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IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 4D2024-2727

FIRSTSERVICE RESIDENTIAL FLORIDA, INC.,
Appellant,

v.

VISION I HOMEOWNERS ASSOCIATION, INC.,
Appellee.

On Appeal from a Non-Final Order of the Circuit Court
of the Fifteenth Judicial Circuit, Palm Beach County, FL
LT CASE NO.: 50-2023-CA-015418-XXXA-MB

ANSWER BRIEF OF APPELLEE

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III. STATEMENT OF FACTS

Appellee, Vision I Homeowners Association, Inc., ("Vision I") is a Florida not-for-profit homeowners association located in Palm Beach County, Florida.[1] Appellant FirstService Residential Florida, Inc., ("FirstService") was the property management company for Vision I and was doing business in Palm Beach County.[2] The Appellee's case stems from the former board of directors for Appellee Vision I, who purported to pass an amendment for new roofs that was void *ab initio*. The amendment was defective for failing to properly notice the meeting, falsely reporting information on the meeting minutes, counting invalid proxies, misrepresentation of insurance cancellation, and false certification of the amendment's passage.[3] On the basis of the void amendment, the former board entered into an unapproved roofing contract; contracted for work that was not part of the amendment; secured a loan for repayment by all owners despite the amendment having only placed liability for repayment against owners receiving a new roof; made payment toward the loan from

[1] (A. 51, 52, ¶¶ 3, 4). References to the Appendix ("A.") are to Appellant's Appendix.
[2] (A. 57, ¶¶ 35, 36).
[3] (A. 59, ¶ 49; A. 60, ¶ 56; A. 62, ¶ 66; A. 64, ¶¶ 76, 77 & 80).

the funds belonging to all owners; and failed to assess the roofing costs to those owners who received a new roof.[4]

Based on the wrongful conduct of the former board for Appellee, Vision I filed suit and on December 6, 2023, filed its Amended Complaint.[5] At Count I of the Amended Complaint, Appellee brought a claim for breach of fiduciary duty against the five former board members of Appellee Vision I.[6] The Amended Complaint included allegations that all Defendants (five board members and Appellant FirstService) worked together to ensure that the roof amendment and the subsequent actions based on the improperly recorded amendment were in willful and/or grossly negligent disregard for the requirements of Chapter 720, the Appellee, and the best interests of the owners.[7] Accordingly, Appellee Vision I brought two counts in its Amended Complaint against Appellee FirstService: Count II for aiding and abetting the former board of directors in breaching their fiduciary duty to Vision I and Count III for breach of the management agreement.[8] Count II specifically centers on the allegations that FirstService knew of the

[4] (A. 66, ¶ 93; A. 67, ¶ 94; A. 68, ¶¶ 101,105–108; A. 69, ¶¶ 109–112).
[5] (A. 51).
[6] (A. 70).
[7] (A. 69, ¶ 113; A. 63, ¶ 68).
[8] (A. 75, A. 76).

board members' breach of fiduciary duty and substantially assisted in their wrongdoing by FirstService's actions and omissions.[9]

The former board member Defendants filed a motion to dismiss the Amended Complaint on February 14, 2024, and FirstService also filed a motion to dismiss the Amended Complaint on March 1, 2024.[10] On May 14, 2024, Vision I filed its response in opposition to FirstService's motion.[11] On September 23, 2024, the court granted the board members' motion to dismiss the Amended Complaint and gave leave to amend the complaint, while by separate order denying FirstService's motion to dismiss.[12] Vision I filed its Second Amended Complaint on October 14, 2024.[13] Despite the Second Amended Complaint being the operative complaint, Appellant filed its Notice of Appeal of the order pertaining to the (first) Amended Complaint on October 21, 2024, and subsequently this appeal.[14]

Both the Amended Complaint and Second Amended Complaint contain allegations by Appellee Vision I that all events giving rise to the claims and the damages were incurred in Palm Beach County.[15] The

[9] (A. 75, ¶ 136).
[10] (A. 81 & 91).
[11] (A. 127).
[12] (A. 138, 141).
[13] (A. 144).
[14] (A. 177).
[15] (A. 51, ¶ 2; A. 145, ¶ 2).

causes of action against Appellant in the Amended Complaint and the Second Amended Complaint remain the same, with Count II remaining as the cause of action for aiding and abetting a breach of fiduciary duty and Count III being for breach of contract.[16] The parties do not dispute the existence of a forum selection clause designating Broward County as the forum for disputes.

