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IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 4D2023-2682

TERRACE GALLERY, LLC,

Appellant,

v.

GALLERY ONE CONDOMINIUM ASSOCIATION, INC.,

Appellee,

DEJ HOTELS, LLC,

Intervenor/Defendant-Appellee/Cross-Appellant.

BRIEF OF INTERVENOR/DEFENDANT-APPELLEE/ CROSS-APPELLANT DEJ HOTELS, LLC

ON APPEAL FROM A PARTIAL FINAL JUDGMENT ENTERED IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

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INTRODUCTION

A single residential unit owner, Plaintiff-Appellant Terrace Gallery, LLC (Terrace), sued Defendant-Appellee Gallery One Condominium Association, Inc. (the Association), seeking declaratory relief that would have, among other things, re-written the 2005 Declaration of Gallery One Condominium (the Declaration) to "reclassify" property (the Hotel Unit) that is owned by Intervenor/Defendant-Appellee/Cross-Appellant DEJ Hotels, LLC (DEJ). DEJ owns and operates the Hotel Unit, all 25 of the commercial units, and a number of the residential units in Gallery One, and has entered into an agreement to allow the building to operate as a DoubleTree Suites by Hilton Hotel (the Hotel).

Terrace's requested declaratory relief would have judicially transferred DEJ's fee simple title interest in the Hotel Unit from DEJ to all 257 Gallery One Condominium (Gallery One) Unit Owners in undivided interests, divested DEJ from its rights to maintain and manage the taken property, and granted that right to the Association. Essentially, Terrace sought unilaterally to amend the Declaration in violation of the terms of the Declaration to take a portion of DEJ's Hotel Unit, defined in the Declaration as "Shared Components," and

convert those Shared Components into Gallery One "Common Elements"—some 17 years after the Declaration was recorded and Gallery One was established. And Terrace did so without naming even DEJ as a defendant.

Indeed, Terrace's action was in flagrant violation of Section 718.110(10), Florida Statutes. This is so because Terrace claimed that the Shared Components as defined in the Declaration were improperly included as part of the Hotel Unit and instead are *statutorily required* to be included as part of the minimum Common Elements required by The Florida Condominium Act, Chapter 718, Florida Statutes. Accordingly, the alleged error in the Declaration, as asserted by Terrace, directly challenged and affected "the valid existence of the condominium." Section 718.110(10), Florida Statutes, establishes the requirements for a challenge of this nature and mandates that "[a]ll unit owners, the association, and the mortgagees of a first mortgage of record must be joined as parties to the action."

Because its ox was the one being gored by Terrace's claims, DEJ moved for leave to intervene as a defendant. Before DEJ's motion could be heard, however, Terrace and the Association entered into a

joint stipulation for entry of a consent judgment that would have granted every bit of the relief sought in Terrace's complaint.

The trial court granted DEJ's motion to intervene and denied the Terrace-Association request for a consent judgment. DEJ answered the complaint and pleaded affirmative defenses, including the three-year statute of repose set forth in Section 718.110(10), Florida Statutes, the five-year contract-claims statute of limitations set forth in Section 95.11(2)(b), Florida Statutes, and Terrace's failure to join indispensable parties, as required by Sections 86.091 and 718.110(10), Florida Statutes, the terms of the Declaration, and common law. Both Terrace and DEJ thereafter moved for summary judgment. Terrace responded to DEJ's motion; the Association did not (nor did the Association seek summary judgment).

The trial court entered partial summary judgment for Terrace and denied DEJ's motion. Applying the Third District Court of Appeal's decision in *IconBrickell Condo. No. 3 Ass'n v. New Media Consulting, LLC*, 310 So. 3d 477 (Fla. 3d DCA 2020), the trial court ruled that designating as Shared Components certain "property and installations required for the furnishing of utilities and services"

violated Section 718.108, Florida Statutes. The court otherwise denied all relief sought by Terrace.

The court denied DEJ's motion for summary judgment, in which DEJ asserted that Terrace's aged claims were barred by the statutes of repose and limitations. The court ruled that the three-year statute of repose in Section 718.110(10), Florida Statutes, for challenges to errors or omissions in a declaration, is inapplicable because Terrace was not seeking relief that would have affected "the formation . . . or the existence of the condominium." The court further ruled that the five-year statute of limitations in Section 95.11(2)(b), Florida Statutes, does not bar Terrace's claims because those claims did not accrue until Terrace had purchased its unit.

