IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, THIRD DISTRICT
CASE NO. 3D24-540
L.T. NO. 2018-007053-CA-01

UNIVERSAL HANDICRAFT, INC.
and SHAY SEGEV,

Petitioners,

v.

TZIYONA COHEN,
Respondent.
_____/

UNIVERSAL HANDICRAFT, INC.'S AND SHAY SEGEV'S REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

At issue is the trial court's order providing that after adjudicating "partial final judgment against [Universal] and Shay Segev on Counts II and V of Cohen's Second Amended Complaint and Count VI of Segev's Counterclaim and in favor of Plaintiff" that "Cohen shall recover . . . the sum of $468,952, along with post-judgment costs and interests for which let execution issue."

Those counts omit claims for money damages, and thus the order to "recover . . . the sum", a legal remedy, is inconsistent with equitable pleadings. There also remain counts addressing the parties' dealings, making the order lack finality despite the order's "let execution issue" language.

Below, Petitioners objected regarding finality and execution—along with reference to the pleading discrepancy of Respondent disclaiming the adequacy of money and seeking payment. The trial court did not rule. Because Respondent claims authority to enforce the order, certiorari relief is necessary.

Respondent challenges the order's ripeness for certiorari and claims there is no departure from the essential requirements of law causing irreparable harm. Petitioner replies as follows:

I. The trial court's order is ripe for review.

Respondent challenges ripeness based on: a) the trial court's "stay pending further order of the circuit court" (Resp. at 10); and b) the motion for rehearing filed below. These challenges fail.

A. A stay enables review rather than prevents it.

The trial court's grant of a "stay pending further order" does not defeat the Petition. That order states, "execution. . . is stayed pending further order of this court." It does not address whether execution is allowed (the issue here) or whether Petitioner's motion is a "tolling order" as Respondent contends.

The order invites the question here—whether there has been a final order and whether the trial court could order execution.

To support confining Petitioners to the trial court, Respondent asserts that Petitioners did not inform the Court of their motion to stay (Resp. at 10-11) and that the resulting order defeats relief here.

First, contrary to that assertion, Petitioners made obvious reference to Respondent's position *on that motion*. See Petitioner's Response to Dismissal Motion at 6 ("Below, Respondent . . . oppos[es] a stay").

Second, Respondent's claim about the effect of the order—which **did not** impose a stay pending appellate review--fails. (Resp. at 24). A stay is consistent with review in this proceeding. See Fla. R. App. P. 9.100(h) (order to show cause automatically stays only in prohibition proceedings); 9.310(a) (permitting "Stays" as to "final or non-final order").

A stay enables review; it does not preclude it.

B. The motion below does not defeat certiorari here.

Respondent also asserts that the motion for rehearing defeats certiorari here. This argument was already rejected—this Court denied the motion to dismiss and did not carry it with the case. Accordingly, that argument fails here.

The same defects remain in Respondent's argument. Respondent invokes Fisher Island Club, Inc. v. Potash, 852 So. 2d 243 (Fla. 3d DCA 2003), which in its entirety reads, "Following review of the petition for writ of certiorari, it is ordered that said petition is hereby denied without prejudice to seek further relief in the trial court, through the pending motion for rehearing and clarification, or other appropriate means." There is no mention of the order's substance.

Respondent also ignores this Court's Empire Fire precedent, which explained:

> . . . The order purports to enter partial judgment against Empire and authorize Chmilarski to execute on the judgment. This July 10, 2023 order, however, does not adjudicate two factually related claims . . . . Our record reflects that these inextricably intertwined claims remain pending.
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> . . . .
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> The order does, however, improperly purport to require Empire to make payment while leaving intertwined factual issues unresolved. For this reason, we treat the matter as a petition for writ of certiorari and quash only those portions of the July 10, 2023 order that purport to require Empire to issue payments to Chmilarski prior to the entry of a final judgment that disposes of the factually intertwined claims. Id.
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> . . . .

Empire Fire & Marine Ins. Co. v. Chmilarski, No. 3D23-1875, 2024 Fla. App. LEXIS 3145, 2024 Fla. App. LEXIS 3145, at *1-2 (3d DCA Apr. 24, 2024); see also People's Tr. Ins. Co. v. Gonzalez, 318 So. 3d 583, 583 (Fla. 3d DCA 2021)("an order resolving only part of a . . . lawsuit by requiring a party to make an interim payment while leaving intertwined factual matters unresolved presents . . .. irreparable harm and departure from the essential requirements of the law remediable by . . . certiorari.").

