IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

CASE NO.: 3D2023-1521

STAR LAKES ASSOCIATION, INC.

Appellant,

v.

SOUTHERN COATINGS, INC.,

Appellee.

On Appeal from an Order of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida

L.T. Case No.: 18-10783

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Appellant Star Lakes Association, Inc. appeals from a Final Judgment of Lien Foreclosure and Damages entered by the trial court in favor of Appellee Southern Coatings, Inc., a Roofing Contractor. The trial court ordered the foreclosure of a lien imposed for payment of charges that the Roofing Contractor purported to impose unilaterally and retroactively through "Change Orders" to which the Association did not agree, in violation of the contract between the parties, which set a fixed price that could only be modified in writing. As further explained below, this Court should reverse.

II. Course of Proceedings

The Pleadings

On April 4, 2018, Southern Coatings filed a Verified Complaint against the Association. R.18-24 (with Exhibits, R.19-53). The Roofing Contractor alleged that the Association had "entered into a contract with [Southern Coatings] for certain roofing services and materials for one of its buildings." R.18.

According to the Roofing Contractor, the "work had a total value of $183,783.23, of which there remain[ed] an unpaid balance of

$50,471.20." R.19. In Count I, the Roofing Contractor sought foreclosure of a construction lien on the units of the members of the Association. R.19-21.

In Count II, the Roofing Contractor asserted a purported cause of action for Breach of Contract. R.21-22. And in Count III, the Roofing Contractor asserted a purported cause of action for Account Stated. R.22-23.

The Association filed an Answer and Affirmative Defenses. R.59-62. It denied the bulk of the allegations and denied that the Roofing Contractor was entitled to relief. R.59-61.

And the Association asserted seven affirmative defenses. R.61-62. Those defenses included that the Roofing Contractor was seeking payment of unauthorized change orders and unauthorized work, that the lien recorded by the Roofing Contractor was for an overstated and/or fraudulent amount, that the Roofing Contractor had failed to comply with required procedures for the timing of recording and the provision of notice to the Association, that the Roofing Contractor had breached the contract between the parties, and that the Roofing Contractor had been paid all amounts owed to it. *Id.*

After new counsel appeared on its behalf, the Association filed a motion for leave to amend its answer and affirmative defenses and an amended answer and affirmative defenses. R.119-126. The trial court granted leave to amend. R.134-135.

In Defendant's Amended Answer and Affirmative Defenses to Plaintiff's Complaint, the Association continued to deny the bulk of the allegations and the Roofing Contractor's right to relief. R.122-123. It admitted "that the sum of $14,636.20 for retainage is due as offered by Defendant to Plaintiff prior to the filing of this action" but denied that any additional amount was owed. *Id.*

The Association specifically alleged that the contract contained an integration clause and that the Roofing Contractor was seeking payment for change orders that were not approved by the Association and such charges were inconsistent with the terms of the contract. R.122-123. It asserted that the Roofing Contractor's claims were barred by the contract, that the Roofing Contractor's lien was defective and/or fraudulent, that the Roofing Contractor failed to comply with a condition precedent regarding provision of notice, and that the Roofing Contractor failed to timely record its lien. R.123-125.

The Trial

The trial court held a non-jury trial commencing December 12, 2022, and continuing on March 27, 2023. R.223. Eleven (11) exhibits were introduced into evidence, as was the transcript of the deposition of Rocio Alonso, a former vice president of the Association. R.430.

Exhibit 1 is titled Proposal. R.431. It says "Southern Coatings, Inc. proposes to complete Roof System in accordance with engineer's specification and local building codes. Removing all work related debris and leave property in broom clean manner." *Id.* And it says "For Unit pricing" to "see attached pricing sheet," "Exhibit PM3."

The reverse side (reflected on the following page) specifies "Terms" and "Conditions." R.432. It contains an integration clause disclaiming oral promises and requiring alterations to be in writing and signed by all parties:

> All terms and conditions must appear in writing on contract (sic). There are no promises, representations or understandings outside of this instrument, and except as herein otherwise expressly provided. This instrument shall not be altered or modified except by an agreement in writing signed by the parties hereto . . .

Id.