On its appeal, Terrace is challenging the trial court's denial of relief, other than the court's ruling for Terrace on "property and installations required for the furnishing of utilities and services." The Association raises a similar challenge in its separate appeal of the trial court's summary judgment (No. 4D2023-2681). That is, *both* of the original parties to this action are attacking the trial court's Final

Order. DEJ's cross-appeal is brought to challenge the trial court's denial of relief to DEJ on its affirmative defenses.[1]

STATEMENT OF THE CASE AND FACTS

I. THE GALLERY ONE DECLARATION.

The Declaration created Gallery One on December 14, 2005, converting an existing hotel into a condominium. (R:2647, 2698, 2734). Gallery One comprises 231 Residential Units, 25 Commercial Units, and the Hotel Unit. (R:2708). The Hotel Unit, which includes substantially all condominium property other than the Residential Units and Commercial Units, operates as a Hilton Double Tree Suites. (R:2595-96, 2695).

Rather than a traditional residential condominium, Gallery One is a "resort condominium," *see* § 509.242, Florida Statutes, *i.e.*, residential unit owners may freely lease their units on a nightly basis. (R:2729, 2734). Section 16.7 of the Declaration evinces the intent freely to allow leasing of residential units. (R:2729) ("It is intended that the Residential Units may be used for rentals. As such, leasing of Units or portions thereof shall not be subject to the approval of the Association."). That provision—and all other provisions in the

[1] On DEJ's motion, this Court has consolidated the appeals for purposes of assignment to the same panel.

Declaration—are perpetual covenants running with the land, are binding on all unit owners, and inure to unit owners' benefit. (R:2734). "The acceptance of a deed or conveyance, or the entering into of a lease, or the entering into occupancy of any Unit, shall constitute an adoption and ratification of the provisions of th[e] Declaration." *Id.* Section 23.8 of the Declaration, titled "Ratification," states that "[e]ach Unit Owner, by reason of having acquired ownership[,] . . . and each occupant of a Unit, by reason of [their] occupancy, shall be deemed to have acknowledged and agreed that all of the provisions of this Declaration . . . are fair and reasonable in all material respects." (R:2737).

Section 2.13 of the Declaration defines Common Elements, in pertinent part, as "[t]he portions of the Condominium Property which are not included within the Units." (R:2704). This aligns with Section 718.103(9), Florida Statutes, which defines "Common Elements" as the portions of the condominium property not included in the units.

Section 2.13 further states:

> The Condominium has been established in such a manner to minimize the Common Elements. Most components which are typical "common elements" of a condominium, have instead been designated herein as part of the Shared Components of the Hotel Unit, including, without

> limitation, all property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements, if any.

(R:2704).

Section 2.36 of the Declaration states:

> Together . . . the Common Elements, Residential Units, Commercial Units and the Hotel Unit have been, or shall be, constructed as a single structure and operated as an integrated project.

(R:2707). "Given the integration of the structure," the Shared Components include numerous improvements that could be deemed Common Elements in a traditional residential condominium. *Id.*

Section 6.5 of the Declaration protects the rights conferred by the Declaration upon the Hotel Unit owner. (R:2713). "No amendment may be adopted which would eliminate, modify, prejudice, abridge or otherwise adversely affect any rights, benefits, privilege or priorities granted or reserved to the Owner(s) from time to time of the Hotel Unit, without the consent of the applicable Unit Owner(s) in each instance." *Id.*

II. THE TRIAL COURT'S RULINGS.

A. Terrace's Claims.

Terrace's Complaint pleaded that "[t]here are substantial doubts, disputes and questions which must be resolved concerning

certain provisions of the Declaration, particularly and without limitation, Sections 2.13, 2.14, 2.27, 2.36, 3.3, 3.4, 5.1, 7.3, 8.3, 9.1, 12.1, and 12.3 thereof." (R:26). Terrace alleged that the cited provisions "are in conflict" with Chapter 718, Florida Statutes. (R:34, 38).

Count I sought three declarations: (i) that the cited Declaration provisions "are unfair, unreasonable, and violate [Chapter 718]"; (ii) that "the percentage of ownership in the Common Elements assigned to the Hotel Unit is invalid"; and (iii) that "all assessments . . . imposed by the Hotel Unit Owner are unlawful." (R:37). Terrace requested the court to "[r]equire[] reformation of the Declaration to comply with Florida law." *Id.* Count II requested a specific declaration on Section 2.36 of the Declaration, converting Shared Components into Common Elements, and similarly pleaded for reformation. (R:39).

