A Compendium of Capacity Cases

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Rule 1.120(a), Fla. R. Civ. P.

RULE 1.120. PLEADING SPECIAL MATTERS

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. The initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

Rule 1.110(b), Fla. R. Civ. P.

RULE 1.110. GENERAL RULES OF PLEADING

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

59 Am.Jur.2d *Parties* § (1971)

"Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court.

Plumbers Loc. U.N. 519 Miami Fla. V. Serv. Plbg., 401 F. Supp. 1008 (1975)

PLUMBERS LOC. U.N. 519, MIAMI FLA. v. SERV. PLBG., (1975)

401 F. Supp. 1008

PLUMBERS LOCAL UNION NO. 519 OF MIAMI, FLORIDA, a labor organization, et

al., Plaintiffs, v. SERVICE PLUMBING CO., INC., and AJA Plumbing Co.,

Inc., Florida Corporations, Defendants.

No. 74-1253-Civ-CF.

United States District Court, S.D. Florida.

October 9, 1975.

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Kaplan, Dorsey, Sicking & Hessen, P.A., Miami, Fla., for plaintiffs.

Ronald L. Davis, P.A., Miami, Fla., for Service Plumbing.

Sibley, Giblin, Levenson & Ward, Miami Beach, Fla., for AJA Plumbing.

MEMORANDUM OPINION

FULTON, Chief Judge.

I. BACKGROUND

On September 27, 1974, Plumbers Local Union No. 519 of Miami, Florida ("Union") and Sam Long, Elmer Frischolz, H.D. Salyers, Joseph L. Cole, Robert E. Lee, Ben Markowitz, Joseph Goldman, and Robert Hildebrandt as Trustees of Plumbers Local Union No. 519 Health & Welfare Fund, Pension Fund, Vacation Benefit Fund, and Joint Apprentice and Educational Committee ("Trustees") brought suit against Service Plumbing Co., Inc. ("Service") and West Page 1010 AJA Plumbing Co., Inc. ("AJA") to enforce a collective bargaining agreement signed by the defendant Service. Jurisdiction was based upon the Labor Management Relations Act, **29 U.S.C. § 185**(a).

Plaintiffs' complaint covers the time period from April 16, 1973 through November 4, 1974. Two collective bargaining agreements entered into between the plaintiff Union and Service were admitted into evidence: the original contract ("agreement"), Exhibit 1-B, which covered the time period April 16, 1973 to April 15, 1974; and a supplemental contract ("supplemental agreement"), Exhibit 1-A, which provided that the terms and conditions of the agreement would remain in effect until April 30, 1975,

except as changed in the supplemental agreement. Examination of the supplemental agreement indicates that the changes consisted of increases in the wage rates and hourly fringe benefit payments, and did not consist of substantive changes.

Plaintiffs have alleged that the defendant AJA is bound by the agreement signed by Service because of Article I, section 6(b) of the agreement which provides in pertinent part:

"If any Employer . . . controls or operates any other business within the trade and territorial jurisdiction of the Union, such other business entity shall either have a signed Agreement with the Union or this Agreement shall be interpreted as including such business entity under the term `Employer'."

Alternatively, plaintiffs have alleged that the defendant AJA was an alter ego of Service so that AJA was bound by the agreement signed by Service.

Plaintiffs have contended that the defendants are obligated to pay the following sums to the plaintiff Trustees: the amount of fringe benefit contributions due and owing by each defendant, as provided in Article VI, sections 1 and 2 of the agreement, and Article I, sections C and D of the supplemental agreement; a 10% service charge on the late contributions, as provided for in Article VI, section 6 of the agreement; a 10% service charge on late contributions as to contributions relating to Service employees which were paid by Service but were paid late, as provided in Article VI, section 6 of the agreement; plaintiffs' accountants' fees, attorneys' fees and costs. In addition, plaintiffs have contended that the defendants are obligated to pay to the individual employees "waiting time pay" as defined in the agreement in Article VI, section 6, as follows:

"If contributions or withholdings required to be paid are not paid in full [timely] . . ., the Employer shall be considered delinquent. In such case, the Employer shall pay *to each employee* on whose behalf the delinquent payments were to have been made, a sum equal to eight (8) hours of fringe benefit contributions and withholdings, as waiting pay . . ." (emphasis added)

Thus, waiting time pay is an amount of money due to the individual employees if the fringe benefit contributions were not made to the trustees in the time period provided in the agreement.

In their answers AJA denied that it was bound by the agreement entered into between Service and the Union, and Service denied that the monies described above were due and owing.

In their joint pre-trial stipulation filed with the Court on April 17, 1975, the parties stipulated that the following facts would require no proof at trial:

1. The plaintiffs, as Trustees, have standing to bring this suit.

2. The plaintiff Union has standing to bring this suit.

3. The jurisdictional requirements for bringing this suit have been met. West Page 1011

4. Defendants were engaged in a business affecting commerce within the meaning of the Labor Management Relations Act.

5. Copies of the agreement and the supplemental agreement, attached to the complaint, are genuine.

6. The plaintiff Trustees are entitled to recover their attorneys' and accountants' fees should any delinquencies be shown to be due.

The case was tried before the Court without a jury on July 14, 1975. At the conclusion of presentation of all the evidence, the Court ordered the parties to submit post-trial briefs. The Court has carefully considered all of the evidence and all of the parties' submissions.

II. PLAINTIFF'S CAPACITY TO SUE

At the conclusion of the trial and in their post-trial briefs, counsel for the defendants asserted that plaintiffs had failed to prove their capacity to maintain this action as they had introduced no evidence to establish that the plaintiff Union was in fact a legally organized union, that any of the named plaintiffs were the trustees of the various trusts, or that the trusts were actually in existence. In their reply memorandum, plaintiffs correctly noted that Rule 9(a) of the Federal Rules of Civil Procedure provides that it is not necessary to aver capacity of a party to sue or the legal existence of an organized association of persons that is made a party, except to the extent required to establish jurisdiction. "When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue . . . or the authority of a party to sue . . . in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Fed.R.Civ.P. 9(a).

If defendants wished to raise the issue of plaintiffs' capacity, Rule 9(a) required them to do so by a specific negative averment, which includes supporting particulars. Neither of the defendants' answers contained such specific denials. Rather, each defendant only denied its knowledge of plaintiffs' capacity, which is insufficient to raise the issue of plaintiffs' capacity. *Tractortechnic Gebrueder Kulenkempft & Co. v. Bousman,* **301 F. Supp. 153** (E.D.Wis. 1969); *Volkswagenwerk Aktiengesellschaft v. Dreer,* **253 F. Supp. 37** (E.D.Pa. 1966); *Montellier v. United States,* **202 F. Supp. 384** (E.D.N.Y. 1962), *aff'd on other grounds,* **315 F.2d 180** (2d Cir. 1963). Generally, failure to raise the issue of plaintiffs' capacity by a specific negative averment has been held to constitute a waiver of that defense. *Montellier v. United States, supra. SeeSummers v. Interstate Tractor and Equipment Co.,* **466 F.2d 42** (9th Cir. 1972); *Marston v. American Employers Insurance Co.,* **439 F.2d 1035** (1st Cir. 1971).

In their pre-trial stipulation, the parties stipulated that the plaintiff Union and the plaintiffs Trustees have standing to bring this suit. The stipulation does not list the capacity of plaintiffs as an issue of fact to be litigated.