The following page is a "Bid Sheet." R.433. It contains pricing and makes clear that the bid price must be all-inclusive:

> The bidder understands and agrees that the total amount of Bid is **inclusive of all work** necessary to complete the job as described in the drawings and specifications. The price of each bid item shall include the cost of labor, material, equipment, licenses, insurance, permits and bonds, overhead and profit, **shoring and bracing existing structure** and General conditions and all items/conditions noted into his project manual and contract drawings and **all incidental costs**, expressed or implied, required for the performance of the work in accordance with the Contract Specifications.
>
> The bidder understands and agrees that the Total amount of Bid is **inclusive of all work and incidentals** necessary to complete the job as described in the Contract Plans and Specifications. The Association reserves the right to reduce or increase the scope of work.

Id. (emphasis added).

At the bottom of this document, it contains an entry to state the "GRAND TOTAL OF All THE BID ITEMS." R.434. The amount stated is "$146,362.00." *Id.*

Exhibit 2 consists of several documents titled "Statement" and dated April 3, 2018. R.435-439. Each refers to five "change orders"

titled “Change Order #1,” “Change Order #2,” “Change Order #3,” ““Change Order #4,” and "Change Order #5.” *See id.*

Exhibit 3 is a document titled “Financial History.” R.440. It lists an “Original Base Contract Price” of $146,362.00 followed by “Wood Additions” 1 to 5 bearing additional charges. *See id.*

Exhibit 4 is a composite of documents bearing Southern Coatings’ logo and titled “Invoice.” R.441-446. Each Invoice lists “Change Order #1,” “Change Order #2,” “Change Order #3,” ““Change Order #4,” and "Change Order #5” and amounts charged for each. *See id.*

Exhibit 5 is a composite exhibit. R.447-451. The first document is titled Change Order #1 and dated November 4, 2016. R.447. Change Order #1 states that it is for installation of 23 sheets of 5/8 inch plywood for the “Front Section of Bldg.,” removal of “work related debris and leave job site in broom clean manner” at a cost of $1,955.00. *Id.* It is unsigned. *Id.*

Change Order #1 is followed by Change Order #2, which is dated November 8, 2016. R.448. Change Order #2 states that it is for installation of 40 sheets of 5/8 inch plywood for the “Back Section of

Bldg.," removal of "work related debris and leave job site in broom clean manner" at a cost of $3,400.00. *Id.* It is unsigned. *Id.*

Next is Change Order #3 dated November 9, 2016. R.449. Change Order #3 states that it is for installation of 2,100 linear feet of 2 x 6 lumber on the "Complete Edge of Bldg.," removal of "work related debris and leave job site in broom clean manner." *Id.* The stated cost is $25,200.00. *Id.* Like the other Change Orders, Change Order #3 is unsigned. *Id.*

Change Order #4 is also dated November 9, 2016. R.450. It states that it is for installation of a "new roof hatch" on "flat of Bldg.," removal of "work related debris and leave job site in broom clean manner" at a cost of $3,480.00. *Id.* Like the other Change Orders, Change Order #4 is unsigned. *Id.*

The final document in Composite Exhibit 5 is titled Change Order #5 with a date of November 17, 2016. R.451. It states that it is for installation of "2 x 6 fascia board as needed" on "Mansard," removal of "work related debris and leave job site in broom clean manner" at a cost of $1,800.00. *Id.* Like the other Change Orders, Change Order #5 is unsigned. *Id.*

Exhibit 6 is the "Claim of Lien" recorded by Southern Coatings. R.452. It states that "in pursuance of agreement with" the Association, Southern Coatings provided

> labor, services, and/or materials . . . of total value of One Hundred and Ninety One Thousand Four Hundred and Eight Dollars and Twenty Three Cents ($191,406.23), of which there remains unpaid Fifty Seven Thousand Nine Hundred and Seventy One Dollars and Twenty Cents ($57,971.20).

Id.

Exhibit 8 is a "Roof Assessment Report" that purports to have been authored by RAS Engineering, P.A. R.460-475.

Scott Biederman, the owner and president of Southern Coatings, testified on behalf of the Roofing Contractor. *See* Appendix to Motion to Supplement (Appx. to MTS) at 4. He said Southern Coatings was given an engineering report to help it "in the bidding process." *Id.* at 6.

The Association's counsel objected to Biederman reading from the report, which had not been admitted into evidence, in his testimony. *Id.* When the Roofing Contractor sought to introduce the report into evidence, the Association's counsel objected based on the

parol evidence rule, lack of foundation, and the fact that the report contained "hearsay within hearsay." *Id.* at 7-8.