Respondent contends that the order—which requires payment of money—is distinct and can be separately appealed. She cites to Mendez v. West Flagler Family Association, where the defendants were sued for breaches of contract and fraud. The Mendez Court explained that the summary judgment "arose from the alleged fraudulent issuance of the insurance policy originally and had naught to do with breaches of the policy after it was issued" and consequently "there is a distinct and separate cause of action and it makes no essential difference whether the distinct cause of action arises in a plaintiff's complaint or in a defendant's counterclaim or crossclaim" because "the judgment, order or decree adjudicates a

distinct and severable cause action." Mendez v. W. Flagler Fam. Asso., 303 So. 2d 1, 4-5 (Fla. 1974).

Mendez is an exception to the piecemeal appeal rule, not an opening for Respondent here--where there remain undecided related portions of the case. See Hallock v. Holiday Isle Resort & Marina, Inc., 885 So. 2d 459, 461 (Fla. 3d DCA 2004)("this exception only applies to partial judgments which are unrelated to the remaining portions of the case."); see also Waterside at Boynton Homeowners' Ass'n v. S. Homes of Palm Beach, 373 So. 3d 351, 354 (Fla. 4th DCA 2023)("The breach of contract count . . . was interrelated with the . . . rescission count. Therefore . . .the order on appeal was not . . . appealable").

Respondent fails in her burden to invoke this exception and create finality that would permit execution. This order manifests that the amounts at issue—including some findings of the trial court—relate to the counts that remain to be adjudicated. The relationship between these parties relies upon the entity in suit and its operations. There is no *independent* contract or tort.

Thus, any remaining judicial labor that might affect Respondent's recovery of funds related to these transactions and agreements defeats finality and Respondent's claim to execution. See

S. L. T. Warehouse Co. v. Webb, 304 So. 2d 97, 100 (Fla. 1974)("The claims . . . are . . . interrelated and in substance . . involve the same transaction"); Belle Isle Assocs. v. Nine Island Ave. Condo. Ass'n, 990 So. 2d 1176, 1177 (Fla. 3d DCA 2008); ("the Association's still-pending counterclaim is intertwined with, and directly affected by, the issues in the main action", and "Although the existing judgment directs the Association to submit an affidavit stating the dollar amount due as to each lien on each unit owned by a counter-defendant, the retention of jurisdiction does not state that the entry of judgment on those amounts will be self-executing or that there will be no further hearings if the counter-defendants"); accord Federated Nat'l Ins. Co. v. Palenzuela, 11 So. 3d 969, 970 (Fla. 3d DCA 2009)("the degree of finality necessary to support an appeal--an adjudication on the merits which effectuates a termination of the cause as between the parties directly affected--has not occurred").

Certiorari is the remedy. See Mohler v. Elliott, 332 So. 3d 1120, 1122 (Fla. 2d DCA 2022) ("By authorizing execution at a time when petitioner has no appellate remedy . . . the partial final summary judgment subjects the petitioner to a material injury that has no appellate remedy" and "[i]t therefore satisfies the two jurisdictional

prongs of the certiorari standard."); American Franchise Grp. LLC v. Gastone, 319 So. 3d 147, 148 n.1 (Fla. 3d DCA 2021)(explaining that "The judgment is titled, "Final Summary Judgment." . . . it only adjudicates Count I of the operative complaint, the judgment is a partial summary judgment".); see also Vital v. Summertree the Cal. Club Condo. Ass'n., 343 So. 3d 1260, 1263 (Fla. 3d DCA 2022) (stating the order is not final because "the final foreclosure judgments do not adjudicate the pending affirmative defenses, and therefore, judicial labor remains").

II. The elements for certiorari are met.

Respondent argues that she should receive execution—i.e., "recover the sum"—notwithstanding that the count on which she sued disclaimed money damages and that the funds cannot be awarded without litigating the related counts.

Respondent claims: a) that there was invited error or lack of preservation due to agreeing to the "process and procedures undertaken by the circuit court" (Resp. at 13)--despite the objections raised below in the rehearing motion); and b) that the "accounting" count can stand alone and includes damages under Florida law for which execution of judgment for money can follow (e.g., Resp. at 17,

19)--despite the pending related counts and the disclaimer of money damages in the her pleading. Both arguments fail.

A. There was neither invited error nor lack of preservation.

Petitioner objected to the ruling below; the "agreed order" regarding the **process** for accounting is not a waiver of challenges to the outcome (on direct appeal) and Plaintiff's use of that outcome improperly (seeking premature execution).

