce loan modification, the Defendant made the modified payments required by the Order and the Plaintiff thereafter dismissed the subject action.

APPLICABLE MORTGAGE PROVISION AND STATUTE

Paragraph 22 of the mortgage provides as follows:

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this

Paragraph 22 provides that the lender may accelerate the loan and bring a foreclosure action if the borrowers "breach of any covenant or agreement in this security instrument," and that in such action the lender "shall be entitled to collect all expenses incurred. . . . Including but not limited to attorney's fees and costs of title evidence." Florida Statute 57.105(7) makes any one-way contractual attorney fee provision into a two-way prevailing party fee provision.

Florida Statute 57.105(7) provides:

> 7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Since the lender is entitled to attorney's fees when it takes any action to enforce "any covenant or agreement," by virtue of 57.105(7), the borrower is likewise entitled to fees if the borrower takes "any action" to enforce "any covenant or agreement." The borrower acted to enforce the loan modification by filing a Motion to Enforce the Loan Modification.

RULING

1. The Court is not awarding attorney's fees pursuant to Florida Rule of Civil Procedure, Rule 1.420, Dismissal of Actions, because the case was not adjudicated on the merits when it was voluntarily dismissed.

2. The Court does grant entitlement to an award of attorney's fees pursuant to Paragraph 22 of the Mortgage, and F.S. 57.l05(7). The Frequently Asked Questions (FAQ) section of the initial loan modification offer set forth that the original provisions of the mortgage would carry forward into the modified mortgage. While the modification changed the applicable interest rate and unpaid principal balance, it did not change the rights and responsibilities of the parties, including those set forth in Paragraph 22 of the Mortgage. The Defendants did take "any action" to enforce the breach (by Plaintiff Bank of NY Mellon) of a covenant or agreement in the mortgage as modified by the loan modification agreement. As such, with respect the litigation from February of 2023 through the date of the hearing (held February 8, 2024), the Defendants have prevailed on their motion to enforce the loan modification and are entitled to their reasonable attorney's fees and costs, and the Plaintiff was the non-prevailing party on the motion to enforce and is not entitled to attorney's fees for the time spent opposing the motion to enforce.

3. The Court will separately issue its Fee Hearing Procedures and Management Order that the litigants are directed to comply with before setting a hearing to determine the amount of fees and costs to be awarded.

* * *

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COUNTY COURTS

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Evidence—Examination under oath transcript cannot be used by insurer in support of material misrepresentation defense at summary judgment or trial—Transcript which was created in claims process is inherently untrustworthy, is double hearsay and not subject to any exception to hearsay rule, is not a deposition or affidavit, was not given during judicial proceeding, and was not taken while there was opportunity for cross-examination or objection—Further, transcript was not provided to declarant at time of EUO as required by section 92.33, which prohibits use of EUO transcript for any purpose in any civil action when copy was not provided to declarant

MANUEL V. FEIJOO, M.D., et al., a/a/o Martha Valverde, Plaintiff, v. ASCENDANT COMMERCIAL INSURANCE, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-008382-SP-26. Section SD04. June 12, 2024. Lawrence D. King, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Susan Steakley, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE EUO TRANSCRIPT AS SUMMARY JUDGMENT EVIDENCE

This matter having come before the court on June 10, 2024, on Plaintiff's Motion to Strike the EUO Transcript as Summary Judgment Evidence, and the Court being otherwise fully advised in the premises, hereby finds and orders as follows:

BACKGROUND & PROCEDURAL HISTORY

On June 2, 2016, Martha Valverde was injured in an automobile accident and incurred medical expenses for her accident-related injuries. Thereafter, Plaintiff submitted its medical bills to Defendant for payment. When Defendant refused to remit payment, Plaintiff, as the assignee of Valverde, filed this action. In its answer and affirmative defenses, Defendant asserted that the policy issued to the named insured, Jose Maradiaga, was rescinded and voided due to an alleged material misrepresentation made by the insured at the time of the policy inception. Apparently, Defendant's 'material misrepresentation defense' was based on the transcript of an examination under oath (EUO) taken of the insured, Madriaga. On February 14, 2023, Defendant filed its motion for summary judgment seeking to establish its defense. In support of its motion for summary judgment, Defendant filed a copy of the EUO Transcript. Plaintiff contends that the EUO transcript cannot be used to support Defendant's motion for summary judgment because it is an untrustworthy hearsay document which does not fall within one of the hearsay exceptions; that it is not a deposition; that it was not taken in the course of a judicial proceeding; that there was no opportunity for cross examination nor objection; that it is not the statement of a party opponent; and that it was never provided to the declarant in violation of F.S. 92.33. Accordingly, Plaintiff seeks an order striking the EUO as summary judgment evidence.

To the contrary, Defendant contends that the EUO transcript is trustworthy and admissible as an exception to the hearsay rule under 803(18).

ANALYSIS & ADMISSIBILITY OF THE EUO

Documents created for purposes of litigation are inherently untrustworthy and therefore inadmissible. *McElroy v. Perry*, 753 So. 2d 121 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D111a] (IME report prepared for the purpose of litigation lacks the trustworthiness that business records are presumed to have, and therefore, is not admissible). Plaintiff contends—and the court agrees—that an EUO transcript, which was created by the Defendant in the claim process, is inherently untrustworthy and therefore inadmissible as summary judgment evidence because it is a document that was created by the Defendant to support its denial of the subject claim.

Plaintiff also argues, and the Court agrees, that the EUO transcript is not admissible under Fla. Stat. §90.802 because it is not a deposition; there was no opportunity for anyone to cross-examine the witness; there is no opportunity for anyone to assert any objections; it was not obtained in the course of a judicial proceeding; the EUO was never signed nor even acknowledged by the declarant; and, an EUO is a pre-suit investigatory tool obtained by the Defendant pursuant to the terms of an insurance policy.

The EUO transcript also does not fall under the 90.803(18)(a-d) hearsay exceptions because the declarant is not a party, and the statement was not made in a representative capacity for a party.