IV. SUMMARY OF THE ARGUMENT

This appeal should be dismissed as moot because Appellee Vision I has filed a Second Amended Complaint that supersedes the Amended Complaint that was the subject of the trial court's order. Florida courts consistently hold that the filing of an amended complaint renders moot any appeal relating to the original complaint.

Even if the Court reaches the merits, the trial court properly declined to enforce the forum selection clause based on compelling reasons recognized by Florida courts. The trial court correctly determined that enforcement would result in multiple lawsuits involving the same witnesses and evidence, create unnecessary duplication of judicial labor, and risk

[16] (A. 75, 76, 171, 172).

inconsistent verdicts given the interconnected nature of the claims against FirstService and the other defendants in Palm Beach County.

V. STANDARD OF REVIEW

This Court has jurisdiction to review the non-final order denying Appellant's motion to dismiss under Florida Rule of Appellate Procedure 9.130(a)(3)(A), which permits review of non-final orders concerning venue. While the *interpretation* of a forum selection clause is reviewed de novo, the trial court's decision in the order denying dismissal turns on declining to enforce the forum selection clause altogether. Here, the applicable standard of review is competent, substantial evidence.

The trial court's decision in this case was based on whether there exist compelling reasons to decline to enforce the forum selection clause.[17] When a trial court decision is based on factual findings, the standard of review applicable to the trial court's factual findings is whether they are supported by competent, substantial evidence. *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1023 (Fla. 4th DCA 2005). In this case, the trial court did not base its ruling on an interpretation of the subject forum selection clause; rather the court found that enforcement of the forum

[17] (A. 138–140, 127–131).

selection clause was outweighed by compelling reasons for the case to proceed in Palm Beach County. Thus, the applicable standard of review here is whether the trial court's order was based on competent, substantial evidence.

VI. ARGUMENT

A. THE APPEAL OF THE NON-FINAL ORDER IS MOOT DUE TO THE FILING OF THE SECOND AMENDED COMPLAINT

This appeal is moot because Vision I filed its Second Amended Complaint after the trial court entered the non-final order that is the subject of this appeal. The Second Amended Complaint [A. 144] supersedes the prior Amended Complaint [A. 51], and was filed after the entry of the appealed non-final order [A. 138]. Florida courts have consistently held that the filing of an amended complaint renders the legal sufficiency of the original complaint moot. *See Vanderberg v. Rios*, 798 So. 2d 806, 807 (Fla. 4th DCA 2001); *City of N. Miami Beach v. City of Miami Gardens*, 306 So. 3d 211, 212 (Fla. 3d DCA 2020); *Adweiss LLLP v. Daum*, 367 So. 3d 1264, 1266 (Fla. 3d DCA 2023).

On September 23, 2024, the lower tribunal entered two separate non-final orders. One order dismissed the Amended Complaint and

provided the Appellee an opportunity to amend the pleading.[18] The second order, which is the subject of this appeal, denied the Appellant FirstService's motion to dismiss.[19] In compliance with the non-final order permitting leave to amend, Appellee filed its Second Amended Complaint, which superseded the Amended Complaint.[20] Therefore, the Amended Complaint is no longer the operative complaint, rendering the appeal of the non-final order as moot.

If FirstService seeks to challenge the venue regarding the Second Amended Complaint, it must file a new motion addressing the operative pleading. This would permit the trial court to consider the venue issue in the context of the current operative pleading. Accordingly, this appeal should be dismissed as moot. Even though this appeal may be technically moot, because the issue brought by Appellant in this appeal is the same under the Amended Complaint as under the Second Amended Complaint, Appellee sets forth below its substantive argument as to the appropriateness of the trial court's ruling.