For all of the foregoing reasons, the Court concludes that defendants' tardy attempt to raise the issue of plaintiffs' capacity is unfounded particularly in light of the parties' stipulation. Since the parties stipulated that the plaintiffs have standing to bring this action, no evidentiary finding by the Court is necessary.

III. FACTS

Except for the issue of plaintiffs' capacity to sue, discussed above, defendants have not disputed the underlying facts. Defendant Service was in the business of plumbing contracting and repairs with its

principal place of business in Dade County, Florida. Service's business affected commerce within the meaning of the Labor Management Relations Act. Service paid the Union wage scale to its plumbers. About three West Page 1012 months prior to the incorporation of AJA, in January or February, 1974, Somerset Construction Company invited Fred Krutel, president of Service, to bid on the plumbing subcontracting job at the Costa del Sol, at 36th Street, northwest area of Dade County, Florida. The work bid on consisted of installation of plumbing facilities in new construction. Krutel's bid was successful. Steven D. Taylor, vice president of Service, testified that AJA was formed specifically to perform the Costa del Sol job. Krutel testified that AJA's incorporation in April, 1974 was after he was awarded the Costa del Sol job. Irwin Stolberg, Secretary-Treasurer of Service, testified that AJA was formed to perform the Costa del Sol job because it was a nonunion job, that Service could have performed it but would have had to pay the higher union wage scale and "probably never could have gotten the job because our work costs would have been higher." Transcript of Trial Proceedings ("TT") at 51. Stolberg testified that Nat Fectner, a master plumber, was paid a fee for use of his license to allow AJA to do business as a plumbing contractor. Fectner performed no services or labor for AJA, but his license was used, rather than Taylor's since Taylor's license was being used by Service. When AJA was formally incorporated, Krutel, Taylor and Stolberg were its officers and directors.

The evidence showed that Service and AJA interchanged and commingled funds and employees. The two corporations had common officers, stockholders, and managers, and were both operated from a common office. The capitalization for each corporation was, at times, furnished by the other corporation and the salaries and expenses of one were, at times, paid by the other.

Stephen Kass, a staff accountant employed by Caplan, Morrison, Brown & Company, a certified public accounting firm in Miami, Florida, testified that he had inspected the books and records of Service and AJA and performed an audit of both companies. Composite Exhibit No. 9, summaries of the payroll records and supplemental schedule; Exhibit No. 8, a shop audit of Service for the period April 16, 1973 through November 4, 1974; and Exhibit No. 10, a shop audit of AJA for the period April 1, 1974 through May 1, 1975, were received in evidence. Kass testified that the purpose of a shop audit is to compare the hours worked by the employees of a company with the hours reported to the administrator of a Trust Fund to find out how much money may be due to the Fund. Kass testified that he prepared summaries of his findings and that they had been received in evidence as Composite Exhibit No. 9, Exhibit No. 8 and Exhibit No. 10.

Kass testified that as to Service he found that the total delinquent amount due to the Trustees was $9,648.82. Examination of Exhibit No. 8 reveals that this figure comprises a finding of total delinquent contributions of $2,822.27, the 10% service charge on those delinquent contributions of $282.23, and the 10% service charge on delinquent contributions paid untimely in the amount of $6,544.32. In addition, Kass testified that he computed the waiting time pay due to the employees of Service and that this amounted to a sum of $14,248.32. As to AJA, Kass testified that assuming AJA was bound by the terms of the agreement and supplemental agreement, he found that the total delinquent amount due to the Trustees was $19,653.17. "TT" at 77. Examination of Exhibit No. 10 reveals that this figure comprises a finding of total delinquent contributions of $17,866.52, and the 10% service charge on those delinquent contributions of $1,786.65. Kass testified that he computed the waiting time pay due to the employees of AJA and that this amounted to a sum of $4,019.36. "TT" at 78.

Plaintiffs subpoenaed the books and records of both defendant corporations for production at trial, so that they could be identified by the accountant West Page 1013 and that his summaries could be received. The defendants did not produce the books and records at the trial. In lieu thereof counsel for

both defendants stipulated and waived the requirement that the accountant's report had to be supported by the original books and records, and agreed that the reports themselves could come into evidence subject only to the right of cross-examination of the accountant who prepared the reports. "TT" at 23-24. After the completion of Kass' direct testimony, counsel for Service stated that he had no questions.
Counsel for AJA asked a few questions concerning Kass' preparation of Composite Exhibit No. 9 and his method of computation of total delinquent contributions owed by AJA. "TT" at 79-84. He did not in any way diminish the credibility or accuracy of Kass' testimony and reports as to the amounts he found due and owing by either defendant corporation. Counsel for both defendants stipulated that the amounts which Kass testified he found to be due and owing have not been paid. "TT" at 27. Thus, the Court accepts Kass' testimony as uncontroverted.

Howard Farbish, a supervisor and certified public accountant employed by Caplan, Morrison, Brown & Company, testified that Kass was under his supervision and control when he prepared Exhibits 8, 9 and 10, that he reviewed these exhibits, and that in his opinion as a certified public accountant Exhibits 8 and 10 correctly reflect the monies due from Service and AJA to the plaintiff Trustees. He testified that in his opinion the testimony of Kass with regard to the amount of waiting time pay due to the individual employees of Service and AJA was correct and that the computation was correct. Farbish testified that his firm's fee for its services in connection with these audits was $1,694.00, which was based upon an hourly rate of $22 an hour for staff time and that this rate was generally consistent with the rates charged by other accounting firms. Neither defense counsel asked any questions of this witness. "TT" at 84-88.

IV. ALTER EGO

The Court finds and concludes that on the basis of the standards established by the Fifth Circuit in *Markow v. Alcock,* **356 F.2d 194** (1966), plaintiffs have established by the greater weight of the evidence that the two defendant corporations were intertwined and related such that the corporate fiction of a separate identity of the two defendants was overcome.

The operations of each corporation were so integrated through the commingling of funds, interactivities, and common direction and supervision that they can only be considered as one enterprise. The defendant corporations were so organized and controlled and their businesses were conducted in such a manner as to make them merely agencies, instrumentalities, adjuncts or alter egoes of one another. *Markow v. Alcock,* **356 F.2d 194**, **197-98** (5th Cir. 1966); *Fisher v. East,* **114 F.2d 177** (10th Cir. 1940).

The principals of the defendant corporations themselves testified that the only reason AJA was formed was to do the Costa del Sol job at non-union rates, that Service could have done the job but would have had to pay the union scale wage rates, and that if their bid had been based upon union rather than nonunion rates they never would have obtained the job.

The Court concludes that Service and AJA are, in the eyes of the law, a single entity and as such are both bound by the agreement and the supplemental agreement and are liable for the obligations of one another. *See Feagan v. Drywall, Inc.,* Case No. (FL)-74-35-Civ-JE (S.D.Fla., May 20, 1975, Eaton, J.). "Corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud."*Fish v. East, supra,* **114 F.2d, at 191**. West Page 1014 Moreover, the provisions of Article I, Section 6(b) of the agreement itself provide that AJA is bound by its terms and conditions.