The Association is the only defendant named in the complaint. (R:27). The trial court granted DEJ's motion to intervene and refused to enter the proposed consent judgment proffered by Terrace and the Association. (R:237-47, 248-49).

B. The Summary Judgment Motions.

Terrace's summary judgment motion asserted that the Declaration violates Chapter 718 "by designating what should be 'common elements,' owned and controlled by the residential association, as 'shared components' owned and operated by [DEJ]" as the Hotel Unit Owner. (R:1259). Terrace argued that the Declaration violates Chapter 718 "by improperly recharacterizing all or virtually all common elements . . . as 'Shared Components' owned by the Hotel Unit owner." (R:1277, 2975). Terrace requested a "finding that . . . portions of the Declaration impermissibly divest unit owners of their undivided share in the ownership and control of the Condominium's 'common elements' in violation of the Florida Condominium Act." (R:2976).

In both its response to Terrace's summary judgment and in its own motion for summary judgment, DEJ asserted, in part, that Terrace's claims are barred by the Florida Condominium Act's three-year statute of repose, § 718.110(10), Florida Statutes, and the five-year statute of limitations on contract disputes, § 95.11(2)(b), Florida Statutes, as pleaded in DEJ's affirmative defenses, counterclaim, and cross-claim. (R:552-54, 571-75, 944-48, 952-53, 1058-61, 1070-90,

1459-63, 1474-77, 1482, 2136-47, 2679-83). The Association did not respond to either summary judgment motion and did not itself seek summary judgment. (R:3108).

C. The Trial Court's Order.

The trial court first ruled that Terrace's claims are not barred by the statute of repose because Terrace "is not seeking a judgment determining whether the Declaration's errors affect[] the formation of the condominium or the existence of the condominium," but rather "is seeking a declaratory judgment finding that the specific provisions of the Declaration pertaining to the 'shared components' impermissibly reclassify the statutorily required 'common elements.'" (R:3109-10 (emphasis omitted)). The court rejected DEJ's limitations defense on a ruling that Terrace and DEJ became adverse only when Terrace purchased its Gallery condominium unit, which was less than five years before the action was commenced. (R:3110-11).

On Terrace's summary judgment motion, the trial court relied on *IconBrickell Condominium No. Three Association v. New Media Consulting, LLC*, 310 So. 3d 477, 480 (Fla. 3d DCA 2020) ("all provisions of a condominium declaration must conform to the Act, 'and to the extent that they conflict therewith, the statute must

prevail'" (quoting *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995)), to rule that "the Declaration's characterization of elements that are statutorily required to be 'common elements' as 'shared components'" violates Section 718.108. (R:3113). But the court limited that ruling: "the only elements required to be 'common elements' . . . that were included as 'shared components' in the Declaration [are] 'all property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements,'" such that only Section 2.13 of the Declaration violates Section 718.108, Florida Statutes, and solely to that limited extent. (R:3113-14 (emphasis omitted)).

The court rejected Terrace's challenge to all other Declaration provisions set forth in the complaint as "unfair and unreasonable." (R:3114). The only relief granted by the court was a determination that Section 2.13 "is in conflict with [Section 718.108] and must conform" with the statute solely to the limited extent of failing to add "all property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements." (R:3113-14, 3118).

Terrace and the Association moved for rehearing, with the Association also seeking clarification related to an asserted inconsistency in the court's ruling. (R:3126-30; R:3210-3378). Specifically, the Association claimed the court's ruling created "an apparent contradiction" by failing to recognize that Section 2.36 of the Declaration—like Section 2.13—conflicts and must conform with Section 718.108. (R:3213-18). The court denied the motions. (R:3520-22; R:3523-25).

SUMMARY OF ARGUMENT

1. On the appeals by Terrace and the Association from the partial final judgment and underlying summary judgment, the Court should affirm the judgment because the limited relief granted by the trial court is consistent with the Third District's *IconBrickell* decision, which is the primary authority for Terrace's claims. As in *IconBrickell*, the trial court here ruled that one element of the Shared Components should be treated as a Common Element, and rejected Terrace's vague claims that provisions of the Declaration should be stricken as "unfair."

