Case No. 3D23-1096
L.T. Case No. 21-45242-SP

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

Indoor Environmental Restoration Now, Inc.
a/a/o Maybet Falcon

Appellant,

v.

Citizens Property Insurance Corporation

Appellee.

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

This appeal arises from a final judgment and order of dismissal in a first party property insurance claim case. The lower court dismissed on grounds that the assignment of benefits agreement ("AOB") that Appellant Indoor Environmental Restoration Now, Inc. ("Indoor Environmental") entered into with the named insured, Maybet Falcon, did not comply with the requirements of section 627.7152(2)(a)(2), Florida Statutes (2021). The lower court ruled that the AOB was invalid because it lacked a rescission clause required by section 627.7152(2)(a)(2), and Indoor environmental therefore lacked standing to sue.

STATEMENT OF THE CASE AND FACTS

A. Maybet Falcon enters into an assignment of benefits agreement with Indoor Environmental.

In August 2021, Maybet Falcon's home suffered water damage. (R. 49). Ms. Falcon hired Indoor Environmental to test for mold caused by the water damage. (R. 49). Ms. Falcon and Indoor Environmental entered into an "Assignment of Benefits/Assignment Agreement" ("AOB") under which Indoor Environmental had the right to submit a claim directly to Citizens for its mold testing work. (R. 49, 53-56). If Citizens denied the claim, the AOB granted Indoor

Environmental the right to sue Citizens for breaching Ms. Falcon policy. (R. 53).

The AOB also contained the following rescission provision:

YOU ARE AGREEING TO GIVE UP CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY TO A THIRD PARTY, WHICH MAY RESULT IN LITIGATION AGAINST YOUR INSURER. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING IT. YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHOUT PENALTY WITHIN 14 DAYS AFTER THE DATE THIS AGREEMENT IS EXECUTED, AT LEAST 30 DAYS AFTER THE DATE WORK ON THE PROPERTY IS SCHEDULED TO COMMENCE IF THE ASSIGNEE HAS NOT SUBSTANTIALLY PERFORMED, OR AT LEAST 30 DAYS AFTER THE EXECUTION OF THE AGREEMENT IF THE AGREEMENT DOES NOT CONTAIN A COMMENCEMENT DAY AND THE ASSIGNEE HAS NOT BEGUN SUBSTANTIAL WORK ON THE PROPERTY. HOWEVER, YOU ARE OBLIGATED FOR PAYMENT OF ANY CONTRACTED WORK PERFORMED BEFORE THE AGREEMENT IS RESCINDED. THIS AGREEMENT DOES NOT CHANGE YOUR OBLIGATION TO PERFORM THE DUTIES REQUIRED UNDER YOUR PROPERTY INSURANCE POLICY.

(R. 54).

B. Indoor Environmental, as an assignee, makes a claim with Citizens.

Indoor Environmental completed the mold assessment for Ms. Falcon and timely and properly submitted its claim to Citizens. (R. 49-50). Indoor Environmental's claim sought payment of $2,200.00 for its mold testing work. (R. 50).

C. Citizens does not pay the mold testing claim, Indoor Environmental files suit.

In September 2021, Citizens denied Indoor Environmental's claim for mold testing. (R. 57). According to Citizens, "mold was already present" and it "does not feel [the testing] was necessary to confirm the presence of mold for our investigation process." (R. 57). The record contains no evidence that Citizens advised Indoor Environmental that its claim was denied because the AOB was deficient. (R. *passim*).

Original Complaint. After Citizens denied its claim, Indoor Environmental, as an assignee, sued Citizens for breaching the terms of Ms. Falcon's policy. (R. 12-20). Citizens moved to dismiss on grounds that AOB did not Ms. Falcon did not contain a rescission clause per section 627.7152(2)(a)(2), Florida Statutes (2021). (R. 24).

Amended Complaint. Indoor Environmental amended its complaint and attached Citizens' claim denial letter as an exhibit. (R. 48-58). Citizens moved to dismiss again, making the same argument about the AOB lacking the necessary rescission clause. (R. 68-78).

In its response to the dismissal motion, Indoor Environmental made the same three arguments it raises here on appeal. (R. 92-

100).[1] First, that the AOB *did* contain a rescission clause in compliance with section 627.7152(2)(a)(2). (R. 93-94). Second, that Citizens waived its right to challenge the AOB in suit after not doing so during the claims process. (R. 94-97). Third, that Citizens was equitably estopped from contesting the AOB's validity in litigation after not doing so in pre-suit. (R. 97-99).