V. WAITING TIME PAY

It appears that the Union does have standing to maintain an action for the use and benefit of the employees for the receipt of waiting time pay. No evidence was introduced which tended to show that Service did not freely and voluntarily enter into the agreement with the plaintiff Union, or that it was coerced into agreeing to any of its terms, including Article VI, Section 6, which provided for waiting time pay to the individual employees. Since the failure of the defendants to pay the required fringe benefit contributions could adversely affect an employee's pension rights and health insurance coverage, and since the amount of such damage is difficult to calculate, this provision is valid as a provision for liquidated damages due to the employees. Liquidated damages for employer breaches of the fringe benefit provisions of collective bargaining agreements have been allowed in *Sherman v. Carter,* **353 U.S. 210**, **77 S.Ct. 793**, 1 L.Ed.2d 776 (1957); *Jensen v. Garvison,* **274 F. Supp. 866** (D.Ore. 1967); and in *Schlecht v. Hiatt,* **271 F. Supp. 644** (D.Ore. 1967), *rev'd on other grounds,* **400 F.2d 875** (9th Cir. 1968). Similarly, the Court concludes that the waiting time provision freely entered into by Service is a valid liquidated damages provision, and applies to both Service and its alter ego AJA. Thus the Court is persuaded that the provision of the agreement which provides for waiting time pay is enforceable as and for the payment of liquidated damages and is not a penalty as the Court first surmised.

However, no evidence was adduced to identify the employees who are entitled to payment of waiting time, nor has there been any evidence as to how much each employee is entitled to receive. In view of the absence of this type of proof, the Court is unwilling to pay the Union the amount that has been determined to be due to the employees for this purpose, which amount is in the total sum of $18,267.68. For the reasons stated, no recovery of waiting time shall be included herein, nor in the Judgment to be entered hereon; but the omission of a recovery for waiting time is without prejudice to those employees who are entitled to receive the same, any or all of whom may seek recovery thereof by separate action.

VI. CONCLUSION

For all of the foregoing reasons, it is ordered and adjudged that the plaintiff Trustees are entitled to a Judgment against both defendants, jointly and severally, as follows:

1. The sum of $29,301.99 representing the fringe benefit contributions and service charges due to the Trustees on behalf of employees employed by the defendants under the jurisdiction of the agreement and supplemental agreement, plus plaintiffs' accountants' fees in the sum of $1,694.00, plus attorneys' fees in the sum of $2,500.00, plus the costs of this action to be taxed by the Clerk.

2. Simultaneously with the entry of this Memorandum Opinion, the Court shall enter its Final Judgment which shall incorporate by reference these rulings. West Page 1015

Coburn v. Coleman, 75 F. Supp. 107 (1947)

COBURN v. COLEMAN, (1974) (*DATE IS A TYPO*)

75 F. Supp. 107

COBURN v. COLEMAN.

Civ. A. No. 818.

United States District Court, W.D. South Carolina, Spartanburg Division.

December 17, 1947.

Curran E. Cooley, of Anderson, S.C., and Victor F. Schmidt, of Rossmoyne, Ohio, for plaintiff.

P.D. Barron, of Union, S.C., and Sam R. Watt, of Spartanburg, S.C., for defendant.

WYCHE, District Judge.

In this case the plaintiff, as administratrix of the estate of Cecil B. Coburn, deceased, brings an action in this court under sections 411 and 412, Code of Laws of West Page 108 South Carolina 1942,[fn1] for damages for the wrongful death of her intestate, in which she alleges that she is a citizen of the State of Indiana, and was duly appointed as such administratrix by the Circuit Court of Steuben County, Indiana, and is still acting in that capacity; that she, being the surviving widow of the said Cecil B. Coburn, deceased, brings this action in the capacity of said administratrix in behalf of herself personally and her and decedent's two minor sons Cecil Coburn, Jr., and Joseph Edward Coburn; that the defendant is a citizen of the State of South Carolina and within the jurisdiction of this court; that the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

The defendant has filed no answer, but moves to dismiss upon the following grounds: 1. That it affirmatively appears upon the face of the complaint that the administratrix in this action does not have legal capacity to maintain this action in that such administratrix was appointed by a court in Indiana. 2. That it appearing affirmatively upon the face of the complaint that plaintiff is a foreign administratrix and there being no law or statute in South Carolina extending to an administratrix appointed by a foreign state the right to maintain an action of this character in South Carolina, plaintiff as such foreign administratrix has no power or authority to maintain this action and no standing in this court.

The jurisdiction of this court is not questioned in this motion, nor can it be successfully questioned, because federal jurisdiction, when it is based upon diversity of citizenship, depends upon the citizenship of the parties to the record and not of those whom they may represent; in an action by an administrator, the administrator's personal citizenship controls, not that of the decedent, or the next of kin, and it is not material in what state the administrator's appointment is made. Continental Ins. Co. v. Rhoads, 1886, 119 U.S. 237, 7 S.Ct. 193, 30 L.Ed. 380. An administrator suing for damages for wrongful death is not a mere nominal party, but the real party whose citizenship and not that of the beneficiaries, controls the question of federal jurisdiction. Harper v. Norfolk & W.R. Co., C.C.Va., 1887, 36 F. 102.

The question made by the motion here is the lack of capacity of the administratrix in this case to maintain this action in the United States District Court for the Western District of South Carolina when such administratrix was not appointed by a South Carolina Court.

Rule 9(a), Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides: "(a) Capacity. * * * When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative West Page 109 capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

The defense or objection of lack of capacity to sue must be raised by motion prior to answer, or in the answer itself, otherwise the defendant is held to have waived the objection. Trounstine v. Bauer, Pogue & Co., Inc., 2 Cir. 1944, **144 F.2d 379**; Kucharski v. Pope & Talbot, D.C., 4 F.R.D. 208, at page 209; Rule 12(h), Rules of Civil Procedure.

The grounds upon which the defendant asserts the lack of capacity on the part of the plaintiff to sue in this court appears affirmatively upon the face of the complaint. Therefore, it is not necessary for the defendant to raise the issue as to the authority of the administratrix to sue in her representative capacity by specific negative averment. It is not necessary to raise this issue by answer; it may be made by motion to dismiss. See Rule 7(b), Rules of Civil Procedure.

At the outset I am confronted with Rule 17(b), Rules of Civil Procedure, as amended, which is as follows: "(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held;* * * *." (Emphasis added.)

I must therefore be guided by the South Carolina law in deciding this matter.

It will be noted in the State Statute (section 412) that actions under this statute "shall be brought by or in the name of the executor or administrator of such person". See, In re Mayo's Estate, **60 S.C. 401**, **38 S.E. 634**, 54 L.R.A. 660.

Under the common law, powers of an administrator do not extend beyond the limits of the state of his appointment. The common law prevails in South Carolina, unless changed by statute. I can find no statute, and none has been called to my attention, that gives a foreign administrator the power to sue in the courts of South Carolina.

Furthermore, it is well settled in South Carolina that an administrator appointed in another state has no legal capacity to sue as such in this state. Richardson v. Gower, 10 Rich. 109; Kirkpatrick v. Taylor, 10 Rich. 393; Patterson v. Pagan, 18 S.C. 584; Dial v. Tappan, 20 S.C. 167; Dial v. Gary & Tappan, 24 S.C. 572; Tyer v. Charleston Rice Milling Co., 32 S.C. 598, 10 S.E. 1067; Stevenson v. Dunlap, 11 S.E. 1017, 33 S.C. 350; Heyward v. Williams, 57 S.C. 235, 35 S.E. 503; Martin v. Fowler, 51 S.C. 164, 28 S.E. 312; In re Mayo's Estate, **60 S.C. 401**, **415**, **38 S.E. 634**, 54 L.R.A. 660; Dial v. Gary, 14 S.C. 573, 37 Am.Rep. 737; Carmichael v. Ray, 1 Rich. 116; Tillman v. Walkup, 7 S.C. 60; Merchants' National Bank v. Tax Commission, **133 S.C. 406**, **131 S.E. 142**; Stoddard v. Aiken, 57 S.C. 134, 35 S.E. 501; Beidler v.