The trial court's partial final judgment properly adjudicated both Count I and Count II of the complaint, contrary to Terrace's

assertion that it was entitled to a trial on those counts after summary judgment was denied. Count I was fully addressed, and the trial court correctly ruled that its demise doomed the all-but identical claim in Count II.

2. On DEJ's cross-appeal, the Court should overturn the Final Order and Partial Summary Judgment in entirety, for three independent reasons.

First, Terrace failed to join all individual unit owners, as required by Sections 86.091 and 718.110, Florida Statutes. The statute is specific and mandatory, and joining the Association as a party is not a substitute for statutory compliance.

Second, the three-year statute of repose in Section 718.110 required the trial court to reject Terrace's attempt to invalidate a *17-year old* Declaration. And third, the five-year statute of limitations for contract-based claims would bar Terrace's action, even if the statute of repose did not.

ARGUMENT

I. STANDARD OF REVIEW.

"The standard of review for an entry of summary judgment is *de novo*." *Glegg v. Van Den Hurk*, 379 So. 3d 1171, 1173 (Fla. 4th DCA 2024). The same review standard applies to both "[a] trial court's interpretation of a condominium's declaration," *Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n*, 105 So. 3d 579, 580 (Fla. 3d DCA 2012), and a trial court's application of the Florida Condominium Act. *IconBrickell Condo. No. Three Ass'n v. New Media Consulting, LLC*, 310 So. 3d 477, 479 (Fla. 3d DCA 2020).

A trial court's rulings on statutes of repose and limitations are also reviewed *de novo*. *E.g., Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 692 (Fla. 2015) (statute of repose); *It's A New 10, LLC v. Wilson*, 367 So. 3d 539 (Fla. 4th DCA 2023) (statute of limitations).

II. THE LIMITED RELIEF GRANTED BY THE TRIAL COURT IS CONSISTENT WITH THE THIRD DISTRICT'S DECISION IN *ICONBRICKELL CONDO. NO. THREE ASS'N V. NEW MEDIA CONSULTING, LLC*, 310 So. 3d 477, 479 (Fla. 3d DCA 2020) [Answer Brief].

A. The Court's Final Order.

On their appeals from the Final Order, both Terrace and the Association seek invalidation of multiple provisions of the

Declaration, beyond Section 2.13, the single provision as to which relief was afforded by the trial court's ruling. Appellant's Initial Brief (No. 4D2023-2682) (Terrace Brief) at 26-42; Appellant Gallery One Condominium Association, Inc.'s Initial Brief (No. 4D2023-2861) (Association Brief) at 12-18. The trial court ruled that "the only elements required to be 'common elements' . . . that were included as 'shared components' in the Declaration [are] 'all property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements,'" such that only Section 2.13 of the Declaration violates Section 718.108, Florida Statutes, and solely to that limited extent. (R:3113-14 (emphasis omitted)).

That ruling is consistent with the Third District's decision in *IconBrickell*, but ignores the curative language of Section 718.110, Florida Statutes, which expressly provides: "If an action to determine whether the declaration or another condominium document complies with the mandatory requirements for the formation of a condominium is not brought within 3 years of the recording of the certificate of a surveyor and mapper . . . or the recording of an instrument that transfers title to a unit in the condominium which is

not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first, *the declaration and other documents will effectively create a condominium, as of the date the declaration was recorded*, regardless of whether the documents substantially comply with the mandatory requirements of law." § 718.110(10), Fla. Stat. (emphasis added). Based upon this language, even if there was something non-compliant in the Declaration, the Declaration is deemed compliant upon expiration of the three-year period.

The declaration in *IconBrickell* is identical to the Gallery One Declaration in material respects, designating "all 'property and installations required for the furnishing of utilities and other services to more than one unit or to the Common Elements, if any.'" 310 So. 3d at 481. The Third District held that "[t]his recharacterization, and the resultant expropriation of undivided common ownership, indubitably contravenes the edict of the Act." *Id.*

Critically, the Third District "decline[d] to embrace the broader proposition that the transfer of ownership and control of any amenities traditionally designated as common elements violates the spirit, if not the letter, of the law." *Id.* The court noted that the

"threshold misnomer" in the *IconBrickell* declaration, *i.e.*, "misnaming" property and installations required for the furnishing of utilities and other services to more than one unit or to the Common Elements, if any, as Shared Components rather than Common Elements in the Declaration, "necessarily engendered the litany of additional statutory violations comprehensively delineated in the [trial court's] order." *Id.* But the court, citing the artful adage that, "[i]f it is not necessary to decide more, it is necessary not to decide more," rejected the blunderbuss challenge to the declaration in that case. *Id.* at 481 n.2. So too did the trial court here, and properly so.