D. Motion to dismiss hearing.

At the hearing on the dismissal motion, Citizens conceded that the AOB *did* contain a verbatim recitation of the rescission provision required by subsection (2)(a)(6): "That part is in there." (R. 134). But Citizens argued the AOB did *not* have a "distinct and separate" rescission advised the assignee (Ms. Falcon) that she could rescind the contract "by written notice" as required by subsection (2)(a)(2):

> What is not in this AOB, anywhere in there, and what is required by the statute, is information to the insured, stating that they can be (inaudible) by written notice. There is nothing within this AOB addressing written notice. It is not contained in there. That is distinct and separate."

(R. 134).

[1] Indoor Environmental also argued that Citizens did not have privity to challenge the AOB. (R. 99-100). Indoor Environmental is not raising this issue here on appeal.

In response, Indoor Environmental's counsel argued that the AOB contained an exact copy of the rescission provision required by subsection (2)(a)(6) which, in turn, satisfies the rescission provision requirement of subsection (2)(a)(2). (R. 136-37). Indoor Environmental's counsel also briefly addressed Citizens' waiver and estoppel based on its presuit conduct. (R. 137-38).[2]

At the end of the hearing, the lower court reserved ruling on the issue. (R. 142-43).

E. Order of dismissal and final judgment.

After the hearing, the lower court entered an order of dismissal, ruling that the AOB did not "meet the statutory requirement to contain a provision that allows the assignor to rescind the assignment agreement … by submitting a written notice of rescission signed by the assignor to the assignee. § 627.7152(2)(a)2." (R. 156-57). The dismissal order was silent on Indoor Environmental's arguments on waiver or equitable estoppel. (R. 156-57). The lower

[2] Indoor Environmental's counsel also argued that there was an "equitable assignment" in place. (R. 138). Indoor Environmental is not making that argument here on appeal.

court subsequently entered final judgment (R. 158-59), and this timely appeal followed (R. 147-53).

Summary of the Argument

The lower court's final judgment and order of dismissal should be reversed because the AOB did, in fact satisfy section 627.7152(2)(a)(2), Florida Statutes (2021). The AOB contained a rescission clause that did, in fact, "*allow*" the assignee, Ms. Falcon, to rescind the AOB via a signed writing. There is nothing in the AOB which states otherwise. Thus, the lower court erred in dismissing the suit on grounds the AOB failed to meet section 627.7152. Even if the lower court correctly ruled that the AOB's rescission clause did not comply with subsection (2)(a)(2), the court erred in rejecting Indoor Environmental's equitable estoppel and waiver arguments because those doctrines are valid avoidances of a standing defense. For these reasons, and as further detailed next, Indoor Environmental requests that the Court reverse the lower court's order of dismissal and final judgment.

ARGUMENT

Standard of Review. "A trial court's order granting a motion to dismiss is reviewed de novo." *Grove Isle Ass'n v. Grove Isle Associates*,

137 So. 3d 1081, 1089 (Fla. 3d DCA 2014) (citing *Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006); *GLK, L.P. v. Four Seasons Hotel Ltd.* 22 So. 3d 635 (Fla. 3d DCA 2009); *Susan Fixel, Inc. v. Rosenthal & Rosenthal,*842 So. 2d 204, 206 (Fla. 3d DCA 2003).

ISSUE I: The AOB substantially and materially complied with the rescission provision requirements of section 627.7152(2)(a)(2), Florida Statues.

AOBs Under Section 627.7152. Section 627.7152, Florida Statutes (2021) sets the requirements for the AOB in this post-loss benefits property damage claim case. *See The Kidwell Grp. v. Olympus Ins.,* 346 So. 3d 658, 660 (Fla. 5th DCA 2022) ("Section 627.7152 provides a list of requirements for any agreement that assigns post-loss benefits under a property insurance policy…."); *Adjei v. First Cmty. Ins.,* 352 So. 3d 900, 904 (Fla. 3d DCA 2022) ("The statute [Fla. Stat. § 627.7152] contains a "checklist" of terms that must be included within any such assignment agreement.").