Tax Commission, 162 S.C. 447, 160 S.E. 264; Reynold's Executors v. Torrance, 2 Brev. 59.

As the South Carolina Supreme Court pointed out in Re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638, 54 L.R.A. 660: "And, in case administration could be obtained in Florida, the appointment there would not authorize a suit by the administrator in this state in the absence of a statute of this state permitting it, and there is none."

Under the foregoing South Carolina decisions it clearly appears that the administratrix in this case, having been appointed by a court in Indiana, has no legal capacity to sue in the courts of South Carolina. Therefore, such administratrix has no legal capacity to bring this action in the United States District Court for the Western District of South Carolina. Rybolt v. Jarrett, 4 Cir., 122 F.2d 642; Hodges v. Kimball, 4 Cir., 91 F. 845; Heath v. Smyther, D.C.S.C., 19 F. Supp. 1020.
For the foregoing reasons the motion to dismiss should be granted, and it is so ordered.

[fn1] "§ 411. Civil action for wrongful acts causing death. —
Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

"§ 412. Beneficiaries of action for wrongful death — damages
recoverable — distribution. — Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect or default was the result of recklessness, wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate."

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Hershel California Fruit Products Co. v. Hunts Food, 119 F. Supp. 603 (1954)

HERSHEL CALIFORNIA FRUIT PRODUCTS CO. v. HUNT FOODS, (1954)

119 F. Supp. 603

HERSHEL CALIFORNIA FRUIT PRODUCTS CO., Inc. et al. v. HUNT FOODS, Inc.

No. 31833.

United States District Court, N.D. California,

S.D.

January 7, 1954.

West Page 604

Philip S. Ehrlich, Julian R. Bauer, San Francisco, Cal., for plaintiff.

Cushing, Cullinan, Duniway & Gorrill, San Francisco, Cal., for defendant.

OLIVER J. CARTER, District Judge.

Plaintiffs in this action are six corporations, eight individuals who are partners doing business under a fictitious name, and a trust. The only defendant is a corporation. All of the plaintiffs and the defendant are engaged in the business of canning and selling tomato paste.

The complaint alleges violations of the anti-trust laws of the United States by the defendant and alleges that such violations have injured plaintiffs in their respective businesses. The prayer is for injunctive relief and treble damages.

At a prior stage of this action, the court denied plaintiffs a preliminary injunction. See opinion of Judge Harris, Hershel California Fruit Products Co. v. Hunt Foods, D.C., 111 F. Supp. 732. Now, defendant has moved to dismiss the complaint, and, in the alternative, to dismiss it as to plaintiff Aron Hershel Trust and to strike the entire complaint or certain designated portions therefrom.

The allegations of the complaint state two separate theories of defendant's liability. One theory is that defendant is monopolizing and attempting to monopolize interstate trade and commerce in tomato paste, in violation of Section 2 of the Sherman Act, 15 U.S.C.A. § 2. The other theory is that defendant Is West Page 605 selling tomato paste in interstate commerce at unreasonably low prices for the purpose of destroying competition and of eliminating competitors, including plaintiffs, all in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C.A. § 13a.

The motion to dismiss is based upon the grounds that:

(1) The complaint fails to state a claim upon which relief can be granted; and,

(2) It is clear from the face of the complaint that plaintiff "Aron Hershel Trust" has no legal capacity to sue.

Plaintiffs have incorporated two statements of their claim for relief into one count in the complaint. Such pleading is permitted by Rule 8(e)(2), F.R.C.P., 28 U.S.C.A.

With reference to the alleged violation of Section 3 of the Robinson-Patman Act, the complaint recites that during 1951 and 1952, defendant progressively lowered the price at which it offered tomato paste for sale. The price in January, 1952 was $6.75 per case of 6-ounce cans. In June, 1952 the price per case of 6-ounce cans was lowered to $6. Both of these prices are alleged to have been unreasonably low because: (1) such prices were not justified by the condition of the market or by any other lawful objective of defendant; and, (2) defendant could have sold its paste for higher prices. It is also alleged that the $6 price was unreasonably low in that it was not less than $1 below the cost of production of such paste by either defendant (including advertising in its cost) or plaintiffs (excluding advertising from their respective costs). The complaint alleges that defendant continues to sell at the price of $6 per case, and that such price is still unreasonably low for the same reasons.

The complaint further alleges that the defendant sold, and continues to sell and offer to sell, its paste at the aforesaid prices for the purpose of destroying competition and of eliminating its competitors, including plaintiffs. It is said in the complaint that approximately 95% of the tomato paste produced in the United States is canned and packed in California, and thereafter sold and shipped to other points throughout the United States, in interstate commerce. The defendant is alleged to have sold, and to now sell and offer to sell, its paste at the aforesaid prices in all of the forty-eight States.

With respect to the alleged violation of Section 2 of the Sherman Act, the complaint charges that the defendant alone has monopolized and attempted to monopolize interstate commerce and trade in tomato paste. Defendant is not charged with conspiring or combining with others to monopolize.

It is alleged that defendant is the fourth largest canner and packer of fruits and vegetables in the United States, that defendant's business is large as compared to the individual businesses of the respective plaintiffs, and that during the period from 1943 to 1948 defendant experienced substantial growth through acquisition or absorption of other concerns. In the field of the production of tomato paste, which is the only product as to which a monopoly or attempted monopoly is charged, the defendant is alleged to have produced 7% to 8% of the total pack for the year 1951. It is further alleged that prior to 1951 the defendant packed an inconsequential amount of tomato paste and was an unimportant factor in that branch of the canning industry.

The conduct alleged to have been utilized by defendant in monopolizing and attempting to monopolize is as follows: (1) price cutting; (2) extensive nationwide advertising of its products; (3) offering to buyers of tomato paste more favorable credit terms than any other seller of such product; (4) offering to buyers of tomato paste substantial payments for advertising its products; (5) offering to sell tomato paste at prices lower than those which might be offered by any competitor.

The complaint further alleges specific items of damage to the respective plaintiffs, West Page 606 and alleges that such damages were directly and proximately caused by defendant's violations of the Robinson-Patman Act and of the Sherman Act.

Defendant contends that Section 3 of the Robinson-Patman Act, prohibiting sales at "unreasonably low prices", is unconstitutional because its language is so vague and uncertain that it contravenes the Fifth and Sixth Amendments. Defendant further contends that Section 3 of the Robinson-Patman Act is not one of the "anti-trust laws of the United States" and hence neither an action for an injunction nor for treble damages may be maintained by a private party as a result of its violation.

Whether or not the language of the Robinson-Patman Act is so vague and uncertain as to violate the Fifth and Sixth Amendments to the Constitution is a question which should not be determined on a motion to dismiss. United States v. Bowman, D.C.N.D.Ill., **89 F. Supp. 112**, **114**. See also Borden's Farm Products Co. v. Baldwin, **293 U.S. 194**, 55 S.Ct. 187, 79 L.Ed. 281.