In addition, Florida Statute §90.804(2) reads:

> Hearsay Exceptions—The following are not excluded under section 90.802, provided that the declarant is unavailable as a witness:
>
> a. *Former testimony* - Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The "former testimony" rule found in section 90.804(2)(a) is the counterpart of Federal Rule of Evidence 804(b)(1) and it basically codifies the common law rule of evidence previously recognized. Florida has long permitted the use of former testimony. *Putnal v. State*, 47 So. 864 (Fla.1908); *Habig v. Bastian*, 158 So. 508 (Fla. 1935). However, the rule only applies if the following requirements are met: (a) the former testimony was taken in the course of a judicial proceeding in a competent tribunal; (b) the party against whom the evidence is offered, or his privy, was a party to the former trial; (c) the issues are substantially the same in both cases; (d) a substantial reason is shown why the original witness is not available; (e) the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness. See, *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984). In the instant case, none of these exceptions apply.

"The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath *in a judicial proceeding*, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great weight and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness, in any subsequent suit between the same parties." *Putnal,* supra.

Unlike a sworn affidavit, the EUO transcript in the instant case was neither seen nor signed by the declarant. In contrast, a witness in a deposition taken pursuant to the civil procedural rules in a judicial proceeding is always given an opportunity to read his or her testimony to confirm the accuracy of the transcribed testimony (and can submit an errata sheet to correct any errors in the transcript). See, Rule 1.310(e) ('**Witness Review'). The** safeguards found in Rule 1.310(e) are not available in a pre-suit EUO. In fact, depositions (and affidavits) are specifically authorized as summary judgment evidence. EUO's are not. See, *Goldman v. State Farm*, 660 So. 2d 300 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and Depositions are not the same and they serve vastly different purposes).

Additionally, Florida Statute §92.33 also prohibits the use of an EUO transcript as summary judgment evidence under the facts of this case. F.S. §92.33 provides that "*Every person who shall take a written statement by any injured person with respect to any accident or with respect to any injury to person or property shall, at the time of taking such statement, furnish to the person making such statement a true and complete copy thereof.*" F.S. §92.33 goes on to state that "No written statement by an injured person shall be admissible in evidence or otherwise used in any manner in any civil action relating to the subject matter thereof unless it shall be made to appear that a true and complete copy thereof was furnished to the person making such statement at the time of the making thereof. . . ."

This statutory provision was discussed in *Fendrick v. Faeges* 117 So. 2d 858 (Fla. 3rd DCA 1960), where the court held that the statement made by the declarant prior to suit was properly excluded from evidence where it was not shown that the statement had been provided to the declarant as required by F.S. § 92.33. "Clearly, this statute makes inadmissible any statement by an injured person . . . until it is shown that a copy of the statement made was furnished to the person making the same. The *Fendrick* court went on to say that ". . .the trial judge was eminently correct in excluding it from evidence." *Fendrick*, supra.

Pursuant to F.S. §92.33, Defendant was required to provide the declarant with a copy of the EUO transcript after the declarant submitted to the EUO, but Defendant undisputedly failed to do so. As a result, Defendant is precluded from using the EUO for any purpose in any civil action.

Defendant argues that the EUO is admissible as summary judgment evidence and relies on *Star Casualty v. Garrido,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct., Oct. 3, 2017), where the Miami-Dade Circuit Court, Appellate Division, found that while an EUO is not an affidavit nor a deposition, it falls under "other materials as would be admissible in evidence" pursuant to Rule 1.510. However, Defendant has not proffered any facts indicating whether the declarant signed, acknowledged or even saw the EUO transcript in the Garrido / Garay case, or if the EUO was even provided to the declarant at the time of the EUO. The *Garrido / Garay* decision does not discuss or even mention the effect of F.S. 92.33 on the admissibility of the EUO. In the instant case, it is undisputed that the EUO transcript was neither seen nor signed by the claimant.

In reaching its conclusion, the *Garrido / Garay* court, relied on *Smith v. Fortune Ins. Co.*, 404 So. 2d 821 (Fla. 1st DCA 1981), which found that "[A]lthough the EUO transcript is hearsay, it was admissible in that case under the party admission hearsay exception found in Fla. Stat. §90.803(18) because unlike the instant case, the declarant in the *Smith* case was aligned with the plaintiff in *Smith* because the plaintiff was the owner of the burned mobile home and the declarant was a member of the insured household and their interests were aligned.

In the instant case, the declarant, Martinez, and the Plaintiff medical provider, are not the same; they are not aligned, and they have very different and adverse interests in this action because a patient like Martinez is primarily responsible for the cost of his or her medical care, irrespective of the availability of insurance to cover that expense. Defendant's reliance on *Smith* and the cases citing to *Smith,* is misguided because the claimant in the instant case cannot be a party to this action as a matter of law since she assigned her rights to the Plaintiff and under Florida law only the provider or the patient can have standing to bring a PIP case, not both. See, *Progressive Exp. Ins. Co. v. McGrath Chiropractic*, 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. And because the patient is responsible to the Plaintiff medical provider, their interests are not aligned.

The *Garrido / Garay* case also relies on two county court orders, *Millennium Diagnostic v. Allstate,* 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. Oct. 12, 2006), and *Garrido v. Star Casualty,* 23 Fla. L. Weekly Supp. 557c (Fla. Miami-Dade Cty. Ct. Jan. 14, 2015), neither of which contain any legal analysis as to how the court concluded that a hearsay EUO transcript was somehow rendered admissible in light of F.S. 90.802, F.S. 90.804, and F.S. 92.33. There is also no indication regarding whether or not the EUO transcripts in those cases were signed or even acknowledged by the witnesses, nor if the EUO transcripts were ever provided to the witnesses at the time of the EUO, as required by F. S. §92.33. But we do know that the EUO was not provided to the declarant in the instant case.