If the AOB here did not "comply" with the requirements of section 627.7152(2), it was "invalid and unenforceable." Fla. Stat. § 627.7152(2)(d). That said, nothing in section 627.7152 equates "compliance" with the statute with "precise, verbatim reproduction"

of the statutory language.[3] Thus, As demonstrated next, the AOB was valid because the rescission clause substantially and materially complied with the requirements of 627.7152(2)(a)(2).

Section 627.7152's Required Rescission Provision. Subsection 2(a)(2) required the AOB "contain a provision that ***allows*** [Ms. Falcon] to rescind the assignment agreement without a penalty or fee by submitting a written [and signed] notice of rescission." Fla. Stat. § 627.7152(2)(a)(2) (emphasis added). In other words, so long as Ms. Falcon was *allowed* to rescind the AOB via a signed, written notice, the AOB complied with subsection (2)(a)(2):

> (2)(a) An assignment agreement must:
>
> * * *
>
> 2. *Contain a provision that* ***allows*** *the assignor to rescind the assignment agreement without a penalty or fee by submitting a written notice of rescission signed by the assignor to the assignee* within 14 days after the execution of the agreement, at least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed, or at least 30 days after the execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property.

Fla. Stat. § 627.7152(2)(a)(2) (emphasis added).

[3] That is, except for subsection (2)(a)(6), which we address below, and which the parties agree the AOB here complied with.

By comparison, subsection (2)(a)(6) required the AOB contain a "notice" which included a rescission provision:

> (2)(a) An assignment agreement must:
>
> * * *
>
> 6. Contain the following notice in 18-point uppercase and boldfaced type:
>
> YOU ARE AGREEING TO GIVE UP CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY TO A THIRD PARTY, WHICH MAY RESULT IN LITIGATION AGAINST YOUR INSURER. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING IT. *YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHOUT PENALTY WITHIN 14 DAYS AFTER THE DATE THIS AGREEMENT IS EXECUTED*, AT LEAST 30 DAYS AFTER THE DATE WORK ON THE PROPERTY IS SCHEDULED TO COMMENCE IF THE ASSIGNEE HAS NOT SUBSTANTIALLY PERFORMED, OR AT LEAST 30 DAYS AFTER THE EXECUTION OF THE AGREEMENT IF THE AGREEMENT DOES NOT CONTAIN A COMMENCEMENT DATE AND THE ASSIGNEE HAS NOT BEGUN SUBSTANTIAL WORK ON THE PROPERTY. HOWEVER, YOU ARE OBLIGATED FOR PAYMENT OF ANY CONTRACTED WORK PERFORMED BEFORE THE AGREEMENT IS RESCINDED. THIS AGREEMENT DOES NOT CHANGE YOUR OBLIGATION TO PERFORM THE DUTIES REQUIRED UNDER YOUR PROPERTY INSURANCE POLICY.

Fla. Stat. § 627.7152(2)(a)(6) (emphasis added).

Citizens and the lower court failed to appreciate that subsection (2)(a)(2) simply required the AOB "*allow*" Ms. Falcon, the assignor, to rescind the AOB via a signed writing. And the AOB's rescission provision—a verbatim copy of the notice provision required by subsection (2)(a)(6))—did exactly that. The AOB here *allowed* Ms. Falcon to notify Indoor Environmental of rescinding the AOB any way she pleased, *including* by way of a signed, written notice per subsection (2)(a)(2). Thus, the rescission provision in the AOB here complied with both subsection (2)(a)(2).

The rescission provision in the AOB also satisfied the legislative intent behind section 627.7152. When the legislature amended section 627.7152, it did so to "address[] the abuse of post-loss AOBs for property insurance claims…."[4] The legislature sought to prevent unscrupulous contractors from abusing AOBs and from "attempt[ing] to transfer broad rights under the policy … with authorization to perform services described only in general times." *Id.* at p. 2. To that

[4] Fla. H.R. CS/CS/HB 7065 (2019) Final Bill Analysis (May 28, 2019), p. 1, https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h7065z1.CJS. DOCX&DocumentType=Analysis&BillNumber=7065&Session=2019.

end, the legislature ensured that the statute would "allow[] the assignor to rescind the agreement without penalty[.]" *Id.* at p. 10.

If Ms. Falcon provided Indoor Environmental with a signed, written notice of rescinding the AOB—as contemplated by (2)(a)(2)—no court would reasonably rule that the notice was invalid under the terms of the AOB. Thus, the AOB's rescission also comports with the spirit of subsection (2)(a)(2) because it *allowed* Ms. Falcon to rescind the AOB, if she chose to do so, via a signed writing.