B. Terrace's Procedural Arguments Are Unpreserved and Meritless.

Terrace argues that the trial court erred in entering its Final Order because Terrace had "the right to proceed to trial on the remainder of Count I," and in adjudicating Count II. Terrace Brief at 42-49. Terrace fails to address the trial court's express ruling that Terrace's post-Final Order motion for rehearing, in which Terrace attempted to raise these issues before the trial court (R:3216-44), was denied as *untimely* by the trial court. (R:3520-21); Terrace Brief at 8-9, 42-50. Because Terrace's initial brief offers *no* arguments that

the trial court erred in ruling that the rehearing motion was untimely, Terrace has *waived* that issue for appellate review. *E.g., Delray Beach Cmty. Redevelopment Agency v. Robinson*, 312 So. 3d 934, 936 (Fla. 4th DCA 2021).[2]

The trial court alternatively addressed the merits of Terrace's untimely objections, but only to "clarify its ruling without effect to the Final Order." (R:3521). The court ruled that there was no basis to reconsider the order on Terrace's Count I, *i.e.*, "there is no question of law or fact left for the Court to answer." *Id.* On appeal, Terrace vaguely alludes to "the remainder of Count I"—but never explains how anything "remained" to be adjudicated by the trial court once the court granted the limited relief set forth in Point II.A., *supra*, and denied further relief. Terrace Brief at 45.

As for Terrace's confected "due process" argument with respect to its Count II (Terrace Brief at 48-50), in which Terrace sought declaratory relief to convert the Hotel Unit's Shared Components into Common Elements, the Final Order merely *denies* Terrace's summary judgment motion and grants *no* affirmative relief to DEJ.

[2] Terrace cannot, of course, raise new arguments in its reply brief. *E.g.*, *Miller v. State*, 379 So. 3d 1109, 1122 n.9 (Fla. 2024).

(R:3118). Terrace recognized as much in its rehearing motion. (R:3127 (referring to "the denial of [Terrace's] Motion for Summary Judgment [as] to Count II")). Moreover, as DEJ noted in its opposition to the rehearing motion, the arguments set forth in Terrace's summary judgment papers are as applicable to Count II as they are to Count I. (R:3149-50).[3]

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR TERRACE [Cross-Appeal].

On summary judgment, "[t]he movant must disprove the [defendant's] affirmative defenses or show they are legally insufficient." *Prime Inv'rs & Devs., LLC v. Meridien Cos.*, 289 So. 3d 1, 6 (Fla. 4th DCA 2020) (citation omitted). Here, DEJ pleaded failure to join all Gallery One unit owners as indispensable parties, the statute of repose, and the statute of limitations as affirmative defenses, opposed summary judgment for Terrace because of those valid defenses, and also moved for summary judgment on the defenses (and other defenses as well). (R:552-54, 571-75, 944-48, 952-53, 1058-61, 1070-90, 1459-63, 1474-77, 1482, 2136-47, 2679-

[3] Terrace also acknowledged that Count II is essentially duplicative of Count I: "I think if the Court rules favorably [to Terrace] on Count I, Count II may become moot." (R:3176).

83). Because the record indisputably establishes DEJ's defenses, the trial court erred in granting even its partial summary judgment for Terrace and, indeed, in denying summary judgment for DEJ. At a bare minimum, DEJ's defenses raised triable issues of fact that barred entry of summary judgment for Terrace on Count I, relating to the striking from Section 2.13 of the Declaration the phrase "property and installations required for the furnishing of utilities and other services to more than one unit or to the Common Elements, if any." (R:3112-14, 3118).

A. Terrace Failed to Join All Unit Owners as Indispensable Parties.

"A declaration of condominium . . . operates as a contract . . . , spelling out mutual rights and obligations of the parties thereto." *Cohn v. Grand Condo. Ass'n*, 62 So. 3d 1120, 1121 (Fla. 2011) (citation and internal quotation marks omitted). The declaration thus "operates as a contract among unit owners and the association." *Id.* (citation omitted). Terrace, however, failed to name *any* unit owners—including DEJ—as defendants in its action, which was brought solely against the Association, necessitating DEJ's intervention in the case to defend the Declaration. Terrace thus

sought to adjudicate unit owners' contractual rights by naming only a *separate* party to that contract—the Association—as a defendant.