After expressing frustration at the pace in which the trial was proceeding, the trial judge said that she was "going to rule he can ask his questions. If I'm wrong they'll tell me." *Id.* at 8. The report was admitted into evidence as Exhibit 8. *Id.*

Biederman said he had the opportunity to inspect the roof before bidding and had seen indications of wood rotting. *Id.* at 9. When he went to "pitch the job," he was aware that residents had damage to their ceilings. *Id.*

The trial court overruled the Association's counsel's objection, based on parol evidence, to Biederman testifying that there was an indication in the Roofing Contractor's "bid sheet" that a certain item was "TBD." *Id.* at 10.

Biederman admitted that it referred to the charges for wood as "change orders." *Id.* at 20. He also admitted that the documents titled "Change Order" were unsigned. *Id.*

Biederman claimed that the entries for "change orders" in the invoice that the Roofing Contractor had given to the Association was

a "clerical error." *Id.* at 11. He said the charges were "not a change." *Id.* Biederman testified that he had a meeting with the Association in which the Association said it was willing to pay the remaining amount of the charge specified in the contract but not the additional charges for wood that the Roofing Contractor had imposed. *Id.* at 12.

On cross-examination, Biederman admitted that the contract called for payment of the final 10% of the amount specified in the contract to occur "upon customer receiving close-out documents." *Id.* at 14. He admitted that a final release lien was a "close-out document" and that he had not provided a final release lien to the Association and was unaware of anyone else providing a final release lien to the Association. *Id.*

The Association was willing to pay the 10% owed of the original amount specified in the contract. *Id.* at 19. But the Roofing Contractor would not accept payment of the amount specified in the contract without payment for invoices for wood. *Id.*

Elesio Cruz, an employee of the Roofing Contractor, testified. *Id.* at 35. He answered "yes" when asked whether a change order is

needed when it is necessary to do something that is not specified in the contract. *Id*. at 36.

When trial resumed, Denise Brooks and Merilyn Tatum testified on behalf of the Association. *See* Transcript of Proceedings, March 27, 2023 (being filed contemporaneously with this Initial Brief pursuant to the Court's May 1, 2024 order granting Appellant's Motion to Supplement the Record), pp. 8-104.

Ms. Brooks has been the property manager for the Association since 2016. *Id*. at 8-9. Among other things, she testified that the Association conducted a "special assessment for the price of" the contract with the Roofing Contractor. *Id*. at 19. The amount of the special assessment was $146,362.00. *Id*. The contract was never amended in writing. *Id*. at 22.

When the work was completed, the Association was prepared to pay the Roofing Contractor the 10% of the $146,362.00 contract price that remained outstanding, approximately $14,632.00, on receipt of the closeout documents. *Id*. at 25. The Roofing Contractor insisted that the Association pay it an additional approximately $35,000.00

stated on change orders that the Association had never approved. *Id.* at 27-29.

Following the testimony, the parties made closing arguments. *Id.* at 108-166. The trial judge indicated that she was unsure how she would rule. *Id.* at 173. She said she wanted "to read these cases and look at this again" before deciding. *Id.*

The Final Judgment

On May 4, 2023, the trial court issued an Order Memorializing the Court's May 4, 2023 Sua Sponte Status Conference. R.481-482. The trial court stated that it had concluded that judgment should be entered in favor of the Roofing Contractor. R.481.

On June 14, 2023, the trial court filed a Final Judgment of Lien Foreclosure and Damages for Plaintiff. R.519-530. It concluded that Exhibit 1 constituted a contract between the parties. R.519.

The trial court found Biederman's testimony credible. R.520. It said the Roofing Contractor "prepared the August 16, 2016 Contract based upon the bid sheet provided RAS Engineering, P.A.," whose report "was 'limited to the visual observations made on the roof surface. RAS cannot comment of the condition of the systems and

areas beyond such as structural framing, trusses ….'". *Id.* And it said the evidence showed that wood needed to be replaced. R.520-521.