B. THE TRIAL COURT'S DENIAL OF ENFORCEMENT OF THE FORUM SELECTION CLAUSE IS SUPPORTED BY SUBSTANTIAL COMPELLING REASONS

[18] (A. 141)
[19] (A. 138)
[20] (A. 144)

The Appellee does not dispute that the contract between Appellant and Appellee contains a forum selection clause in favor of Broward County. However, Appellant has mischaracterized the trial court's ruling as being based on the interpretation and enforceability of a forum selection clause. Here, the trial court's decision was based on whether there exist compelling reasons to decline to enforce the forum selection clause.

While mandatory forum selection clauses are generally enforced, Florida courts recognize an exception when "compelling reasons" justify non-enforcement. *Love's Window & Door Installation, Inc. v. Acousti Engineering Co.*, 147 So. 3d 1064, 1065 (Fla. 5th DCA 2014) (citing *Mason v. Homes by Whitaker, Inc.,* 971 So. 2d 1029, 1029–30 (Fla. 5th DCA 2008); *Girdley Constr. Co. v. Architectural Exteriors, Inc.,* 517 So. 2d 137, 138 (Fla. 5th DCA 1987) (holding a forum selection provision should not be enforced when a transfer of venue would result in multiple suits and splitting causes of action)). The compelling reasons cited by Florida courts for not enforcing a forum selection clause include "avoiding multiple lawsuits, minimizing judicial labor, reducing the expenses to the parties, and avoiding inconsistent results." *Id*. If enforcement of the forum selection clause would result in multiple lawsuits, or in the splitting of causes of action, the clause should not be enforced. *See Mason*, 971 So. 2d at

1029–30; *McWane, Inc. v. Water Management Services, Inc.*, 967 So. 2d 1006 (Fla. 1st DCA 2007); *Dore v. Roten*, 911 So. 2d 218, 220–221 (Fla. 2d DCA 2005); *Girdley Constr. Co.*, 517 So. 2d at 138 (Fla. 5th DCA 1987); *Interval Marketing Associates, Inc. v. Sea Club Associates IV, Ltd.*, 468 So. 2d 262, 263 (Fla. 2d DCA 1985).

The reasons for not enforcing a forum selection clause Florida appellate courts have found to be compelling are all present in this case. In *Love's Window & Door Installation, Inc.*, the Fifth District Court of Appeal addressed an appeal arising from complex litigation involving a construction project, including claims filed by the developer and the general contractor, as well as "third and fourth party complaints." 147 So. 3d at 1065. In one of the claims, the general contractor sued subcontractors regarding improperly installed windows. *Id.* The contract between the general contractor and the subcontractor contained a forum selection clause. *Id.* The court analyzed whether the forum selection clause should be enforced and stated, "Compelling reasons not to enforce a forum selection clause include avoiding multiple lawsuits, minimizing judicial labor, reducing the expenses to the parties, and avoiding inconsistent results." *Id.* The court noted that some of the same witnesses would have to testify in both forums (the original forum and the selected forum), and

that claims against the principal of the sub-subcontractor would have to stay in the original forum. *Id.* at 1065–66. With these findings, the court found "a compelling reason not to enforce the forum selection provision found in the parties' contract." *Id.* at 1066.

In *Mason v. Homes by Whitaker, Inc.*, the Fifth District Court of Appeal addressed an appeal arising from denial of a motion to transfer venue of a breach of contract case to consolidate that action with a lien foreclosure action involving the same parties and the same property. The breach of contract case was venued in Marion County pursuant to a contractual forum selection clause, and the foreclosure suit was brought in Clay County, where the property was located. 971 So. 2d 1029. The buyer asked the Marion County court to transfer the breach of contract case from Marion County to Clay County, despite the forum selection clause, so that the two actions could be consolidated. *Id.* On appeal, the court started with the basic rule that "a mandatory forum section clause contained in a contract should be enforced absent a showing that the clause is unreasonable or unjust." The court then noted that "a court is not bound to abide by such an agreement where, as here, there are compelling reasons not to enforce it." *Id.* at 1030. The court stated that transfer of the breach of contract case from Marion County (where the forum selection clause