The relevant arguments were preserved below. Petitioners argued the accounting claim, as pled, cannot independently support damages. (A642-43). The accounting claims (which are equitable) require adjudication of the claims at law[1]. Petitioners also explained that "despite the numerous counts remaining, the . . . Order [states]: "Plaintiff . . . .shall recover the sum . . . along with post-judgment interest and costs, for which let execution issue"" and "execution is improper and contrary to binding caselaw." (A.641-42).

Second, there was no invitation to either issue a "final" judgment on the accounting count or allow execution. The accounting may be final—until it can be reviewed on direct appeal

[1] Argued below as "Fiske's accounting is no substitute for a trial on the parties' ***actions at law.***" (A.643).

with the rest of the case—but the right to payment is not. Respondent cites to the agreed order on the accountant, but that order says, "a party may seek to recover as determined by the Accounting". (A273). That is not an agreement to premature execution; "seek[ing] to recover" based upon the accounting is not the same as **immediate execution or payment**.

Instead, that language—which is ambiguous—addresses efforts to use the accounting results *in suit*. The order omits mention of rights to appeal, finality, or any rights related to a final judgment. Petitioners did not agree to any finality for purposes of execution or payment; they agreed only to the procedure for the accounting. Respondent cannot craft a waiver of well-settled rights from ambiguity.

Moreover, following the order, Petitioners challenged the elements of the order at issue here. See, e.g., A638-39.

Respondent's preservation and invited error arguments fail.

B. The order departs from the essential requirements of law and causes harm that cannot be remedied on appeal.

1. Ordering premature execution departs from the essential requirements of law.

In opposing the certiorari remedy, Respondent argues: the order is final; and the final order for an accounting can support execution. Neither argument survives scrutiny.

a. Only a final judgment can authorize execution.

"Permitting execution prior to completion of the litigation before the trial court . . .[is] improper." See East Ave., LLC v. Insignia Bank, 136 So. 3d 659, 665 (Fla. 2d DCA 2014) (granting certiorari and quashing the order). Consequently, the partial judgment allowing execution meets the jurisdictional standard. See, e.g., Team Richco, Ltd. Liab. Co. v. Rapid Sec. Sols., Ltd. Liab. Co., 290 So. 3d 629, 631 (Fla. 2d DCA 2020)("The partial judgment results in irreparable injury where it authorizes execution prior to the entry of a final, appealable order").

"By authorizing execution at a time when petitioner has no appellate remedy and therefore cannot protect his assets by filing a supersedeas bond, the partial final summary judgment subjects the petitioner to a material injury that has no appellate remedy" and "[i]t therefore satisfies the two jurisdictional prongs of the certiorari standard." Mohler v. Elliott, 332 So. 3d 1120, 1122 (Fla. 2d DCA 2022); see also Baumann v. Intracoastal Pac. Ltd. P'ship, 619 So. 2d

403, 404 (Fla. 3d DCA 1993)(addressing a "partial final summary judgment" and stating that "the order was entitled partial final summary judgment . . . [but] was not an appealable order" and "the order was improperly entered before disposition of all matters").

b. There is no final judgment here.

The order is not a final judgment and it cannot be reviewed as a "partial final judgment." Respondent seeks to "enforce" the accounting but stretches enforcement too far. The order is decided, not final, meaning that Respondent can use the finding—subject to review on direct appeal later—in pursuing the remaining elements of this case. However, Respondent cannot claim a right to that payment right now, when the claimed "judgment" is not subject to direct appellate review.

As Petitioner explained below "Using [the accountant's] numerical determinations as a guidepost, the Plaintiff is entitled to prove up her alleged damages at trial" and "In other words, the Plaintiff can now try to prove that her rights as a 27% owner of UHI were abridged or impinged upon and seek the monetary relief that Fiske purports to have identified in her accounting—assuming, of

course, that the Plaintiff also prevails in the defense of UHI's and Segev's respective counterclaims." (A.644).

Respondent misconstrues Petitioner's claim regarding the accounting order. Petitioner explained—correctly, under Florida law—that the accounting **cannot stand on its own** in this case and requires further proceedings to mature into any right to payment.

These arguments support certiorari here. As this Court has explained when awarding certiorari to address a trial court's severance of the matters for trial:

> . . . it is well settled that where mixed equitable and legal claims are presented on interrelated facts, the trial court first must have a jury decide the case so as to preserve the parties' right to a jury trial. . .
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> . . . the trial court first must determine that Kavouras misdirected corporate funds. In the damage claim, the plaintiff alleges he was injured as a result of Kavouras' misappropriation or misdirection of corporate funds. Therefore, the jury must determine that Kavouras misapplied or misdirected corporate funds before it can award any damages. The facts required to prove a misappropriation or misdirection of funds are the same for the separate claims. Thus, separate trials create a risk of inconsistent findings regarding whether Kavouras misapplied or misdirected corporate funds.