A condominium is solely a creature of statute. It is only created when a condominium declaration is recorded. When a person buys a condominium unit, they make a decision to live in accordance with the terms and conditions established by the condominium declaration. The Condominium Act, in Section 718.104, Florida Statutes, grants broad discretion in the terms that may be included in a Declaration. A change to any provision of a declaration affects all unit owners.

"[A]n indispensable party is one whose interest will be substantially and directly affected by the outcome of the case or whose interest in the subject matter is such that if he is not joined[,] a complete and efficient determination of the equities and rights between the other parties is not possible." *Toyano's Auto Repair Servs. v. S. Auto Fin. Co.*, 331 So. 3d 186, 188 (Fla. 4th DCA 2021) (citation and internal quotation marks omitted; brackets in original). Here, Florida statutes control on the question whether the absent unit owners were required to be named as defendants.

First, Section 86.091, Florida Statutes, states:

> When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. *No declaration shall prejudice the rights of persons not parties to the proceedings*.

Id. (emphasis added). Under this statute, "all persons materially interested, either legally or beneficially, in the subject-matter of the suit *must* be made parties . . . so that a complete decree may be binding upon all parties." *Stevens v. Tarpon Bay Moorings Homeowner's Ass'n*, 15 So. 3d 753, 754 (Fla. 4th DCA 2009) (citation omitted; emphasis added).

Second, and more specifically, when a claim is made by "one or more of the unit owners in the condominium" of an "error or omission" in a declaration "[a]ll unit owners, the association, and the mortgagees of a first mortgage . . . *must be joined as parties to the action*." § 718.110(10), Fla. Stat. (emphasis added). The statute's text is pellucid and accordingly must be enforced by the courts:

> In interpreting [a] statute, we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration*

> *Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69).

Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 946-47 (Fla. 2020).

The trial court's ruling that the statute's *mandatory* language—that *all* unit owners "*must* be joined as parties"—can be disregarded because the *Association* is a party (R:3116) flies in the face of the statutory text. If the statutory language meant *association* rather than *unit owners*, the Legislature would have said so. But Section 718.110(10) says that "[a]ll *unit owners, the association,* and the mortgagees of a first mortgage of record must be joined." So it is that the statute requires joinder of owners *and* the association, not one or the other.

Moreover, even if the Association could be a stand-in for unit owners in some circumstances, it cannot be here: "an association may sue and be sued as the representative of condominium unit owners in an action to resolve a *controversy of common interest to all units*." *Four Jay's Constr., Inc. v. Marina at Bluffs Condo. Ass'n*, 846 So. 2d 555, 557 (Fla. 4th DCA 2003) (emphasis added; citing *Kesl, Inc. v. Racquet Club of Deer Creek II Condo., Inc.*, 574 So. 2d 251, 253

(Fla. 4th DCA 1991)); *see also* Fla. R. Civ. P. 1.221 (condominium association may "institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members"). "[A]s to controversies affecting the matters of common interest . . . the condominium association, without more, should be construed to represent the class composed of its members as a matter of law." *Allied Tube & Conduit Corp. v. Latitude on the River Condo. Ass'n*, 306 So. 3d 312, 314 (Fla. 3d DCA 2020) (citation omitted).

Here, there plainly are adverse interests at play: DEJ, as the Hotel Unit Owner, is undeniably adverse to Terrace, a residential unit owner; DEJ also owns 25 Commercial Units and a number of residential units. It cannot be said that the Association is a proper representative of both DEJ and Terrace. Additionally, lenders and mortgagees also must be joined under the statute—and the Association cannot represent those parties. The Association plainly cannot represent the interests of parties with conflicting interests, much less a non-member of the Association, and Terrace's failure to join indispensable parties barred the entry of summary judgment for Terrace. *E.g.*, *Toyano's Auto Repair*, 331 So. 3d at 188 ("[a] judgment

is void for failing to join indispensable parties" (citations and internal quotation marks omitted)).