According to the trial court, "the bid sheet, which is part and parcel to the Contract, clearly and expressly indicates in Bid Items 2, 3 and 4, that the quantities of wood and wood trusses was unknown at the time the Contract was executed." R.521. It said "Bid Item 2 clearly denotes 'TBD', or to be determined" and the "three (3) Bid Items contained blank amounts for Bid Amount in dollars." *Id.*

The trial court held that documents that documents associated with the additional charges, despite being titled "Change Orders" by the Roofing Contractor, "were **not** change orders as defined by Florida Statute 713.01(11)." *Id.* It said *JD's Asphalt Engineering Corp. v. Arch Insurance Company,* 329 So. 3d 165 (Fla. 3rd DCA 2021), was inapplicable because "fail[ed] to state what the nature of the change orders involved or whether the materials and labor sought as change orders was contemplated by the underlying contract" and "involved a payment bond and not the owner of the subject property." *Id.* According to the trial court, the need to purchase wood had been contemplated. R.524.

And the trial court held that the amount of the lien was not a willful exaggeration. The trial court concluded that Southern Coatings had "a valid construction lien . . . for the amount of $50,471.20," and that the Roofing Contractor was entitled to 18% interest from May 3, 2018 and an award of attorney's fees. R.524-526.

The Association filed a timely motion for rehearing. R.484-509. On August 4, 2023, the trial court entered an order denying the motion. R.549. The Association timely filed a notice of appeal. R.517-518,

SUMMARY OF THE ARGUMENT

The trial court erroneously entered judgment for the Roofing Contractor. It did so based on an erroneous construction of the parties' contract, which it effectively modified rather than enforcing according to its terms.

Under the plain terms of the contract, the total amount of the Roofing Contractor's bid was inclusive of all work, materials, and incidental charges. It was a fixed, unqualified price of $146,362.00.

And the contract had an integration clause. So the price, like all the terms of the contract, could only be modified by a written document signed by the parties.

There was no signed, written document agreeing to increase the amount the Association was obligated to pay over the $146,362.00 "GRAND TOTAL" stated in the contract. There were only unsigned "Change Orders" unilaterally created by the Roofing Contractor.

The trial court should have enforced the contract as written, without consideration of parol evidence as to whether doing so would cause the Roofing Contractor to bear more costs than it anticipated.

ARGUMENT

I. Standard of Review

Even where a trial court renders a decision after a bench trial, "the standard of review is de novo if a legal principle is involved." *Telemundo Media, LLC v. Mintz*, 194 So. 3d 434, 435 (Fla. 3d DCA 2016). Similarly, "[t]his Court reviews a trial court's interpretation of a contract de novo." *Id.* The trial court's findings of fact are reviewed for competent, substantial evidence. *Underwater Eng'g Servs., Inc. v. Utility Bd. of the City of Key West*, 194 So. 3d 437, 444 (Fla. 3d DCA 2016).

Because the trial court's judgment was premised on interpretation of a contract and application of legal principles, this Court's should review the judgment de novo. And because the trial court erred as a matter of law, this Court should reverse.

II. The Trial Court Erroneously Construed the Contract to Authorize the Roofing Contractor to Unilaterally Impose Additional Charges

All of the Roofing Contractor's causes of action ultimately depend on the construction of the contract between the parties. The trial court erred in construing the contract to authorize the Roofing

Contractor to unilaterally charge the Association amounts (let alone almost 25%) in excess of the "GRAND TOTAL" agreed contract price of $146,362.00 without written modification or authorization signed by the Association.

Under Florida law, "the intentions of the parties to a contract govern its construction and interpretation. When determining intent, the best evidence is the plain language of the contract." *Royal Oak Landing Homeowner's Ass'n, Inc. v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993).

Accordingly, "[t]he cardinal rule of contractual interpretation is that when the language of a contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with the plain meaning." *Cleveland v. Crown Fin., LLC*, 183 So. 3d 1206, 1209 (Fla. 1st DCA 2016).

The plain meaning of the contract was that the "GRAND TOTAL" bid price was the total amount that the Association would be charged absent signed, written authorization to charge additional amounts. In fact, the opening paragraph of the document that the trial court

referred to as the "Bid Sheet" explains at length that no amount may be charged that is not included in the stated total price:

> The bidder understands and agrees that the **total amount of Bid is inclusive of all work** necessary to complete the job as described in the drawings and specifications. The price of each bid item shall include the cost of labor, material, equipment, licenses, insurance, permits and bonds, overhead and profit, **shoring and bracing existing structure** and General conditions and all items/conditions noted into his project manual and contract drawings and **all incidental costs**, expressed or implied, required for the performance of the work in accordance with the Contract Specifications.
>
> The bidder understands and agrees that the Total amount of Bid is **inclusive of all work and incidentals** necessary to complete the job as described in the Contract Plans and Specifications. The Association reserves the right to reduce or increase the scope of work.

