Third District Court of Appeal

State of Florida

Opinion filed September 20, 2023.
Not final until disposition of timely filed motion for rehearing.

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No. 3D22-656
Lower Tribunal No. 22-1062

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Flamingo South Acquisitions, LLC, etc.,
Appellant,

vs.

Flamingo/South Beach I Condominium Association, Inc., etc.,
Appellee.

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

Siegfried Rivera, and Lindsey Thurswell Lehr; Podhurst Orseck, P.A., and Stephen F. Rosenthal, for appellant.

Frank, Weinberg & Black, P.L., and Marc A. Silverman and Michael R. Kassower (Plantation), for appellee.

Before EMAS, LOBREE and BOKOR, JJ.

PER CURIAM.

Flamingo South Acquisitions, LLC (FSA) appeals an order dismissing with prejudice its complaint for declaratory judgment. The trial court articulated two independent grounds for its dismissal order: (1) collateral estoppel based on an earlier Summary Final Order issued by the Department of Business & Professional Regulation and, alternatively, (2) the failure of FSA, as a statutory condition precedent to litigation, to arbitrate a "dispute" as defined by section 718.1255(1), Florida Statutes.

We hold that, although the trial court erred in dismissing FSA's complaint on collateral estoppel grounds, see Fernandez v. Cruz, 341 So. 3d 410, 413 (Fla. 3d DCA 2022) (observing: "[C]ollateral estoppel, often referred to as issue preclusion or estoppel by judgment, consists of the following five elements: (1) the identical issue was presented in a prior proceeding; (2) the issue was a critical and necessary part of the prior determination; (3) there was a full and fair opportunity to litigate the issue; (4) the parties to the prior action were identical to the parties of the current proceeding; and (5) the issue was actually litigated") (quoting Marquardt v. State, 156 So. 3d 464, 481 (Fla. 2015))), the trial court correctly concluded that FSA's action for declaratory judgment fell within the definition of a "dispute," as defined in section 718.1255(1), Florida Statutes[1]:

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[1] One of the issues involved in the underlying dispute is which version of Chapter 718 applies to the instant action: the 2006 version or the amended

> *(1) [T]he term "dispute" means any disagreement between two or more parties that involves:*
>
> (a) The authority of the board of directors, under this chapter or association document, to:
>
> 1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
>
> 2. Alter or add to a common area or element.
>
> *(b) The failure of a governing body, when required by this chapter or an association document, to:*
>
> 1. *Properly conduct elections*.

(Emphasis added).

Because the claims raised in FSA's declaratory judgment action represent a "disagreement between two or more parties that involves. . . [t]he failure of a governing body . . . to [] [p]roperly conduct elections," FSA was required to engage in nonbinding arbitration as a condition precedent to litigation, pursuant to section 718.1255(4)(a), Florida Statutes.[2]

2010 version. While section 718.1255(1) (defining "dispute") is identical in both versions, other sections of the 2006 and 2010 versions of Chapter 718 contain differing language. We make no determination regarding which version applies.

[2] Section 718.1255(4)(a), Florida Statutes (2022), provides in relevant part:

> Before the institution of court litigation, a party to a dispute, other than an election or recall dispute, shall either petition the division for nonbinding arbitration or initiate presuit mediation as provided in subsection (5). Arbitration is binding on the parties if all parties in arbitration agree to be bound in a writing filed in arbitration.

Affirmed.