The lower court therefore erred in dismissing the complaint on those grounds.

ISSUE II: The lower court erred in rejecting Indoor Environmental's equitable estoppel and waiver arguments at the dismissal stage.

The lower court erred in granting Citizens' dismissal motion based on standing because Indoor Environmental raised legally valid avoidances to the standing defense; i.e., waiver and equitable estoppel. As detailed next, the court should have denied the dismissal motion, ordered Citizens to answer the complaint and allow it to raise a standing defense, and permit Indoor Environmental to raise waiver and equitable estoppel as avoidances to the defense.

Standing is an Affirmative Defense. "It is well-established that standing is an affirmative defense…." *Republic of Ecuador v. Dassum*, 255 So. 3d 390, 394 (Fla. 3d DCA 2017). Generally, an affirmative defense "should be pled by the party asserting it, and … thereafter be considered after the facts are fleshed out by summary judgment or trial." *Fariello v. Gavin*, 873 So. 2d 1243, 1245 (Fla. 5th DCA 2004). A motion to dismiss may only be based on an affirmative defense only in "exceptional cases in which the facts giving application to the defense are clearly apparent on the face of the complaint…." *Id.*

Avoidances of Affirmative Defenses. An "avoidance" to an affirmative defense is, "in effect," proving "an affirmative defense to an affirmative defense." *See Reno v. Adventist Health Sys.*, 516 So. 2d 63, 64 (Fla. 2d DCA 1987). An avoidance opposes an affirmative defense by injecting a new matter or issue into the case—an avoidance does more than just deny the defense. *See Hertz Com. Leasing Corp. v. Seebeck*, 399 So. 2d 1110, 1111 (Fla. 5th DCA 1981); *Moore Meats, Inc. v. Strawn*, 313 So. 2d 660, 661 (Fla. 1975).

Importantly, a plaintiff *must* be given leave to allege an avoidance of an affirmative defense so long as the allegations in the

complaint do not "conclusively negate conclusively negate the plaintiff's ability to allege facts in avoidance of the defense…." *Grove Isle Ass'n v. Grove Isle Associates, LLLP*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014).

With these principles in mind, we turn to the avoidances at issue here: equitable estoppel and waiver. Because these are related but distinct legal theories, we analyze them separately. *See DK Arena, Inc. v. EB Acquisitions I*, LLC, 112 So. 3d 85, 97-98 (Fla. 2013) ("While waiver is sometimes viewed as related to estoppel, the two doctrines are founded on different principles and are considered distinct.").

A. EQUITABLE ESTOPPEL

"The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris*, 881 So. 2d 1079, 1084 (Fla.2004).

The AOB's validity was material. Without a valid AOB, there is no assignment, no claim, no right to payment, and no right to sue. The amended complaint's allegations and attachments, taken

together and in a light most favorable to Indoor Environmental, establish that the AOB's validity was a material issue. *See Lloyds Underwriters at London v. Keystone Equip. Finance Corp.*, 25 So. 2d 89, 93 (Fla. 4th DCA 2009) ("The 'representation' upon which an estoppel may be predicated may consist of words, conduct, or, if there is a duty to speak, silence.") (citations omitted).

Indoor Environmental trusted that Citizens would conduct itself in an honest and forthright manner during the claims handling process. If the AOB was not valid, Indoor Environmental would reasonably expect Citizens to raise the issue. By waiting to challenge the AOB's validity until litigation, Citizens obtained a dismissal with prejudice, leaving Indoor Environmental without any recourse. *See Richards v. Dodge*, 150 So. 2d 477, 481 (Fla. 2d DCA 1963) ("The conduct … such as to create an estoppel … consists of willful or negligent words and admissions, or conduct, acts and acquiescence causing another to believe in a certain state of things by which such other person is or may be induced to act to his prejudice.") (internal citations omitted).

Citizens' presuit statements and conduct during the claims process caused Indoor Environmental to proceed as though the AOB

were valid. If Citizens advised Indoor Environmental from the start that it did not believe the AOB was valid, Indoor Environmental could have moved forward with seeking reimbursement from Ms. Falcon for its work. Instead, Citizens lulled Indoor Environmental into a false sense of security, waiting until litigation began to pull the rug out from under it.