R.433 (emphasis added).

After listing individual items, the Bid Sheet then contains a line that includes the "GRAND TOTAL OF ALL THE BID ITEMS," i.e., all the individual elements included in the job. R.434. That phraseology further confirms that the total stated price is intended to be all-inclusive, fixed, and not variable.

And the amount of the "GRAND TOTAL" is stated as a fixed, unqualified dollar amount, "$146,362.00." *Id.* It does *not* state "$146,362.00 plus an amount to be determined" or the like. To the contrary, the amount is stated in a manner indicating that it is the fixed, total charge to be paid, without alteration.

The contract's integration clause made clear that the parties intended that the written terms of the contract could only be modified in writing and signed by all parties:

> All terms and conditions must appear in writing on contract (sic). There are no promises, representations or understandings outside of this instrument, and except as herein otherwise expressly provided. This instrument shall not be altered or modified except by an agreement in writing signed by the parties hereto . . .

R.432.

Taken together, the terms of the contract dictate that $146,362.00 would be the total, fixed price to be paid by the Association for the roofing project to be performed by the Roofing Contractor, unless additional charges were agreed-to by the parties in writing. Thus, it is unsurprising that the Association conducted a special assessment for precisely $146,362.00. And it was undisputed

that there was no writing signed by the Association in which it agreed to pay additional charges.

The trial court erred in failing to enforce the contract as written, including its fixed price, "GRAND TOTAL OF ALL THE BID ITEMS." The trial court expressed concern about the Roofing Contractor being burdened with a large expense for wood and purported inability to know in advance the amount of wood that would be required.

But "it is not the province of a court to second guess the wisdom of their bargain, or to relieve either party from the burden of that bargain by rewriting the document." *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014) (citing *Pol v. Pol*, 705 So.2d 51, 53 (Fla. 3d DCA 1997) ("[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract."). The trial court was required to enforce the contract according to its terms, including the "total amount of Bid . . . inclusive of all work" without adding terms or modification. It erred in failing to do so.

The trial court erroneously focused on three individual components of the total bid, items 2, 3, and 4 as purportedly authorizing the Roofing Contractor to unilaterally increase the total

contract price. It appears to have been swayed by the fact that the Roofing Contractor did not write a number in the "Bid Amount" column to be added into the total bid amount.

But those items were merely bid items that were (or were supposed to be) included in the all-inclusive "GRAND TOTAL OF ALL THE BID ITEMS," not added to it. The plain terms of the contract dictate that the "GRAND TOTAL OF ALL THE BID ITEMS" was the total fixed price to be paid by the Association absent a signed writing, such as a change order authorizing additional charges.

The trial court's interpretation effectively, and erroneously, read additional terms into the contract making the price variable based on the amount of wood the Roofing Contractor unilaterally determined to purchase, purportedly to replace rotting wood. Nowhere does the contract authorize the Roofing Contractor to unilaterally determine a quantity of wood to purchase to replace the existing wood supporting the roof and impose extra charges on the Association without a change order or other written authorization.

The only item that states "TBD" for the quantity is Item 2. R.433. And that item is not for replacing the wood supporting the

roof. Rather it states expressly that it is for "STRENGTHEN[ING]" the existing wood trusses by "sistering" them by "nailing" a 2 x 4 "on each side of the affected member." R.433. None of the Change Orders states that the associated charges are for 2 x 4's for "sistering" trusses.

Although the trial court pointed to Items 3 and 4 on the Bid Sheet, there is no statement in either item that anything was "TBD" in Items 3 and 4. Rather, both items are specified as having a precise "Budget Quantity" of "1." R.433.

Moreover, these items indicate that the quantity and price stated was *not* variable. The unit being a used is indicated as "LS" in the unit column. R.433. According to the Bid Sheet, "LS" means "lump sum." R.434. Thus, the plain terms of the contract dictate that the Roofing Contractor would charge a total "lump sum" price for Item 3 of $85.00 and for Item 4 of $9.00. R.433. So even if the descriptions for these individual items could be construed to authorize the Roofing Contractor to unilaterally charge any amount in addition to the "GRAND TOTAL OF ALL THE BID ITEMS" to which the parties agreed, the most they could be construed to authorize is

a total of $94.00, not $35,000.00. The trial court's reading of the contract was erroneous for this reason as well.