B. Terrace's Claims Are Barred By the Statute of Repose.

Section 718.110(10), Florida Statutes, creates a three-year statute of repose for claims that a declaration fails to comply with Chapter 718:

> If an action to determine whether the declaration or another condominium document complies with the mandatory requirements for the formation of a condominium is not brought *within 3 years* of the recording of the certificate of a surveyor and mapper . . . or the recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first, *the declaration and other documents will effectively create a condominium, as of the date the declaration was recorded, regardless of whether the documents substantially comply with the mandatory requirements of law.*

§ 718.110(10), Fla. Stat. (emphasis added).

Here, the overarching alleged defect on which Terrace relied to challenge the Declaration is that the Declaration violates Chapter 718 "by designating what should be 'common elements,' owned and controlled by the residential association, as 'shared components' owned and operated by [DEJ]" as the Hotel Unit Owner. (R:1259). Terrace argued that the Declaration violates Chapter 718 "by

improperly recharacterizing all or virtually all common elements . . . as 'Shared Components' owned by the Hotel Unit owner." (R:1277, 2975).

Both Terrace and the trial court relied on *IconBrickell* on the repose issue, but nothing in that decision reflects that the Third District was presented with or passed upon any issue regarding the statute of repose (or the statute of limitations). As DEJ noted in its presentation to the trial court on summary judgment, it appears that the *trial court* in *IconBrickell* rejected only an oblique limitations defense, but that question was *not* addressed by the Third District. (R:3008). It is well established that "[n]o decision is authority on any question not raised and considered." *MVW Mgmt., LLC v. Regalia Beach Devs. LLC*, 230 So. 3d 108, 114 (Fla. 3d DCA 2017) (citation omitted).

The only appellate opinion that appears to have addressed Section 718.110's statute of repose is *McGee v. Commonwealth Land Title Insurance Company*, 537 F. App'x 843 (11th Cir. 2013), in which the Eleventh Circuit affirmed a dismissal of a claim brought outside of the statute's time limitation. *Id.* at 845. The trial court here, however, ruled that Section 718.110(10) did not bar Terrace's claims

because Terrace "is **not** seeking a judgment determining whether the Declaration's errors affects the **formation** of the condominium or the **existence** of the condominium," but rather is seeking a declaratory judgment finding that the specific provisions of the Declaration "pertaining to the 'shared components' impermissibly reclassify the statutorily required 'common elements.'" (R:3109-10 (original emphasis)).

That reasoning runs contrary to Section 718.110(10)'s plain language: Terrace's action was brought "to determine whether the declaration . . . complies with the mandatory requirements for the formation of a condominium." § 718.110(10), Fla. Stat. Indeed, there would be neither reason nor basis for bringing an action against a declaration that was in compliance with "mandatory requirements"—because if, as here, the condominium was validly created, changes to a declaration can (and should) be made under the declaration's provisions for amendments thereto. *Id.* If there are no issues as to the declaration's validity, a unit owner such as Terrace has no basis for using a court action to evade the amendment process. Terrace should not be allowed to recast its action on appeal.

And Terrace's own stated position makes it impossible for it to argue otherwise. Terrace argued in the trial court that the Declaration violates Chapter 718 "by improperly recharacterizing all or virtually all common elements . . . as 'Shared Components' owned by the Hotel Unit owner" and requested a "finding that . . . portions of the Declaration impermissibly divest unit owners of their undivided share in the ownership and control of the Condominium's 'common elements' *in violation of the Florida Condominium Act*." (R:1277, 2976 (emphasis added)). That Terrace did not seek *entirely* to invalidate the condominium is of no moment: the statute of repose speaks to the nature of the *claim*.

"The purpose of a statute of repose is to cut off the right of action after a specified time measured . . . regardless of the time of the accrual of the cause of action or the notice of the invasion of a legal right." *Allan & Conrad, Inc. v. Univ. of Cent. Fla.*, 961 So. 2d 1083, 1086 (Fla. 5th DCA 2007). Allowing prosecution of a time-barred stale claim based on a plaintiff's attempt to plead around the statute of repose with artful crafting of a prayer for relief would work great mischief.

That is particularly so here, where the claim has been brought *17 years* after the Declaration's recordation—and, contrary to Terrace's attempt to minimize the nature of the relief that it seeks as merely changing ownership of Hotel Unit elements to Common Elements, would work a material change to the Hotel Unit's boundaries and more importantly materially change the "contract" that all unit owners elected to be governed by when they elected to purchase a unit in Gallery One.[4] The trial court erred in allowing Terrace to avoid the statute of repose.