Kavouras v. Mario City Rest. Corp., 88 So. 3d 213, 214-15 (Fla. 3d DCA 2011).

This is because equity *is only appropriate after the legal remedies have been determined inadequate*. See, e.g., F. A. Chastain Constr., Inc. v. Pratt, 146 So. 2d 910, 913 (Fla. 3d DCA 1962)("equity will take cognizance of cases where the contract demands between litigants involve extensive or complicated accounts and it is not clear that the remedy at law is as full, adequate and expeditious as it is in equity.").

Accordingly, an accounting, as pled here, is a remedy and not a cause of action of its own—it requires reference to (and findings regarding) breaches of duties at law that have been otherwise pled. See, e.g., Johnson v. Pullman, Inc., 845 F.2d 911, 913 (11th Cir. 1988) ("Although plaintiffs' complaint contained a count in which an accounting was sought, that relief would not be available here absent some independent cause of action").

Thus, by awarding damages under the accounting, without determining the other causes of action for money, the trial court departed from the essential requirements of law as it awarded damages without the necessary predicate, via the partial final judgment. Petitioner was entitled to adjudication of its other claims

before a judgment in equity was awarded. (See A643-44). The trial court departed from the essential requirements of law.

c. Respondent's claim that equity provides an exception to this rule fails.

Respondent's citations regarding execution on equity judgments demonstrate the flaw in her position here—none hold that the right to money matures where claims interrelated to that money remain to be adjudicated.

For example, in New Saga Corp. v. Strongwill Corp., 565 So. 2d 407, 408 (Fla. 3d DCA 1990, "The trial court directed New Saga to cause a satisfaction of mortgage to be filed with respect to the fifteen lots by a date certain, failing which the trial court "may" enter a judgment against New Saga equivalent to the value of the fifteen lots." Accordingly, there the "execution" related to an obligation to discharge mortgages—i.e., specific performance—and the "damages" were permissive; even as to that order, this Court noted "We vacate so much of the partial summary judgment as establishes the measure of damages" because of facts necessary to be found below. See New Saga, 565 So. 2d at 409.

There is also no reference in New Saga to the nature of the other counts, making the issue in this case—whether the other counts preclude awarding money now—outside New Saga's scope.[2] New Saga involved specific performance, with a potential penalty (later overruled) for non-performance--not, as here, a count that disclaimed money damages connecting to a damage award under the guise of equity. Respondent's cited Kluger case merely states the elements of a cause of action for accounting, and states it is a remedy in equity. See Bankers Tr. Realty v. Kluger, 672 So. 2d 897, 898 (Fla. 3d DCA

[2] Petitioner cannot use New Saga to claim that having mixed equitable and legal claims makes Rule 9.110(k) applicable, because the counts here are interdependent. See Hernandez v. Jackson Mem'l Hosp. Pub. Health Tr., 305 So. 3d 569, 571 (Fla. 3d DCA 2020)("the conversion claim and the two counts in the amended complaint emanate from a common nucleus of facts" and "the same pecuniary injury . . . is asserted in . . the . . .pending causes of action"); Northcutt v. Pathway Fin., 555 So. 2d 368, 369 (Fla. 3d DCA 1989) (partial summary judgment striking breach of guaranty nonfinal nonappealable order where accounting claim remaining was interrelated); see also Homeowners Choice Prop. & Cas. Ins. Co. v. Fraser, 346 So. 3d 228, 229 (Fla. 3d DCA 2022)(concluding there was no appealable judgment because "All three counts rely on the same operative set of facts."); Inc. v. S. Homes of Palm Beach, LLC, 373 So. 3d 351, 354 (Fla. 4th DCA. 2023) (dismissed recission count interrelated to contract count).

1996)("the evidentiary facts alleged in the complaint show neither complexity nor the inadequacy of a legal remedy.").

The holding in Dahlawi, "that the trial court departed from the essential requirements of the law in holding that any accounting of the alleged partnership affairs would be conducted by the jury" does not change this case. See Dahlawi v. Ramlawi, 644 So. 2d 523, 524 (Fla. 3d DCA 1994). The question here is whether an accounting included among other claims for damages—not yet adjudicated—can stand on its own and require payment of money. Dahlawi does not answer that question.