Moreover, the Change Orders were purportedly for materials such as 2 x 6 lumber, a "new roof hatch," and "2 x 6 fascia board as needed" on "Mansard." None of items 2, 3, or 4 says anything about 2 x 6 lumber, a roof hatch or 2 x 6 fascia board. So even if the descriptions for these individual items could be construed to authorize the Roofing Contractor to unilaterally add any amount to the fixed "GRAND TOTAL OF ALL THE BID ITEMS" to which the parties agreed, they would not authorize unilateral charges to be added for the items specified in the Change Orders.

As the Fourth District Court of Appeal has explained, "when a contract is silent on a matter, the court cannot impose contractual rights and duties under the guise of construction." *Blok Builders, LLC v. Katryniok*, 245 So. 3d 779, 784 (Fla. 4th DCA 2018). Because the contract between the parties did not say that the Roofing Contractor could unilaterally impose charges above the "GRAND TOTAL OF ALL THE BID ITEMS" to which the parties agreed for anything, let alone

for 2 x 6 lumber or fascia or "roof hatch," the trial court erred in reading such rights and duties into the contract.

The terms of the contract were unambiguous in dictating that the "GRAND TOTAL OF ALL THE BID ITEMS" of $146,362.00 was a fixed price and no additional charges could be imposed unless agreed in a signed writing. But if there were any ambiguity about whether the contract authorized the Roofing Contractor to impose charges above the GRAND TOTAL agreed price without a change order or other written authorization, the trial court would have been required to adopt the reading of the contract that favored the Association.

That is because the Roofing Contractor was the party that drafted the contract. It is well established that "[a]n ambiguous term in a contract is to be construed against the drafter." *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000); *see also F.H. Paschen, S.N. Nielsen & Associates LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 45 (Fla. 4th DCA 2021) ("An ambiguous contractual provision must be construed against the drafter."); *Vargas v. Schweitzer-Ramras*, 878 So. 2d 415, 417 (Fla. 3d DCA 2004) ("[T]he rules of

construction require that contracts be construed against the drafter . . .").

Because the Roofing Contractor was the drafter of the contract, the trial court would have been required to construe the contract against the Roofing Contractor and in favor of the Association. The trial court erroneously did the opposite and adopted the reading that favored the Roofing Contractor.

The trial court also erred in considering parol evidence, including the engineering report, photographs, and testimony regarding the need to replace the wood. As this Court has explained, "[u]nder the parol evidence rule the terms of a valid written contract cannot be varied by a verbal agreement or other extrinsic evidence . . ." *Bird Lakes Dev. Corp. v. Meruelo*, 626 So. 2d 234, 237 (Fla. 3d DCA 1993). This rule "serves as a shield to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict, add to, or subtract from it, or affect its construction." *Id.* (quoting *Sears v. James Talcott, Inc.,* 174 So.2d 776, 778 (Fla. 2d DCA 1965)).

Consideration of parol evidence is appropriate only where there is a latent (as distinguished from a patent) ambiguity. *EcoVirux, LLC v. BioPledge, LLC*, 357 So. 3d 182, 185 (Fla. 3d DCA 2022). "Patent ambiguities are on the face of the document, while latent ambiguities do not become clear until extrinsic evidence is introduced and requires parties to interpret the language in two or more possible ways." *Prime Homes, Inc. v. Pine Lake, LLC*, 84 So. 3d 1147, 1151–52 (Fla. 4th DCA 2012).

The trial court did not find any latent ambiguity and none exists with respect to the contract. As such, the trial court erred in considering parol evidence to construe the contract.[1]

In sum, the contract unambiguously set a fixed price of $146,362.00 as the "GRAND TOTAL OF All THE BID ITEMS." The amount to be paid by the Association was only subject to modification in a signed writing. It was undisputed that there was no signed

[1] Moreover, in considering parol evidence, the trial court did not appear to attempt to discern the intent of both parties as distinguished from the Roofing Contractor's unilateral attempt. There was no competent, substantial evidence, and the trial court did not find, that the Association intended that it would be obligated to pay more than the "GRAND TOTAL OF All THE BID ITEMS" that the Bid Sheet said was to be all inclusive.

writing. Thus, the trial court erred in concluding that the Association was obligated to pay the Roofing Contractor any amount above the 10% remainder of the "GRAND TOTAL OF All THE BID ITEMS" due on receipt of the closeout documents, which the Roofing Contractor refused to provide to the Association unless it paid an additional amount that was more than 20% of the total contract price.