Defendant further contends that there is no statutory authority for a private party to bring an action for an injunction or treble damages, based upon a violation of Section 3 of the Robinson-Patman Act. Section 4 of the Clayton Act, 38 Stat. 731, **15 U.S.C.A. § 15**, authorizes a private party to bring an action for treble damages sustained as the result of a violation of the "anti-trust laws." Section 16 of the Clayton Act, 38 Stat. 737, **15 U.S.C.A. § 26**, creates in private parties a right to injunctive relief against threatened loss or damage caused by a violation of the "anti-trust laws, including sections two, three, seven and eight of this Act". Section 1 of the Clayton Act, 38 Stat. 730, **15 U.S.C.A. § 12**, defines "`antitrust laws,' as used herein," as including certain named Acts of Congress. The Robinson-Patman Act is not one of the Acts included within the provisions of Section 1 of the Clayton Act.

Defendant also argues that the Clayton Act cannot be construed to refer to the Robinson-Patman Act because: (1) the former was enacted in 1914, whereas the latter was not adopted until 1936; (2) Section 3 of the Robinson-Patman Act was not an amendment to the Clayton Act or to any of the "anti-trust laws", but was an independent enactment; (3) the fact that the draftsmen of the United States Code have included in Section 12 of Title 15 thereof, Section 1 of Clayton Act, a reference to Section 3 of the Robinson-Patman Act is entitled to no weight because where there is a difference between the statute as enacted by Congress and the Code, the statute controls.

The question of whether or not a private party may maintain an action for damages or an injunction as a result of a violation of Section 3 of the Robinson-Patman Act has been considered by several courts. Holding that that statute is one of the "anti-trust laws of the United States" and that an action thereunder is maintainable by a private party are: Atlantic Brick Co. v. O'Neal, D.C.E.D.Tex., **44 F. Supp. 39**; Spencer v. Sun Oil Co., D.C.Conn., **94 F. Supp. 408**; Balian Ice Cream Co., Inc., v. Arden Farms Co., D.C.S.D.Cal., **94 F. Supp. 796**; Myers v. Shell Oil Co., D.C.S.D.Cal., **96 F. Supp. 670**. See also the dictum in Bruce's Juices, Inc., v. American Can Co., **330 U.S. 743**, 67 S.Ct. 1015, 91 L.Ed. 1219. To the contrary is National Used Car Market Report v. National Auto. D. Ass'n, D.C.D.C., **108 F. Supp. 692**, **694-695**; Affirmed on this point 91 U.S.App.D.C. 313, **200 F.2d 359**. As pointed out in the latter case there are many legal publications and law review articles expressing the opinion that a private party may not maintain such an action. See 50 Harv.L.R. 121; 85 U. of Pa.L.R. 306, 312; 22 Wn.U.L.Q. 153, 182; 22 A.B.A.J. 593, 649.

While the court has grave doubts as to the correctness of the view that the Robinson-Patman Act is one of the "anti-trust laws" and that Section 3 of that Act is included within the provisions of Sections 4 and 16 of the Clayton Act giving a private party the right to West Page 607 maintain an action for an alleged violation of the statute, this view represents the weight of authority of the United States District Courts which have passed upon the question. The same arguments advanced here by defendant were ruled on

adversely in those cases. Any change in the rule announced by those Courts is for the Court of Appeals, not this Court.

The allegations of the complaint are sufficient to charge a violation of Section 3 of the Robinson-Patman Act, The complaint also alleges damage to plaintiffs resulting from such violations and the threat to plaintiffs of irreparable injury if such violations continue. This is sufficient to state a cause for the granting of relief to plaintiffs.

Since the plaintiffs adequately state cause for the granting of relief under the theory that they have been damaged by defendant's violation of the Robinson-Patman Act, it is unnecessary to decide whether or not the complaint adequately alleges cause for relief because of defendant's violation of the Sherman Act. A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of the facts which could be proved in support of his claim. Turner v United States Gypsum Co., D.C.N.D.Ohio, 11 F.R.D. 545; Moore's Fed. Practice, 2d Ed., Section 8.13, P. 1653.

A complaint in an anti-trust suit requires a statement of matters and their relation to each other considerably more extensive than that required in the ordinary case. Bader v. Zurich General Accident & Liability Ins. Co., Ltd., D.CS.D.N.Y., 12 F.R.D. 437. A motion to strike will not be granted if the allegations, even though immaterial, can do no harm to the moving party by their presence in the pleading, and the point can better be determined in connection with a decision on the merits. First Trust & Savings Bank of Zanesville, Ohio v. Fidelity-Philadelphia Trust Co., D.C.E.D.Pa., 12 F.R.D. 195; H.K. Porter Co., Inc. v. Bremer, D.C.N.D.Ohio, 11 F.R.D. 89. However, plaintiffs' through their counsel, have agreed that certain specified portions of the complaint may be stricken. Therefore, those particular portions should be stricken.

One of the parties plaintiff named in the complaint is the Aron Hershel Trust. The complaint names the Trust itself as plaintiff and not the trustee. Under both the Federal Rules of Civil Procedure and the law of California, the trustee, rather than the trust itself, is the proper party to a legal action. Rule 17(a), F.R.C.P.; Thorpe v. Story, 10 Cal.2d 104, 114, 73 P.2d 1194; Calif. Code Civil Procedure, §§ 367, 369 The issue of capacity to sue may be raised by motion to dismiss where the defect appears on the face of the complaint. Coburn v. Coleman, D.C.W.D.S.C., 75 F. Supp. 107; Brush v. Harkins, D.C.W.D.Mo., 9 F.R.D. 604. The complaint should be dismissed as to plaintiff Aron Hershel Trust with leave to amend.

Accordingly,

(1) Defendant's motion to dismiss on the ground that the complaint fails to state a claim for which relief can be granted is denied;

(2) The action is dismissed as to plaintiff, Aron Hershel Trust;

(3) Those portions of the complaint specified in plaintiffs' letter of August 19, 1953 are stricken; and

(4) Plaintiffs shall have 20 days from the date hereof to amend the complaint to join as a party or parties the real party or parties in interest in the place of Aron Hershel Trust.

Counsel for plaintiffs are directed to prepare and present an order in accordance herewith.
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Keehn v. Joseph C. Mackey and Co., 420 So.2d 398 (Fla. 3rd DCA 1982)

KEEHN v. JOSEPH C. MACKEY AND CO., 420 So.2d 398 (Fla.App. 4 Dist. 1982)

THEODORE S. KEEHN AND FIRST REALTY EQUITY INVESTMENT CORPORATION,

APPELLANTS, v. JOSEPH C. MACKEY AND COMPANY, APPELLEE.

No. 81-1762.

District Court of Appeal of Florida, Fourth District.

October 13, 1982.

Appeal from the Broward County Circuit Court, George Richardson, Jr., J.
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Dewey A.F. Ries, Fort Lauderdale, for appellants.

Michael M. Westerman of Goodman, Pleeter & Webber, Hollywood, for appellee.

GLICKSTEIN, Judge.