dictated the breach of contract case should proceed) to Clay County (the location of the foreclosure lawsuit) "would avoid multiple lawsuits, minimize judicial labor, reduce the expenses to the parties and avoid inconsistent results." *Id.* Importantly, the court observed, "In both cases, the witnesses and the basic dispute are the same. Having separate proceedings makes no sense, despite the forum selection provision in the contract." *Id.*

Also, in *Interval Marketing Associates, Inc. v. Sea Club Associates IV, Ltd.*, the Second District Court of Appeal addressed an action involving two plaintiffs: one with an agreement that contained a forum selection clause naming Volusia County and one with an agreement that contained a forum selection clause naming Sarasota County. The plaintiffs filed suit in a single action in Sarasota County. While the court determined the plaintiffs had the right to bring a cause of action in Sarasota County, where one of the causes of action arose, and the parties could change the right by agreement to venue in their contract, it said, “Nevertheless, a court is not bound to abide by such an agreement where, as here, there are compelling reasons not to enforce it. . . . Thus, venue in one court may avoid the necessity for multiple suits and may expedite determination of the issues in this case.” 468 So. 2d 262, 263.

In the instant case, the events giving rise to this action occurred in Palm Beach County; the property at issue, Vision I, and all five defendants other than Appellant are located in Palm Beach County, and FirstService carried out the management services for Vision I in Palm Beach County. FirstService maintains an office in Palm Beach County, out of which they operated the services for Vision I. Venue for the causes of action claimed in the Amended Complaint and the Second Amended Complaint are properly before the Palm Beach County court. All board meetings and votes that are at issue in this case took place in Palm Beach County. All of the witnesses pertinent to the facts of the underlying action will likely be located in Palm Beach County. The actions of the former board members that breached their fiduciary duty are fundamentally interconnected with the Appellant FirstService's role as property manager, including FirstService's actions in aiding and abetting the board's breach of their fiduciary duty. Ultimately, the claims arise from the same series of events regarding the roofing project and amendments to association documents.

In the end, it is undisputed that there are elements of the underlying suit that cannot be litigated in Broward County; in fact, the vast majority if not all of the acts, witnesses, and documents are present in or tied to Palm Beach County, not Broward County. Separating these related claims into

different venues would create unnecessary duplication of judicial labor, time, and expense for the same witnesses and attorneys to litigate issues based on the same set of facts in two different courts and create the risk of inconsistent results. Frankly, it is conceivable that the Palm Beach County courts could find that the former board did not breach their fiduciary duty, yet the Broward could find that FirstService is liable for aiding and abetting the breach of fiduciary duty. In the words of the Court in *Mason*, "[h]aving separate proceedings makes no sense."

In summary, the trial court's order reflects competent, substantial evidence demonstrating that maintaining venue in Palm Beach County serves the interests of justice and judicial economy.

VII. CONCLUSION

This Court should dismiss the appeal as moot due to the filing of the Second Amended Complaint. Alternatively, the Court should affirm the trial court's order denying enforcement of the forum selection clause because compelling reasons justify maintaining all claims in Palm Beach County to avoid multiple lawsuits, minimize judicial labor, reduce expenses to the parties, and prevent inconsistent results.

VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this December 20, 2024, to all parties listed below. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this December 20, 2024.

By: 
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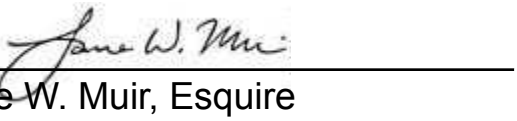
IX. CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with Florida Rules of Appellate Procedure 9.045 and 9.210, in that it was prepared utilizing Arial 14-point font and contains less than 13,000 words.



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