Similarly, the court in *Hollywood Pain v. United Auto,* 13 Fla. L. Weekly Supp. 162c (Fla. Broward Cty. Ct. June 5, 2002), found that the EUO of the insured / patient was not given under oath at a trial, hearing, or other legal proceeding; it was not subject to cross examination, and it was therefore deemed inadmissible hearsay evidence under the Florida Evidence Code. See, also *Damadian MRI v. United Auto,* 14 Fla. L. Weekly Supp. 498b (Fla. Broward Cty. Ct. Mar. 13, 2007) (EUO was not given under oath at a trial or legal proceeding and not subject to cross examination and therefore inadmissible). The vast majority of case law on the admissibility of EUO's suggests that EUO's do not qualify as summary judgment evidence.

Defendant claims that EUO's are substantially similar to affidavits and in support of that position, it relies on *Stinnett v. Longi, Inc.*, 460 So. 2d 528 (Fla. 2d DCA 1984) and *Avampato v. Markus*, 245 So. 2d 676 (Fla. 4th DCA 1971) for the proposition that a sworn statement is admissible summary judgment evidence. However, *Stinnett* and *Avampato* did not involve the use of affidavits or sworn statements at a summary judgment. Instead, a careful reading of those cases reveals that those cases involve the use of a duly noticed deposition taken in connection with a judicial proceeding in which the opposing party chose not to attend. And, depositions are expressly authorized by Rule 1.510. EUOs are not depositions or affidavits.

Judge Dimitris' Order in *Coral Gables Family Chiro. v. Star Casualty Ins. Co*., 24 Fla. L. Weekly Supp. 222a (Fla. Miami-Dade Cty. Ct. July 8, 2016) contains a well-reasoned analysis finding that the EUO of the insured patient is inadmissible summary judgment evidence because "[T]he EUO was not given under oath at trial, hearing or other legal proceeding and was not subject to cross examination." Judge Dimitris also noted that the declarant in his case, just like the declarant in the instant case, was not a party to the action; was simply a lay witness; and had assigned the PIP benefits to the medical provider. "Accordingly, any exceptions to the hearsay rules of evidence that would apply to a party pursuant to the Florida Evidence Code do not apply to the EUO of Pena." *Id*.

This court is aware that Judge Dimitris issued another order in *Dade Injury Rehab. a/a/o G. Green v. Equity Ins. Co*., 24 Fla. L. Weekly Supp. 637a (Miami-Dade Cty. Oct. 18, 2016). In that case, Judge Dimitris found that an EUO was admissible summary judgment evidence by relying on *Avampato,* supra"because the court in *Avampato* allowed the use of a sworn statement." But as indicated above, *Avampato* involved a deposition during litigation where the opposing party failed to attend. *Avampato* did not involve an EUO or a sworn statement.

Finally, the EUO proffered by the defense is inadmissible hearsay because it is an out of court statement allegedly made by the insured and then offered by Defendant to prove the truth of the matter asserted. But once it is transcribed, then it becomes hearsay within hearsay because EUO transcripts are not statements of the insured but rather statements of a stenographer purporting to memorialize what the insured allegedly said. "An oral statement transcribed by a third party which is not read to or adopted by the Defendant is inadmissible in evidence." See, *Williams v. State,* 185 So. 2d 718 (Fla. 3d DCA

1966) citing to *Jenkins v. State*, 35 Fla. 737, 18 So. 182 ("The transcribed record was not a statement of the appellant and consequently, was not admissible in evidence as such."). An EUO which involves the use of an interpreter is even more attenuated. The fact that *Williams* was a criminal case is of no consequence because there is one set of evidence rules which apply to civil and criminal cases alike.

Accordingly, the EUO transcript submitted by Defendant is inadmissible as substantive evidence at summary judgment and cannot be used by the Defendant to support its Motion for Summary Judgment.

CONCLUSION

The EUO transcript at issue in this case is inadmissible summary judgment evidence because it is untrustworthy; not subject to any exception to the hearsay rule; it is not a deposition nor an affidavit; it was never signed nor acknowledged by the declarant in any way; it was not given during a trial or other legal proceeding; there was no opportunity for cross-examination or objection; and, it was never provided to the declarant at the time of the EUO, (nor at any time thereafter) in violation of F.S. 92.33, which prohibits Defendant from using the EUO for any purpose in any civil action. For the foregoing reasons, this Court finds that the EUO transcript is inadmissible hearsay evidence and cannot be used by the Defendant at summary judgment or trial. Plaintiff's Motion to Strike the EUO as Summary Judgment Evidence, is Granted.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to compel appraisal is denied where windshield repair shop has properly pled declaratory counts that challenge appraisal provision—Motion must also be denied because appraisal process that requires parties to petition court to select third appraiser in event that their selected appraisers cannot agree on third appraiser is legally deficient since no Florida court has jurisdiction over petition to select appraiser and policy cannot confer that jurisdiction—Further, appraisal process is complete where shop participated in appraisal process by sending email naming its chosen appraiser, giving that appraiser's opinion of prevailing competitive price, and naming third appraiser, but insurer chose to completely ignore appraisal process

DR. CAR GLASS, LLC, a/a/o Bruce Edwards, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-023516-SP-26. Section SD04. May 29, 2024. Lawrence D. King, Judge. Counsel: Martin I. Berger, Berger|Hicks, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND COMPEL APPRAISAL

This matter, having come on to be heard on the 28th day of March 2024, on Defendant's Motion to Dismiss Plaintiff's Complaint and to Compel Appraisal, and the Court, having heard argument on same, and being otherwise fully advised on the premises, it is:

CONSIDERED, ORDERED and ADJUDGED:

Defendant's Motion to Dismiss Plaintiff's Complaint and Compel Appraisal is **DENIED,** as set forth below.