In 1977 appellee brought an action on a note in circuit court against appellants. In December, 1979, the Secretary of State issued to appellee a certificate of involuntary dissolution for failure to file its annual report or pay the filing fee therefor. On July 16, 1981, appellants moved to dismiss appellee's complaint alleging appellee was no longer a viable corporation because it had been issued the foregoing certificate; plainly this was an attack on appellee's capacity to sue.[fn1] Ultimately appellants' Page 400 motion was unsuccessful and prompted this appeal which appellees, asserting absence of jurisdiction, have moved to dismiss.

We agree with appellee; this appeal cannot be considered reviewable pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i), which permits an appeal of a non-final order determining jurisdiction over the person, because it involves a non-final order on the capacity to sue. *See National Lake Developments, Inc. v. Lake Tippecanoe Owners Association, Inc.,* **417 So.2d 655**, 657 (Fla. 1982) (the supreme court said:

"[I]nterlocutory orders relating to the right of plaintiffs to maintain an action generally do not determine the court's jurisdiction over the plaintiffs." *Id.*).

Nor is there an appropriate underlying basis on which to consider this appeal as a petition for writ of certiorari authorized by Florida Rule of Appellate Procedure 9.040(c). While that rule imposes upon this court the requirement of treating the cause as if the proper rather than improper remedy had been sought, we do not feel constrained to do so in the absence of all the conditions stated in *State ex rel. Bludworth v. Kapner,* **394 So.2d 541**, 542 (Fla. 4th DCA 1981):

Certiorari is a discretionary common law writ which, in the absence of an adequate remedy by appeal, a court may issue to review an order or judgment that is unauthorized or violates the essential requirements of controlling law. *Kilgore v. Bird,* 149 Fla. 570, 6 So.2d 541 (1942).

In the present case these conditions do not exist; therefore we dismiss the appeal. However, we perceive a legislative gap which warrants attention and which we address with the understanding that our lack of jurisdiction limits us to discussion only. Nothing in section 607.297, Florida Statutes (1981) expressly resolves a situation like the present one where an action is pending at the time of dissolution rather than being brought thereafter.[fn2] Only by concluding the Legislature must have intended the continuation of actions *pending* on behalf and in the name of a corporation when it is involuntarily dissolved by the Secretary of State, do we agree with appellee that the foregoing statute was the proper dispositive basis for denial of appellants' motion to dismiss. Unlike the present version of the statute, its predecessor, section 608.30(3), Florida Statutes (1973), bridged the gap by saying that the trustees of a dissolved corporation shall have power to prosecute and defend, as trustees of the corporation, all suits in progress at the time of dissolution or expiration or thereafter arising as may be necessary for closing the affairs of the corporation. . . .

We believe the gap in the present statute is simply the result of oversight, not design. Section 07.301, Florida Statutes (1981), which spells out the duties and responsibilities of those acting as trustees for a dissolved corporation, does not provide for bringing or defending actions. Were the legislative gap not filled, there would be no authority for continuing actions pending by or against corporations subsequently dissolved involuntarily by the Secretary of Page 401 State. Such anomaly plainly was not intended by the Legislature. However, because we must dismiss this appeal because of the lack of this court's jurisdiction, we are limited to discussion of this subject and are precluded from any holding in regard thereto.

APPEAL DISMISSED.

HURLEY and DELL, JJ., concur.

[fn1] "Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d *Parties* § 31 (1971). This is in contrast to "standing" which requires an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position. *Argonaut Ins. Co. v. Commercial Standard Ins. Co.,* 380 So.2d 1066 (Fla. 2d DCA), *pet. for rev. denied,* 389 So.2d 1108 (Fla. 1980). Appellants also argued in their motion to dismiss that it was impossible for appellee to re-incorporate since one of the appellants controlled the appellee's corporate "name." While this appears to be another apparent attack on appellee's capacity to sue, this point is not argued on appeal.

Florida Rule of Civil Procedure 1.120(a) provides:

Capacity. It is not necessary to aver the capacity of a party to sue or to be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within

the pleader's knowledge.

This court said in *Wittington Condominium Apts., Inc. v. Braemar Corp.,* **313 So.2d 463**, 466 (Fla. 4th DCA 1975), *cert. denied,* 327 So.2d 31 (Fla. 1976):

The "specific negative averment" referred to in Rule 1.120 may be reflected in a responsive pleading (answer) or presumably in what might be described as a "speaking motion" whether denominated as a motion to dismiss, a motion to drop improperly joined parties, or a motion to strike.

The Second District Court of Appeal held, in a case in which the defect did not appear on the face of the complaint, that appellant's motion to dismiss was insufficient as a specific negative averment. *Seminole Tribe of Florida, Inc. v. Courson,* **183 So.2d 569** (Fla. 2d DCA 1966).

A complaint's facial defect can be attacked appropriately for lack of capacity to sue pursuant to Federal Rule of Civil Procedure 9(a) (upon which Florida Rule 1.120(a) was patterned identically) by a motion to dismiss which can be justified under Federal Rule of Civil Procedure 12(b)(6), i.e., failure to state a claim upon which relief can be granted. *Klebanow v. New York Produce Exchange,* **344 F.2d 294** (2d Cir. 1965). *See also* 2A J. Moore & J. Lucas, Moore's Federal Practice ¶¶ 12.07-.08 (2d ed. 1982), and 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1292-1295, 1360 (1969 & Supp. 1981).

[fn2] Section 607.297 provides:

Survival of remedy after dissolution. — The dissolution of a corporation either:

(1) By the issuance of a certificate of dissolution by the Department of State;

(2) By a decree of court; or

(3) By expiration of its period of duration shall not take away or impair any remedy available to or against such corporation or its directors, officers, or shareholders for any right or claim existing, or any liability incurred, prior to such dissolution *if action or other proceeding thereon is commenced within 3 years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.* The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of 3 years so as to extend its period of duration.

(Emphasis supplied.)

Altamonte Hitch & Trailer v. U-Haul, 498 So.2d 1346 (Fla. 5th DCA 1986)

ALTAMONTE HITCH & TRAILER v. U-HAUL, 498 So.2d 1346 (Fla.App. 5 Dist. 1986)

ALTAMONTE HITCH AND TRAILER SERVICE, INC., A FLORIDA CORPORATION, AND C.R. FOREMAN, APPELLANTS, v. U-HAUL COMPANY OF EASTERN FLORIDA, A FLORIDA CORPORATION, AND AMERCO, INC., A FOREIGN CORPORATION DOING BUSINESS IN THE STATE OF FLORIDA, APPELLEES.

No. 85-1195.

District Court of Appeal of Florida, Fifth District.

December 11, 1986.

Petition for review from the Circuit Court, Orange County, Lon S. Cornelius, J.

William L. Eagan and Stanton C. Brown, of Arnold, Matheny & Eagan, P.A., Orlando, for appellants.
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J. Thomas Cardwell, Chris N. Kolos and Virginia B. Townes, of Akerman, Senterfitt & Eidson, Orlando, for appellees.

SHARP, Judge.

C.R. Foreman and Altamonte Hitch and Trailer Service, Inc. appeal from an order apportioning costs and attorney's fees against them after an appeal on the main action. The order appealed from was a $9,000.00 award for attorney's fees ($7,000.00 for trial work and $2,000.00 for appellate work), pursuant to our direction and remand.[fn1] We affirm as to the appellant, Altamonte Hitch and Trailer Service, Inc., but we reverse in part, and affirm in part, as to C.R. Foreman.