C. Terrace's Claims Are Barred By the Statute of Limitations.

The trial court recognized that the five-year statute of limitations for contract-based claims in Section 95.11(2)(b), Florida Statutes, applies to Terrace's action. (R:3110). But the court declined to bar Terrace's action because "the parties' **only became adverse**" when Terrace purchased its Gallery unit in 2019. (R:3110-11 (original emphasis)). That ruling directly conflicts with controlling

[4] Section 718.110 recognizes that the terms of the Declaration are relied upon by *all* unit owners, as the statute requires "[a]ll unit owners, the association, and the mortgagees of a first mortgage of record must be joined as parties to the action." § 718.110(10), Fla. Stat.

established precedent, under which the limitations period commences when the Declaration was *recorded*.

In *Harris v. Aberdeen Property Owners Association, Inc.*, 135 So. 3d 365 (Fla. 4th DCA 2014), a homeowner challenged a provision in a homeowners' association governing document that required membership in an affiliated country club. *Id.* at 366-67. One of the claims sought to "declare the mandatory membership amendment improperly enacted." *Id.* at 367. The association asserted that "the limitations period began to run, not just for Harris, but for anyone who might at some point challenge the mandatory membership amendment, at the time the amendment was recorded." *Id.* at 368.

This Court agreed: "To the extent that Harris challenges the validity and the enactment of the mandatory membership amendment, we agree with [the association] that the statute of limitations with respect to such a challenge began to run from the 2004 date *the amendment was recorded in the public records*." *Id.* (emphasis added). Accordingly, Section 95.11(2)(b), the same limitations provision upon which DEJ has relied, barred Terrace's claim to challenge a contract entered more than 17 years earlier. *Id.* Notably, despite DEJ's reliance on *Harris* in the trial court, there is

no mention of that decision in the trial court's summary judgment order.

To the same effect are the First District's decisions in *Silver Shells Corporation v. St. Maarten at Silver Shells Condominium Association, Inc.*, 169 So. 3d 197, 201 (Fla. 1st DCA 2015) ("the Association's claims relating to the validity of the amendment to the Restrictive Covenants, which removed all of the Beach Property from the common properties, accrued on December 4, 2000, when the amendment was recorded"; limitations period commenced upon turnover in 2002), and *Hilton v. Pearson*, 208 So. 3d 108, 110 (Fla. 1st DCA 2016) ("reversal is compelled by *Harris* and *Silver Shells,* which stand for the proposition that a suit challenging the validity of an amendment to restrictive covenants must be filed within five years of the date that the amendment is recorded"). Most recently, the Second District relied on *Harris* and *Silver Shells* to hold that a declaratory action for reformation of a recorded homeowners association declaration was barred by Section 95.11(2)(b) for not having been brought within five years of recordation. *Hogg v. Vills.*

of Bloomingdale I Homeowners Ass'n, 357 So. 3d 1271, 1276 (Fla. 2d DCA 2023).[5]

The trial court's ruling that Section 95.11(2)(b) is inapplicable because the court "is reforming the Declaration to comply" with Chapter 718—a ruling that cannot be reconciled with the trial court's recognition that there is no viable issue as to the Declaration's validity—is thus unsustainable. (R:3111). This action, having been brought some 17 years after the Declaration's recordation, is barred by the five-year statute of limitations.

CONCLUSION

DEJ requests the Court to reverse the partial final summary judgment and the summary judgment order, and to remand with directions to grant summary judgment for DEJ on its affirmative defenses or, in the alternative, to remand for such other and further proceedings as the Court shall deem appropriate.

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[5] *See also Hunters Run Prop. Owners Ass'n v. Centerline Real Estate, LLC*, No. 18-80407-CIV-REINHART, 2019 WL 4694139, at *15 (S.D. Fla. 2019) (recognizing "Florida law holds that the statute of limitations for an action challenging the validity or enactment of a restrictive covenant begins to run when the covenant is recorded") (applying *Harris*, *Hilton*, and *Silver Shells*).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 16, 2024, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts E-Filing Portal, which will send an electronic copy of the foregoing to counsel of record listed below:

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I hereby certify that this answer/cross-initial brief was prepared using Bookman Old Style 14-point font in compliance with Rule 9.045 of the Florida Rules of Appellate Procedure. I also certify that this brief contains 6,196 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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