First and foremost, the Florida Third District Court of Appeal has held that when a party properly pleads declaratory counts that go to the very essence of the appraisal process, it is not proper to compel appraisal without first adjudicating those declaratory counts. In *Progressive American Ins. Co. v. Dr Car Glass*, 327 So. 2d 447 (Fla. 3d DCA, 2021) [46 Fla. L. Weekly D2030c], the Third District ruled that when there are challenges to the very appraisal provision that Defendant is seeking to enforce, it is proper to litigate those matters prior to making the parties engage in the very process that is called into question by the properly pleaded declaratory counts. "Because these are challenges targeting the enforceability of the appraisal and other policy provisions themselves, the trial court could not have granted the motion to compel appraisal as to the breach of contract claim without improperly and prematurely adjudicating these issues with regard to the declaratory judgment claims.

People's Tr. Ins. Co. v. Marzouka, 320 So.3d 945, 948 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a]" *Dr Car Glass*, at 447.

The same holds true in the case at bar. Plaintiff has properly pleaded declaratory counts that go to the heart of the appraisal provision. As these counts are pleaded properly, they must be handled before the appraisal process can begin. *See, Dr Car Glass v. State Farm Mutual Automobile Ins. Co.*, Case No. 2021-25870 SP-26, J. Lawrence D. King, Order On *Defendant's Motion to Dismiss or in the Alternative Motion to Stay and Compel Appraisal*, October 19, 2022; See also; *See, Dr Car Glass v. Star Casualty Ins. Co.*, Case No. 2022-3163 SP-26, J. Lawrence D. King, Order On *Defendant's Motion to Dismiss or Alternatively Motion to Stay and Compel Appraisal*, October 12, 2022.

The second critical reason why Defendant's Motion must be denied is that the appraisal process as written cannot be completed. More specifically, the appraisal clause states as follows:

> **If there is disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal will be used as the first step toward resolution. Appraisal will follow the rules and procedures as listed below:**
>
> a. **The owner and we will each select a competent appraiser.**
>
> b. **The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or we may petition a court that has jurisdiction to select the third appraiser.**

The reason this process cannot be completed before suit is filed is that no court in Florida has jurisdiction over a petition to select a third appraiser and no insurance policy can confer that jurisdiction on this Court. *State Farm Florida Ins. Co. v. Roof Pros Storm Division, Inc.*, 346 So. 3d 163 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1426a]. In *Roof Pros*, State Farm filed, in four separate original actions, petitions for Courts to appoint appraisers. The Court, in finding that there is no such thing in Florida as invoking a trial court's jurisdiction for the purpose of appointing third appraisers, ruled, "Contrary to the initial position taken by State Farm in this appeal, subject-matter jurisdiction cannot be conferred by agreement of the parties, and we find State Farm's argument that the language of the policy gave the court the necessary jurisdiction to appoint an umpire wholly unpersuasive." The Court further states: "State Farm opted to file a non-existent cause of action to simply appoint an umpire." Finally, in further dismissing State Farm's claims, the Court states: "Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim." *Roof Pros*, at 164, 165.

In *State Farm Florida Ins. Co. v. Parrish*, 312 So. 3d 145 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D85a], approved by *Parrish v. State Farm Florida Ins. Co.*, 356 So. 3d 771 (Fla. 2023) [48 Fla. L. Weekly S27a], the Court again struck down State Farm's desire to use the Court as its tool, holding: "To the contrary, State Farm's filing was styled, framed, and constructed, from beginning to end, as if there were a legally recognized, standalone cause of action to have a disinterested appraiser appointed in an insurance coverage dispute. But there isn't." *Parrish*, at 148.

In accordance with the two above cases, there cannot be a condition precedent in an insurance policy that cannot be legally completed. The Third District also holds that a party cannot create causes of

action that are not set forth in the Florida Rules of Court. *State Farm Florida Ins. Co. v. Gonzalez*, 76 So. 3d 34 (Fla. 3rd DCA 2011) [36 Fla. L. Weekly D2692a]. As such, Defendant's Motion is denied.

Defendant's Motion is also denied because despite the appraisal process being legally deficient, Plaintiff participated in the process and Defendant chose to completely ignore the process, thus rendering the process complete. As seen at the hearing. Plaintiff began the appraisal process by sending an email to defense counsel on September 19, 2024. In the email, Plaintiff delineated the name of the owner's chosen appraiser, the claim number, the appraiser's opinion on prevailing competitive price, and among other things Plaintiff's chosen third appraiser. Since receiving the email, some six months prior to the hearing, Defendant chose to do nothing. When a party chooses to ignore the appraisal process, the process is complete, just as this Court has ruled in prior similar cases. *Dr Car Glass v. State Farm Mutual Automobile Ins. Co.*, Case No. 2022-31739 SP-26, J. Lawrence D. King, Order Denying Motion to Dismiss or Alternatively Motion to Stay and Compel Appraisal, January 31, 2024. See also, *See, ADAS Windshield Calibrations v. Progressive Select Ins. Co.*, Case No. 2022-25700 SP-26, J. Lissette De La Rosa, *Order Denying Motion to Dismiss or Alternatively Motion to Abate or Stay and Compel Appraisal*, October 26, 2023.

Defendant's Motion is hereby **DENIED**. Defendant shall file an answer to Plaintiff's Complaint within **fifteen (15) days** of this Order and shall file responses to all outstanding discovery within **twenty (20) days** of this Order.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Declaratory action—Complaint seeking declaration that application of Budget Neutrality Adjustment is incompatible with No-Fault Law states valid cause of action

MIAMI OPEN MRI, LLC., a/a/o Julio Iturri, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-007294-SP-21. Section HI01. June 6, 2024. Milena Abreu, Judge.

ORDER DENYING MOTION TO DISMISS (DOCKET #12)

THIS CAUSE having come before the court on April 19, 2024 on Defendant's Motion to Dismiss Plaintiff's Petition for Declaratory Judgment. After having reviewed the file, considered the motion, heard oral arguments presented by counsel, analyzed the applicable statutory and case law, and being otherwise fully advised, this Court finds,

1. The complaint alleges, Defendant insured the patient, Julio Iturri for Florida No-fault benefits on September 18, 2022, the date of the crash. Plaintiff provided MRI (magnetic resonance imaging) services to Defendant's insured related to a motor vehicle crash on September 18, 2022. Plaintiff contends Defendant issued payment at less than the full amount.