In *Gleason v. Leadership Hous., Inc.*, 327 So. 2d 101 (Fla. 4th DCA 1976), "Jackie Gleason, a renowned entertainer and show business personality," entered into an agreement with a real estate developer. Gleason would design "a golf course and related facilities and the exerting of his efforts to obtain and stage [] a golf tournament for the proposed course." *Id.* at 103. In exchange, the real estate developer would deed land to Gleason. *Id.* The developer, through its conduct and statements, continuously led Gleason to believe that the deal was valid. *Id.* at 103-05. Yet the real estate developer continued to give Gleason the run-around, refusing to convey the land it promised to Gleason. *Id.* at 103-04.

Frustrated with the developer's antics, Gleason sued for breach of contract. *Id.* at 103. The trial court entered judgment for the developer, ruling that the agreement was invalid because it violated

the statute of frauds. *Id.* at 103. The Fourth District reversed on grounds of equitable estoppel. *Id.* at 104-05. The court explained that:

> The facts of this case clearly justify application of the doctrine. Appellee in this litigation has sought to adopt, to Gleason's prejudice, a position completely inconsistent with that taken by it prior to litigation, and upon which … led Gleason to believe that the contract was valid and that land meeting the contract standards would be conveyed to him.

Id. at 104.

As in *Gleason*, Citizens adopted, "a position completely inconsistent with that taken by it prior to litigation" which prejudiced Indoor Environmental. Through its conduct and statements, Citizens led Indoor Environmental "to believe that the [assignment agreement] was valid" before arguing the exact opposite after litigation commenced. Thus, equitable estoppel should preclude Citizens from challenging the assignment given its actions during the claims handling process.

In sum, the doctrine of equitable estoppel is well-established in Florida law and the lower court erred by granting the motion to dismiss and not permitting Indoor Environmental to plead it as an avoidance to Citizens' standing defense.

B. WAIVER

A "waiver" is the "voluntary and intentional relinquishment of a known right." Fla. Std. Jury Instr. (Civ.) 416.30, n. 1 (citing *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005); *Bueno v. Workman*, 20 So. 2d 993, 998 (Fla. 4th DCA 2009); *Winans v. Weber*, 979 So. 2d 269, 274 (Fla. 2d DCA 2007)).

"The elements necessary to establish waiver are: the existence of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage." *Id.,* n. 2 (citing *Bueno v. Workman*, 20 So. 2d 993, 998 (Fla. 4th DCA 2009); *Winans v. Weber* 979 So. 2d 269 (Fla. 2d DCA 2007)).

A waiver need not be express—Florida law allows for implied waivers based on a party's conduct. *See Raymond James Financial,* 896 So. 2d at 711 (internal citation omitted).

Here, Citizens had the right to challenge the AOB's validity. *See The Kidwell Grp. v. ASI Preferred Ins.,* 351 So. 3d 1176, 1180 (Fla. 5th DCA 2022) (holding insurer has standing to challenge validity of AOBs under section 627.7152). As one of the largest property insurance carriers in the State of Florida (if not the largest), Citizens

knew Citizens knows it has the right to contest an assignment's validity during the claims process. Yet there is no record evidence that Citizens challenged the AOB here. Instead, everything Citizens did and said demonstrated an intention *not* to challenge the assignment's validity. Thus, it waived its right to raise a standing defense.

In *Fla. Med. Injury v. PRGRSV*, 29 So. 3d 329, 340 (Fla. 5th DCA 2010), the court held that an insurer waives its right to contest the validity of an AOB when the insurer carrier had the opportunity "to apprise the [assignee] of any alleged deficiencies in its claim submission and yet elect[s] to stay silent." This is exactly what happened here—the record shows that Citizens had an opportunity to contest the validity of the assignment during the claims handling process but elected to stay silent.

Thus, Citizens waived its right to challenge the validity of the assignment of benefits agreement, and the lower court erred by granting the motion to dismiss and not allowing Indoor Environmental to plead waiver as an avoidance to Citizens' standing defense.

CONCLUSION

Based on the above, the Court should reverse the lower court's order of dismissal and final judgment for Citizens.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing with the Florida Courts E-Filing Portal on November 28, 2023, which will serve copies on all parties of record via email as identified on the attached service list.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the brief complies with the font and word-count requirements of Florida Rules of Appellate Procedure 9.045 and 9.210.

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