Respondent's attempt to cast the accounting as a free-standing claim also defeats her claim here, because the authority notes that "Our courts have cautioned against efforts to disguise equitable claims in partnership matters as breaches of contract or breaches of fiduciary duties by including requests for damages . . . [because] such efforts do not transform the equitable claims into actions at law, and will not deprive a party of the right to an accounting under established partnership law." Boyce v. Hort, 666 So. 2d 972, 974 (Fla. 5th DCA 1996). Thus, if Respondent contends the order is some "final" order providing for an equitable accounting in a "partnership

dispute" she is bound by the premise that such claims are in equity—not damage claims at law. She cannot have it both ways.

If alternatively, as Respondent suggests, the accounting involves an obligation to pay money (i.e., to pay a judgment) then it is not a free-standing claim because it requires adjudication of the claims related to the relationship giving rise to those alleged obligations to pay money. Such adjudication is absent here.

Specifically, as to the alleged "partnership claims" against Universal Cohen pleads Breach of Stock Purchase Agreement (Count IV, alleging "damages," and requesting an award of "damages, interest, attorney's fees, costs, and such other further relief as the Court deems just and proper"). That agreement is for shares in Universal Handicraft, and Plaintiff alleges the breaches include that "Segev [did] not devot[e] 100% of his time to UHI" despite an agreement to do so "as UHI's president" and that "Segev charge[d] personal expenses to UHI" and "st[ole] UHI's assets and revenues." (A.020).

Respondent's accounting count states, "Segev and Cohen share a fiduciary relationship where Plaintiff reposed trust in Sege because they both own a portion of UHI" and "Cohen has an ownership

interest." (A.018). Thus, if there is a "partnership dispute" here it relies upon a count that was not adjudicated—Count IV, regarding alleged breaches of the stock purchase agreement.

Any accounting obligation stems from that agreement, and that count remains to be adjudicated. Accordingly, Respondent misconstrues Petitioner's position regarding the accounting count. An accounting, as pled here, is a remedy and not a cause of action of its own—it requires reference to (and findings regarding) breaches of duties at law. See, e.g., Johnson v. Pullman, Inc., 845 F.2d 911, 913 (11th Cir. 1988) ("Although plaintiffs' complaint contained a count in which an accounting was sought, that relief would not be available here absent some independent cause of action"); Petition at 13.

2. Treating a nonfinal judgment as a final warrants certiorari.

Having failed to meet the finality requirement and insisted upon execution, Respondent incorrectly claims that a remedy is unavailable here.

This Court can grant certiorari to remedy the mislabeling (and the attempts to execute). See Baumann v. Intracoastal Pac. Ltd. P'ship, 619 So. 2d 403, 404 (Fla. 3d DCA 1993)(addressing a "partial

final summary judgment" and stating that "the order was entitled partial final summary judgment . . . [but] was not an appealable order" and "the order was improperly entered before disposition of all matters because the Ethan Allen funds constituted only a portion of the damages sought by the Baumanns for the breach of contract."). That is because there is no appellate remedy for improper finality—an order that is not final cannot be subject to direct appeal.

Likewise, this Court can grant certiorari to remedy the improper execution that results from calling the order a final order. See Empire Fire, 2024 Fla. App. LEXIS 3145, at *2 (Fla. 3d DCA Apr. 24, 2024)("The order . . . improperly purport[s] to require Empire to make payment while leaving intertwined factual issues unresolved. . . .we treat the matter as a petition for writ of certiorari and quash . . . those portions of the . . . order that purport to require Empire to issue payments to Chmilarski prior to the entry of a final judgment that disposes of the factually intertwined claims."); Mohler v. Elliott, 332 So. 3d 1120, 1122 (Fla. 2d DCA 2022) ("By authorizing execution at a time when petitioner has no appellate remedy and therefore cannot protect his assets by filing a supersedeas bond, the partial final summary judgment subjects the petitioner to a material injury that

has no appellate remedy" and "[i]t therefore satisfies . . the certiorari standard.").

Consequently, here, certiorari is the remedy.

CONCLUSION

Respondent's attacks on the Petition fail. This Court should grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Florida Rule of Judicial Administration 2.516, the foregoing has been furnished only by electronic mail generated by this Court's e-filing system, this 28th day of May, 2024, to all counsel listed on the attached service list.

/s/ Jeffrey R. Geldens

An attorney for Defendant Universal Handicraft, Inc.

CERTIFICATE OF COMPLIANCE
WITH FONT AND WORD COUNT REQUIREMENTS

I HEREBY CERTIFY, that based on a word count from Microsoft Word, this document complies with the applicable font (Bookman Old Style 14 point) and word count limit (4000 words) requirements.

/s/ Jeffrey R. Geldens

An attorney for Defendant Universal Handicraft, Inc.