2. Plaintiff filed this Declaratory petition on May 25, 2023 seeking this Court's declaration on the question whether the calculation for the full reimbursement for Plaintiff's MRI service is correct at either 200% of the allowable amount under the applicable 2007 fee schedule at 200% of the Medicare Limiting Charge fee schedule or whether the calculation for the full reimbursement for Plaintiff's service is correct at 200% of the allowable amount under the applicable 2007 fee schedule at 200% of the Medicare Limiting Charge fee schedule without the Budget Neutrality Adjustment.

3. Plaintiff avers, "Respondent has taken the position that it elected the statutory fee schedule reimbursement methodology of Fla. Stat. §627.736(5)(a)1, et seq." Plaintiff does *not* dispute that the policy language for this matter allows Defendant to issue payment pursuant to the Sec. 627.736(5), Fla. Stat., payment limitation. Petitioner further alleges that Respondent issued payment at the 2007 Medicare Limiting Charge rate as upheld in *Priority Medical Centers, LLC v. Allstate Insurance Company*, 319 So.3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], which remains binding law in Miami-Dade County.

4. However, Petitioner alleges that Defendant's payment included a reduction including applying the Budget Neutralization Adjustment, which allegedly provides a lower rate of reimbursement than the amount Plaintiff contends is proper without the Budget Neutralization Adjustment, and that the reimbursement including the Budget Neutralization Adjustment is incompatible with the Florida Motor Vehicle No-fault law. This issue was not addressed in *Priority Medical, Supra*. The divergent positions of the parties interpretation of what is the full reimbursement has placed Plaintiff in doubt of his rights.

5. Defendant's Motion to Dismiss alleges that Plaintiff has failed to state a cause of action for which relief may be granted because Plaintiff cannot show that there is a bona fide, actual, and present need for the declaration, or that the Plaintiff is unsure of some power, immunity, or privilege. Defendant's Motion also alleges that Plaintiff's Petition is essentially a cloaked breach of contract action.

6. In the matter of *Bristol West Ins. Co. v. MD Readers, Inc.*, 52 So.3d 48 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2832a] the provider sought a judicial declaration to determine the proper calculation for reimbursement of MRI services under personal injury protection coverage. Thus, the filing of a declaration of rights action to determine the proper calculation for reimbursement of services under personal injury protection coverage is a valid cause of action under Florida Law.

7. Moreover, "The mere existence of another remedy at law does not preclude a judgment for declaratory relief." Section 86.11, Fla. Stat. *See also Michael A. Marks, P.A., v. GEICO General Ins. Co.*, 332 So.3d 11 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D186a], *Cintron v. Edison Ins. Co.*, 339 So.3d 459 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1079a].

8. As this Court has previously opined: *At this early juncture of the case, it could be that the Defendant hasn't made any additional payments and maybe the Plaintiff could be owed more money, or none at all. However, the question is whether the Plaintiff is entitled to a declaration of rights, not whether the Plaintiff will prevail in obtaining the decree. Unlimited Diagnostic Center, Inc., v. Metropolitan Casualty Insurance Company*, 2021-004179-SP-21 (Cty. Ct. 11th Jud. Cir. Miami-Dade Cty, Jud. Milena Abreu March 22, 2023) *citing Bell v. Associated Independents, Inc*., 143 So.2d 904 (Fla. 2d DCA 1962). This Court affirm its prior ruling and has not been provided with legal authority to justify reversing its prior ruling on this legal issue.

9. Furthermore, in making this determination, the trial court must draw all reasonable inferences in favor of the pleader, and accept as true and accurate all well pleaded allegations. *Northwest Center for Integrative Medicine & Rehabilitation v. State Farm Mut. Auto. Ins. Co.*, 214 So.3d 679 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D446b]. In addition, this Court must confine its review to the four corners of the complaint. *Unlimited Diagnostic Center*, *Supra*.

10. Applying the law to the allegations, Florida Statutes provides, "The existence of another adequate remedy does not preclude a judgment for declaratory relief." Sec. 86.111, Fla. Stat. Given that this Court must limit its review to the four corners of Plaintiff's complaint and must draw all reasonable inferences in favor of the pleader, and accept as true and accurate all well pleaded allegations, this Court finds Plaintiff has met the minimum requirements in his allegations under Chapter 86, Fla. Stat., under the Declaratory Judgments statute.

The remaining allegations contained within Defendant's Motion may not be considered in a Motion to Dismiss; however, they may be pled as affirmative defenses.

In conclusion, Defendant's Motion to Dismiss Plaintiff's Petition for Declaratory Judgment is HEREBY DENIED. This Court's ruling is not on the merits of Plaintiff's case, only that the action for declaratory relief is properly pleaded. Defendant has 30 days to file an answer to said Petition, and Plaintiff thereafter has 20 days to file its Reply if necessary.

* * *

Insurance—Personal injury protection—Coverage—Evidence—Hearsay—Business records exception—Affidavit of insurer's corporate representative satisfies requirements for admission of attached documents under business records exception to hearsay rule—Although representative did not actually prepare documents, representative had knowledge of how records were made

AJ THERAPY CENTER, INC., a/a/o Elsa Marina Maldonado, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 23-CC-095224. May 23, 2024. Frances M. Perrone, Judge. Counsel: Timothy Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Cameron Frye, DSK Law, Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES AND MOTION TO STRIKE NOTICE OF FILING DECLARATION AND CERTIFICATION OF BUSINESS RECORDS

THIS MATTER came before the Court at 1:30 p.m. on May 9, 2024, on Plaintiff, AJ THERAPY CENTER, INC.'s ("Plaintiff") Motion to Strike Defendant's Affirmative Defenses and Motion to Strike Notice of Filing Declaration and Certification of Business Records (the "Motion"), and the Court having reviewed the motion and court file, having heard the argument of counsel, and being otherwise being fully advised in the premises, and being otherwise fully advised in the premises, it is hereupon:

ORDERED and **ADJUDGED** as follows:

1. Plaintiff's Motion to Strike Defendant's Affirmative Defenses and Motion to Strike Notice of Filing Declaration and Certification of Business Records is **DENIED**.