Appellants commenced this lawsuit by filing a complaint and an amended complaint against appellees. Involved in some of the counts were assertions that appellees had breached a lease agreement entered into between the parties. Thereupon appellees filed a counterclaim which contained one count based on the lease (Count III), in which appellee claimed past due rent and other sums due under the lease. After a trial, appellees prevailed on the lease and other counts, and appellants were denied any relief. This judgment was appealed and was affirmed.[fn2]

The lease was executed by both appellants and it provided for payment of attorney's fees by the "prevailing party." Appellees' answer failed to request an award of attorney's fees, although the appellees' counterclaim did so. However, the counterclaim was directed *solely* at Altamonte Hitch.

Although C.R. Foreman is listed as a plaintiff in the caption of the counterclaim, his name does not appear anywhere in the body as a person against whom relief was sought. The general rule is that the body of the complaint, and not the caption, determines who is a party to the action. *Weavil v. Myers,* 243 N.C. 386, 90 S.E.2d 733 (1956); *Motor Credit Corp. v. Ray Guy's Trailer Court, Inc.,* 6 N.J. Super. 563, 70 A.2d 102 (1949); and *Morisse v. Billau,* 70 Ohio App. 215, 45 N.E.2d 798 (1941). The naming of an individual or entity in the caption is not a sufficient basis to warrant inclusion in the action if the party is not mentioned in the body of the complaint. It would seem that a similar rule applies to counterclaims.

It therefore follows that appellees failed to plead their right to be awarded attorney's fees against C.R. Foreman, based on the lease provision. In order to support an award of attorney's fees, when the right is based on a contract rather than a statute, the party entitled to such an award must specifically allege and request such an award. *Brown v. Gardens by the Sea South Condominium Association,* 424 So.2d 181 (Fla. 4th DCA 1983); *Ocala Music & Marine Center v. Caldwell,* 389 So.2d 222 (Fla. 5th DCA 1980). Since the award here could only be based on the contract, and the counterclaim was not sufficient to include Foreman personally, we must reverse the $7,000.00 award against him for attorney's fees at the trial level.

In order for an appellate court to make an award of attorney's fees for appellate work, a timely motion must be filed and there must be a legal substantive basis for the award.[fn3] There is no requirement that they be pled below.[fn4] Here, the substantive legal basis for such an award was the contract which provided for an award of attorney's fees to the prevailing party.[fn5] The amended final judgment, which was Page 1348 affirmed by us on appeal, indicates that appellees were the prevailing parties on *both* the complaint and the counterclaim. Even though Foreman was not properly made a party to the counterclaim,[fn6] he was clearly a proper party to the complaint. Therefore, under the language of the contract provision, and Florida Rule of Appellate Procedure 9.400(b), appellees are entitled to recover appellate attorney's fees as prevailing parties on the complaint, and prevailing parties on the main appeal. We therefore affirm the award of appellate attorney's fees in the sum of $2,000.00.

The award of costs of $566.40 is affirmed against both Foreman and Altamonte Hitch. Section 57.041, Florida Statutes (1983) provides that the party recovering judgment shall recover all his legal costs and charges. Since appellants were the parties recovering judgment on the complaint, they are entitled to this award.

REVERSED IN PART; AFFIRMED IN PART.

UPCHURCH, C.J., and DAUKSCH, J., concur.

[fn1] *Altamonte Hitch & Trailer Service, Inc. v. U-Haul Co. of Eastern Florida and Amerco, Inc.,* 483 So.2d 852 (Fla. 5th DCA 1986).

[fn2] *Altamonte Hitch & Trailer Service, Inc. v. U-Haul Co. of Eastern Florida and Amerco, Inc.,* 468 So.2d 492 (Fla. 5th DCA), *review denied,* 476 So.2d 672 (Fla. 1985).

[fn3] Fla.R.App.P. 9.400(b) and Committee Note (b).

[fn4] *Id.*

[fn5]

If either party . . . brings an action . . . the prevailing party in any such action, on trial or appeal, shall be entitled to reasonable attorneys fees to be paid by the losing party as fixed by the court.

[fn6] Thus, appellees could be considered to be prevailing parties only against Altamonte Hitch and not Foreman on the counterclaim.

McDonough Equip. v. Sunset Amoco West, 669 So.2d 3000 (Fla. 3rd DCA 1996)

McDONOUGH EQUIP. v. SUNSET AMOCO WEST, 669 So.2d 300 (Fla.App. 3 Dist. 1996)

McDONOUGH EQUIPMENT CORP., APPELLANT/CROSS-APPELLEE, v. SUNSET AMOCO WEST,

INC., APPELLEE/CROSS-APPELLANT.

No. 94-2705.

District Court of Appeal of Florida, Third District.

February 21, 1996.

Rehearing Denied March 27, 1996.

An Appeal from the Circuit Court for Dade County; Harold Solomon, Judge.

Hunt, Cook, Riggs, Mehr, & Miller and Joseph R. Cook, Boca Raton, for appellant.

Krongold, Bass and Todd and Anthony T. Lepore, Miami, for appellee.

Before HUBBART, LEVY, and GREEN, JJ.

GREEN, Judge.

McDonough Equipment Corp. ("McDonough") appeals an adverse final judgment, cost judgment, and denial of its motion to amend judgment. Appellee Sunset Amoco West, Inc. ("Sunset") cross appeals the cost judgment entered in its favor. Because we conclude that this action is barred by the economic loss rule, we reverse the final judgment entered in favor of Sunset and remand with directions that final judgment be entered in favor of McDonough. As a result, we do not reach the issue raised on cross appeal.

McDonough, a defendant below, is in the business of installing underground petroleum tanks. Sunset is a corporation which manages Page 301 a gas station for P & G Investments ("P & G"), the property's owner. Although Sunset and P & G have common ownership, they remain legally separate business entities.

Both P & G and Sunset were cited in the 1980s by Dade County Environmental Resource Management ("DERM") for various violations at the station. As a result of these citations, P & G and Sunset were required by DERM to remove existing underground tanks and piping and replace them with updated underground facilities which complied with environmental regulations. Thereafter, Sunset contracted with McDonough for the removal and replacement of the station's underground gas tanks. The terms of the contract provided, *inter alia:*

1) . . . under no circumstances shall the seller [McDonough] . . . be liable for any incidental, consequential, or special damages to include, but not limited to, loss of profit, loss of product, or any other costs associated therewith.

2) McDonough [sic] not responsible for any existing contamination of soils, groundwater, or product at site. Any clean-up to be extra.

* * * * * *

EXCAVATING — . . . In the event any underground structures, cables, conduit, debris, rock, water, or running sand are encountered, destroyed, or damaged during the performance of the contract, the Seller [McDonough] shall not be held responsible. Additional costs resulting shall be borne by the Purchaser [Sunset] but shall in no case exceed existing rate scales for labor and materials had the quotation originally been based on time and materials . . . .

The evidence adduced at trial below revealed that prior to the commencement of McDonough's excavation work, there was preexisting contamination at the site. Notwithstanding this fact, during the course of its removal and replacement of the underground tanks at the station, McDonough struck a gasoline line which caused additional gasoline to spill into the site of the excavation. DERM then issued additional citations and orders requiring a clean-up of the groundwater at the station. Sunset retained an environmental engineering firm, AB_2MT, Inc., to clean up the groundwater at the station. Although AB_2MT, Inc. billed Sunset $68,000 for the clean-up services, the checks for the payment of the bills were drawn from P & G's account.