Whether they were "change orders" or some other writing intended to modify the agreed terms of the contract, the documents that the Roofing Contractor created and titled "Change Orders" were ineffective to impose on the Association the obligation to pay any amount above the previously agreed amount because they were not signed. But in fact these "Change Orders," which the Roofing Contractor also referred to as "change orders" in invoices and statements it created, were "change orders" under section 713.01, Florida Statutes.

Under section 713.01, change orders simply refer to alterations to the specifications in the contract:

> (11) "Extras or change orders" means labor, services, or materials for improving real property authorized by the owner and added to or deleted from labor, services, or materials

> covered by a previous contract between the same parties.

§ 713.01(11), Fla. Stat.

The plain meaning of the terms of section 713.01(11), contract law, and common sense all lead to the conclusion that change orders purporting to alter the terms of a contract (indeed, the most important term, the price) that can only be modified by a signed writing must be "authorized by the owner" in a signed writing. It was undisputed here that there was no signed writing. To the contrary, the Roofing Contractor purported to introduce the additional charges through the documents titled "Change Order" that it created, which were not signed by the Association—or even presented to the Association until after the charges were purportedly incurred.

Contrary to the trial court's conclusion, this Court's holding in *JD's Asphalt Engineering Corp. v. Arch Insurance Company*, 329 So. 3d 165 (Fla. 3d DCA 2021), is on point. In that case, this Court held that where a contract "required all change orders to be in writing and signed," a contractor could not maintain a claim to recover for charges purportedly imposed through change orders that were not signed. *Id.* at 166–167.

As explained above, the contract here stated that it could only be modified by a signed, written document. And contrary to the trial court's conclusion, the price set forth in the contract was stated as a fixed price, not a variable price. So by the terms of the contract, any change to the price had to be made through a signed writing, which did not occur.

It follows that the trial court erred in concluding that the Roofing Contractor was entitled to recover the amounts added through the "Change Orders," whether or not those documents are "change orders" under section 713.01(11) or some other attempt to charge amounts above the fixed price of $146,362.00 specified as the "GRAND TOTAL OF All THE BID ITEMS." Either way, these documents were ineffective to impose on the Association the obligation to pay additional amounts because they were unsigned.

The Roofing Contractor was not entitled to a judgment foreclosing its lien because the amounts it sought were not owed by the Association. The Roofing Contractor improperly recorded a lien for the amounts reflected in the unsigned "Change Orders" that were

not lawfully owed to it under the contract. It was not entitled to recover those amounts.

Moreover, the lien was fraudulent and unenforceable. *See, e.g.*, *Skidmore, Owings & Merrill v. Volpe Const. Co., Inc.*, 511 So. 2d 642, 644 (Fla. 3d DCA 1987) ("The inclusion of items not authorized by change orders or by contract renders the lien fraudulent and unenforceable."). Indeed, it was inappropriate for the Roofing Contractor to record any lien because the Association was ready and willing to pay remaining balance of the "GRAND TOTAL" contract price, the only amount it was contractually obligated to pay. Even the Roofing Contractor admits the Association tried to tender payment for that balance. But the Roofing Contractor, in breach of the contract, refused to provide the closeout documents and purported to require the Association to pay more than $35,000.00 extra to which it had not agreed.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's Final Judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 14, 2024, the foregoing is being filed through the Florida Courts E-Filing Portal, which will serve a true and correct copy by e-mail to: Andrew M. Schwartz, Esq. (ams@amslegalteam.com, receptionist@amslegalteam.com, paralegal@amslegalteam.com).

s/ Daniel A. Bushell
Daniel A. Bushell

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief satisfies the font requirements of Florida Rule of Appellate Procedure 9.045(b). It was typed in Bookman Old Style, 14-Point font. I further certify that this brief

satisfies the type-volume limitation of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ Daniel A. Bushell
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