2. The Plaintiff filed this action as assignee of Elsa Maldonado (hereinafter "Maldonado") seeking a declaratory judgment that Defendant, PROGRESSIVE SELECT INSURANCE COMPANY ("Progressive"), improperly denied personal injury protection ("PIP") benefits to the Plaintiff based on Maldonado's failure to appear for an examination under oath ("EUO").

3. Progressive subsequently filed a Motion for Final Summary Judgment (the "Motion for Summary Judgment"). In support of its Motion for Summary Judgment, Progressive also filed the affidavit of Jennifer Jones ("Ms. Jones"), Progressive's Senior PIP Litigation Representative.

4. On February 14, 2024, Plaintiff conducted the deposition of Ms. Jones, who appeared as Progressive's Corporate Representative pursuant to Rule 1.310(b)(6), *Florida Rules of Civil Procedure*. Following the deposition, Plaintiff filed this Motion asking this Court to strike the affidavit of Ms. Jones. In support of its Motion, Plaintiff argues that the affidavit contains inadmissible hearsay and that Ms. Jones she lacked the requisite personal knowledge in order testify as a records custodian.

5. Plaintiff further argued that Progressive's affirmative defenses should be stricken because Progressive's counsel asserted a work-product privilege objection and instructed the witness not to answer questions regarding what computer systems Progressive uses to maintain its claim file documents.

6. After reviewing the Affidavit of Ms. Jones, as well as the transcript of the deposition, the Court finds Plaintiff's arguments unpersuasive.

7. Section 90.803(6), *Florida Statutes*, lays out the foundations requirements for admission of documents under the business records exception to the hearsay rule, which are: (1) that the record was made at or near the time of the event; (2) that it was made by or from information transmitted by a person with knowledge; (3) that it was kept in the ordinary course of a regularly conducted business activity, and (4) that it was a regular practice of that business to make such a record. *See* Sect. 90.803(6), Fla. Stat. (2024).

8. The Court is persuaded by the recent opinion issued by the Third District Court of Appeals which reversed the trial court's exclusion of an insurer's affidavit and denial of summary judgment in a PIP case. In *United Auto. Ins. Co. v. Chiropractic Clinics of South Florida*, the trial court excluded the affidavit of the insurer's litigation adjuster because the records he relied upon were created prior to his involvement in the case and because he did not have knowledge of the record keeping system prior to his involvement in the lawsuit. *United Auto. Ins. Co. v. Chiropractic Clinics of South Florida*, 345 So 3d. 952, 954 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1730a] On appeal, the Third District reversed, confirming that courts have consistently held that "it is not necessary to call the person who actually prepared the document' in order to lay the foundation for the business records exception to the hearsay rule." *Id.* at 955. The Third District further explained that a records custodian or "any person who has the requisite knowledge to testify as to how the record was made" can lay the foundational requirements under section 90.803(6). *Id.* Importantly, once a qualified witness meets the foundational requirements, no additional foundation is required and the witness **does not need to detail the basis for their familiarity with relevant business practices** in order to lay the proper foundation. *Id.*; *See also Jackson v. Household Finance Corporation III*, 298 So.3d 531, 536 (Fla. 2020) [45 Fla. L. Weekly S205a].

9. Based on the authority outlined by the Third District in *United Auto. Ins. Co. v. Chiropractic Clinics of South Florida*, the Court finds Ms. Jones' affidavit to be sufficient and the documents attached to her affidavit admissible under the business records exception to the hearsay rule. *See* Sect. 90.803(6), Fla. Stat. (2024)

10. At the hearing, the Plaintiff cited other opinions from Florida District Courts, as well as other county court orders, including orders from Hillsborough County judges, in support of its argument that the affidavit contains inadmissible hearsay and should be stricken. The Court finds these opinions to be inapplicable, as the cases cited by the Plaintiff both in its motion and at the hearing either involved different factual scenarios (and different affidavits) or did not involve the admission of documents under section 90.803(6).

11. In this case, the affidavit of Ms. Jones satisfies the requirements for admissibility under section 90.803(6). Further, the Court does not find that Progressive has "shielded" itself from discovery by asserting a work product objection in response to deposition questions aimed at its business practices and procedures.

12. For the foregoing reasons, Plaintiff's Motion to Strike Defendant's Affirmative Defenses and Motion to Strike Notice of Filing Declaration and Certification of Business Records is denied.

* * *

Traffic infractions—Citations—Failure to include defendant's signature—Dismissal

STATE OF FLORIDA, v. KENNY EMMANUEL RIVERA VALENTIN, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2024 TR 010569. June 17, 2024. Juna M. Pulayya, Judge. Counsel: Ira D. Karmelin, The Ticket Clinic, Kissimmee, for Defendant.

ORDER DISMISSING THE INSTANT CAUSE WITHOUT PREJUDICE

THIS CAUSE was before the Court upon Defendant's Motion to Dismiss filed with the Court on June 15, 2024. The Court having reviewed the motion; court file; and, being otherwise duly advised in the premises, IT IS

ORDERED AND ADJUDGED that the Instant Cause is HEREBY DISMISSED WITHOUT PREJUDICE. Defendant was served with a uniform traffic citation that does not comport with the requirements of section 318.14(2), Florida Statutes; specifically, it fails to contain the Defendant's signature. *State v. Soto,* 32 Fla. L. Weekly Supp. 43b (Fla. Osceola Cty. Ct. 2024). Law enforcement may serve Defendant with another uniform traffic citation that comports with all requirements of the law within applicable time periods.

* * *

Traffic infractions—Citations—Failure to include applicable civil penalty—Dismissal

STATE OF FLORIDA, v. EDUY JOSE QUEVEDO-MUNOZ, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2024 TR 003500. June 17, 2024. Juna M. Pulayya, Judge. Counsel: Ira D. Karmelin, The Ticket Clinic, Kissimmee, for Defendant.

ORDER DISMISSING THE INSTANT CAUSE WITHOUT PREJUDICE

THIS CAUSE was before the Court upon Defendant's Motion to Dismiss filed with the Court on June 15, 2024. The Court having reviewed the motion; court file; and, being otherwise duly advised in the premises, IT IS

ORDERED AND ADJUDGED that the Instant Cause is HEREBY DISMISSED WITHOUT PREJUDICE. Defendant was served with a uniform traffic citation that does not comport with the requirements of section 318.14(2), Florida Statutes; specifically, it fails to contain the applicable civil penalty. *State v. Soto,* 32 Fla. L. Weekly Supp. 43b (Fla. Osceola Cty. Ct. 2024). Law enforcement may serve Defendant with another uniform traffic citation that comports with all requirements of the law within applicable time periods.

* * *

Attorney's fees—Discovery—Fee discovery filed in violation of order staying post-judgment discovery is stricken

QUICK MOLD LABS, INC., Plaintiff, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21065729. Division 53. May 28, 2024. Robert W. Lee, Judge.

ORDER STRIKING POST-JUDGMENT DISCOVERY ON FEES AND COSTS

This cause came before the Court for consideration of the Defendant's Motion for Relief from Technical Admissions, and the Court's having reviewed the entire Court file and having been sufficiently advised in the premises, finds as follows:

On January 26, 2023, the Court entered its Order on fees, ***staying*** post-judgment discovery in this case pending the parties' compliance with fee disclosure requirements.

The docket reflects that both parties have violated the Court's Order by filing unauthorized fee discovery. As a result, the Court sua sponte STRIKES all post-judgment fee discovery in this case. Accordingly, the Defendant's Motion for Relief from Technical Admissions is moot.

The parties are STRONGLY ADVISED to comply FULLY with the Court's Order on fees, failing which sanctions shall be imposed.

* * *

Arbitration—Arbitrator—Where parties failed to select arbitrator by court-ordered deadline, they must use court-appointed arbitrator

LUIS JOEL VIGO, Plaintiff, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23047310. Division 53. May 29, 2024. Robert W. Lee, Judge.

ORDER STRIKING NOTICE OF SCHEDULING NONBINDING ARBITRATION

This cause came before the Court on review of the Notice of Scheduling Nonbinding Arbitration filed by the Plaintiff's counsel Robyn E. Lustgarten, and the Court's having reviewed the Notice and other matters of record, rules as follows:

The Notice of Scheduling Nonbinding Arbitration is hereby STRICKEN as unauthorized.

On April 19, 2024, this Court entered its Order Referring Civil Case to Arbitration and directing the parties to designate their arbitrator within 15 days, failing which the parties are required to use the Court-appointed arbitrator Jessica Roberts, Esq. The Order further required that the "parties must file the original joint notice of the name, address, and telephone number of the selected arbitrator with the Court Mediation and Arbitration Program." The parties failed to comply with both these portions of the Court's Order.

Notwithstanding that the parties failed to comply with the Court's Order, the Plaintiff unilaterally filed the referenced Notice of Nonbinding Arbitration on May 9, 2024, beyond the deadline for designating an alternate arbitrator even if such Notice were deemed to be compliant with the Court's Order (which it is not).

The parties having failed to comply with the Court's Order, the parties must use the Court-appointed arbitrator Jessica Roberts, Esq.

* * *

Consumer law—Florida Consumer Collection Practices Act—Discovery—Objections to request to produce defendant's policies, procedures, and training materials and to interrogatories regarding those items are overruled—Information sought is relevant and reasonably calculated to lead to discovery of documents or information that may be admissible at trial, and defendant placed materials at issue by raising bona fide error defense

BRADLEY REANO, Plaintiff, v. SPECIALIZED LOAN SERVICING, LLC, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2023-CC-2556. May 31, 2024. Wayne Culver, Judge. Counsel: Bryan A. Dangler and Shawn Wayne, The Power Law Firm, for Plaintiff. McGlinchey Stafford, PLLC, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO OVERRULE DEFENDANT'S OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION, COMPELLING RESPONSIVE DOCUMENTS, OVERRULING OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND COMPELLING BETTER RESPONSES

THIS CAUSE came before the court during a special set hearing on May 22, 2024, to hear Plaintiff's Motion to Overrule Objections to Plaintiff's First Request for Production, to Compel Responsive Documents, and to Overrule Objection to Interrogatories and Provide Better Responses, and the Court having reviewed the motion(s) together with Defendant's objections, having heard argument from all counsel, reviewing the case law presented and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion to Overrule the Defendant's objections to its First Request for Production and requesting that Defendant provide responsive documents is hereby **GRANTED.**

2. The Court reviewed each production request furnished by the Plaintiff and finds that every request is both relevant to this FCCPA action and reasonably calculated to discovery of admissible evidence. The Court therefore **OVERRULES** the Defendant's objections and finds that the information sought by the Plaintiff is not vague or ambiguous or overly broad and is in fact relevant, straight-forward and reasonably calculated to lead to the discovery of documents and information that may be admissible at trial.

3. With respect to the policies and procedures to be produced by the Defendant,[1] by raising the bona-fide error as one of its affirmative defenses to this action, the Defendant voluntarily placed its policies, procedures and training materials for employees "at issue", thereby waiving any right to insist that the documents are protected by privilege or confidentiality. However, neither the Plaintiff nor its counsel shall disseminate, publish, or otherwise broadcast the contents of said policies and procedures for any purpose outside of the scope of Plaintiff's representation in this action. The failure of the Plaintiff or its counsel to abide by this directive may be grounds for sanctions.

4. With respect to Plaintiff's interrogatories, the Court has reviewed each interrogatory and **OVERRULES** Defendant's objections. The interrogatories are not vague or ambiguous or overly broad. In fact, the interrogatories are both relevant to this FCCPA action and reasonably calculated to discovery of admissible evidence. The interrogatories concerning Defendant's policies, procedures and training materials for its employees are relevant to the instant action and have been placed "at issue" due to Defendant raising the bona fide error defense.

5. Defendant shall furnish responses and responsive documents to Plaintiff's first production requests, together with complete and better responses to Plaintiff's first interrogatories, within 30 days from the date of this Order.

[1]Recognizing that because the *bona fide error* defense requires a fact-intensive inquiry, the proof of which requires the policies and procedures to be offered into evidence, their production during discovery is required.

* * *

Consumer law—Florida Consumer Collection Practices Act—Discovery—Admissions—Motion to overrule denial of request for admission that mortgage debt was consumer debt as defined in FCCPA is granted

BRADLEY REANO, Plaintiff, v. SPECIALIZED LOAN SERVICING, LLC, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2023-CC-2556. May 31, 2024. Wayne Culver, Judge. Counsel: Bryan A. Dangler and Shawn Wayne, The Power Law Firm, for Plaintiff. McGlinchey Stafford, PLLC, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO OVERRULE IMPROPER DENIAL TO ADMISSION REQUEST AND AWARDING ATTORNEY FEES

THIS CAUSE came before the court during a special set hearing on May 22, 2024, to hear Plaintiff's Motion to Overrule Improper Denial to Admission Request ("Motion to Overrule"), and the Court having reviewed the motion, having heard argument from all counsel, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion to Overrule is hereby **GRANTED.** Both the Defendant's objection and response[1] to Request for Admission No. 4[2] is **OVERRULED** and its prior admission to the request stands.

2. Plaintiff shall recover all its expenses, including attorney fees, incurred through its efforts to obtain this order in an amount to be determined at a future evidentiary hearing.[3]

[1]"SLS objects to this Request as "mortgage debt" is not a defined term and therefore it is ambiguous what the Request is referencing. To the extent the subject of the Request is the mortgage loan referenced in Paragraph 10 of the Complaint and SLS is required to provide a response, denied."

[2]"Admit or deny that the mortgage debt which is subject to the above styled action, was at all material times a "consumer debt" as defined by Florida Statute Chapter 559, Part VI."

[3]Fla. R. Civ. P. 1.380(c) ("If a party fails to admit the . . . truth of any matter as requested under rule 1.370 and if the party requesting the admissions thereafter proves the . . . truth of the matter, the requesting party may file a motion for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, which may include attorneys' fees.)

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Practice of law—Matters prior to becoming judge—A general magistrate may collect attorney's fees owed for work done before taking bench so long as such collections comply with Canon 5(D)(1)(a) and (b)

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-08. Date of Issue: June 19, 2024.

ISSUES

May a magistrate's former firm enter into formal agreements to memorialize terms of repayment between the magistrate's former firm and parties that owe the magistrate attorney's fees earned before being appointed?

ANSWER: Yes.

May the magistrate's former firm enforce those agreements after the magistrate was appointed?

ANSWER: Yes.

May the magistrate's former firm pursue the enforcement of court orders which address the payment of attorney's fees earned by the magistrate's firm prior to appointment?

ANSWER: Yes.

Would the pursuit of such fees be improper if filed in the courts in the county where the magistrate sits?

ANSWER: No.

FACTS

The inquiring magistrate has been hired as a general magistrate in a particular county in Florida. The magistrate's firm was awarded attorney's fees for work the magistrate performed as a guardian ad litem in a number of family law cases. In those cases, an order has been entered designating the magistrate as guardian ad litem and determining the hourly rate for the magistrate's fees as well as the percentage of those fees to be paid by each of the parties. Most of the cases are now closed, although some are still open. In the closed cases, the inquiring magistrate has been accepting monthly payments from the parties toward the balances owed. There are no formal agreements between the magistrate's firm and the parties. The magistrate understands that he/she is allowed to receive the fees after the magistrate was appointed; however, the magistrate inquires as to whether active collection efforts can be taken to collect those fees once the magistrate takes office.

DISCUSSION

It is well settled that a judge/magistrate may receive payment for legal work performed prior to taking office. Florida Bar Rule 4-1.5(F)(G). *See also* Fla. JEAC Ops. 94-07 [2 Fla. L. Weekly Supp. 274a], 95-11 [3 Fla. L. Weekly Supp. 298c], 97-09, and 06-01 [13 Fla. L. Weekly Supp. 407a]. Although the Committee has formally addressed this issue, the matter of the collection of such fees has not been addressed.

There is no specific provision in the Florida Code of Judicial Conduct preventing a judge/magistrate from collecting debts owed for work performed prior to appointment. Based on the facts of this inquiry, the magistrate has not incurred these fees in his/her individual capacity, but in his/her capacity as a member of a firm. Therefore, the fees are owed to the magistrate's firm and not the magistrate individually. As the fees are paid, the firm takes a portion of those fees as overhead and costs and then the remainder of those fees are ultimately distributed to the magistrate for the work performed.

Any collection efforts on each of those cases would be made by the successor firm and not the new magistrate individually. If an issue arises between the magistrate and his/her former firm, the Committee does not see a problem with resolving such issue in the courts.

The magistrate should be aware of Canon 5(D)(1)(a) and (b) which provides:

> A judge shall not engage in financial and business dealings that (a) may reasonably be perceived to exploit the judge's judicial position, or (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

The comments to Canon 5(D)(1) provide further that a judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or *before other judges on the judge's court*. (Emphasis added.) This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. *See* Comments to Canon 5(D)(1).

REFERENCES

Fla. Code Jud. Conduct, Cannon 5(D)(1)(a) and (b); Commentary to 5(D)(1)(a) and (b)

Fla. JEAC Ops. 1994-07, 1995-11, 1997-09, and 2006-01.

* * *