Sunset instituted the action below against McDonough to recoup the $68,000 for the clean up of the groundwater contamination. The action was for negligent performance of the contract. The case proceeded to jury trial and the jury returned a verdict finding McDonough liable for one third of the cleanup costs or $22,666.66 and Sunset comparatively negligent for two-thirds of the costs or $45,333.34. A final judgment in the amount of $33,732.91, which represented damages plus prejudgment interest was entered against McDonough. It is from this final judgment that McDonough brings the instant appeal.

McDonough first argues that the trial court erred in denying its motions for directed verdict and/or judgment notwithstanding the verdict based upon the fact that Sunset was not the proper party to institute this action since it did not own the property or expend the funds for the clean-up. We conclude that this argument is unavailing to McDonough since it failed to challenge Sunset's capacity to sue in its answer and affirmative defenses to the amended complaint. Pursuant to Rule 1.120 (a), Florida Rules of Civil Procedure:

When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

Since McDonough failed to raise Sunset's capacity to sue in its answer, it waived this issue. *Wittington Condo. Apartments, Inc. v. Braemar Corp.,* 313 So.2d 463 (Fla. 4th DCA 1976), *cert. denied,* 327 So.2d 31

(Fla. 1976); *Cor-Gal Builders, Inc. v. Southard,* 136 So.2d 244 (Fla. 3d DCA 1962); Page 302 *Shelbourne Enters., Inc. v. Last,* 129 So.2d 430 (Fla. 3d DCA 1961).

McDonough next asserts that it is entitled to judgment as a matter of law because this action is otherwise barred by the economic loss doctrine. With this we agree.

The economic loss rule, simply stated, precludes a recovery in tort for purely economic losses which are unaccompanied by personal injury or damage to independent property. *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.,* 620 So.2d 1244 (Fla. 1993); *Florida Power & Light Co. v. Westinghouse Elec. Corp,* 510 So.2d 899 (Fla. 1987); *Palau Intern. Traders, Inc. v. Narcam Aircraft, Inc.,* 653 So.2d 412 (Fla. 3d DCA), *rev. denied,* 661 So.2d 825 (Fla. 1995); *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.,* 609 So.2d 1349 (Fla. 2d DCA 1992), *rev. denied,* 626 So.2d 207 (Fla. 1993). This rule is based upon the prevailing view that contract principles rather than tort principles are more appropriate to resolve purely economic claims and encourage parties to negotiate economic risks through warranty provisions and price. *Florida Power & Light,* 510 So.2d at 900-01. Economic losses or claims have been defined by our supreme court as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits — without any claim of personal injury or damage to other property." *Casa Clara,* 620 So.2d at 1246 (quoting Note, *Economic Loss in Products Liability Jurisprudence,* 66 Colum.L.Rev. 917, 918 (1966)).

Although the economic loss rule emerged in products liability cases, its applicability has been extended to contracts for services. *AFM Corp. v. Southern Bell Tel. and Tel. Co.,* 515 So.2d 180 (Fla. 1987). In *AFM,* the economic loss rule was invoked to preclude a purchaser of advertising services from recovering economic losses (i.e. lost profits) as a result of the negligent performance of the contract. There, the court pointed out that the contract for advertising services "defined the limitation of liability through bargaining, risk acceptance and compensation" and concluded that in the absence of "conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." *Id.* at 181-82.

Based upon the reasoning of *AFM,* we must likewise conclude in the instant case that Sunset may not recover in tort purely economic losses in the form of contractually delegated clean-up costs in the absence of evidence of personal injury or independent property damage. To hold otherwise, we think, would stand the economic loss rule and its underlying premise on their head. In their negotiated contract for services, Sunset and McDonough expressly defined the limitation of liability and respective risks for each party, including the risk of underground water contamination. Having done so, Sunset may not now circumvent its contractual limitations and risks by seeking to recoup such losses in a tort action.

We therefore reverse the judgment and remand with instructions that final judgment be entered in favor of McDonough. In light of our decision, we do not reach the cross appeal.

Underwriters at LaConcorde v. Airtech Serv., 493 So.2d 428 (Fla. 1986)

UNDERWRITERS AT LaCONCORDE v. AIRTECH SERV., 493 So.2d 428 (Fla. 1986)

UNDERWRITERS AT LaCONCORDE, AS SUBROGEE OF INTERNATIONAL AIRCRAFT SALES AND LEASING CORPORATION, PETITIONER/CROSS-RESPONDENT, v. AIRTECH SERVICES, INC., RESPONDENT/CROSS-PETITIONER.

No. 67237.

Supreme Court of Florida.

July 3, 1986.

Rehearing Denied September 26, 1986.

Notice and Cross-Notice for Review of the Decision of the District Court of Appeal — Direct Conflict of Decisions; Third District — Case No. 84-230.

H.C. Palmer, III of McDonald & McDonald, Miami, for petitioner/cross-respondent.

Gilbert E. Theissen of Walsh, Theissen & Boyd, Fort Lauderdale, for respondent/cross-petitioner.

BARKETT, Justice.

We granted review in this case because the decision below, *Underwriters at LaConcorde v. Airtech Services, Inc.,* 468 So.2d 386 (Fla.3d DCA 1985), directly and expressly conflicts with *A.O. Smith Harvestore Products, Inc. v. Suber Cattle Co.,* 416 So.2d 1176 (Fla. 1st DCA 1982), *Broward County v. Sattler,* 400 So.2d 1031 (Fla. 4th DCA 1981), and *Fort Pierce Toyota, Inc. v. Wolf,* 345 So.2d 348 (Fla. 4th DCA 1977). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Subsequent to the Third District's decision in this case, we decided *Argonaut Insurance Co. v. May Plumbing Co.,* 474 So.2d 212 (Fla. 1985). That case is controlling. Accordingly, we quash the decision below with directions to remand the cause to the trial court for the calculation of pre-judgment interest for Underwriters' out-of-pocket pecuniary loss.

We decline to expand review from the conflict question to the issues raised by Page 429 respondent which were the subject matter of the cross-appeal below.

It is so ordered.

McDONALD, C.J., and ADKINS, OVERTON, EHRLICH and SHAW, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring in part and dissenting in part.

I agree with the Court's application of the principle stated in our recent decision of *Argonaut Insurance Co. v. May Plumbing Co.,* **474 So.2d 212** (Fla. 1985), that a plaintiff is entitled to prejudgment interest from the date of the loss when the verdict has the effect of fixing the amount of damages with certainty as of that certain prior date. However, in my view the question of whether the plaintiff was entitled to prejudgment interest in this case is a moot point as there was prejudicial error requiring reversal on other grounds.**[fn1]**

By the verdict of the jury, petitioner-respondent Airtech Service, Inc., was found negligent in the provision of aircraft repair service performed on an airplane owned by International Aircraft Sales and Leasing, Inc. Airtech Service appealed the judgment rendered against it, and the subrogee-plaintiff, referred to in the record as "Underwriters at La Concorde," appealed the trial court's decision not to award prejudgment interest. The district court of appeal provided extensive discussion of the prejudgment interest issue in reaching the erroneous**[fn2]** conclusion that prejudgment interest was for the jury to assess and that the failure of the plaintiff to submit a written jury instruction form justified the trial court's refusal to instruct the jury on the matter.

The question of prejudgment interest was clearly a secondary or ancillary issue before the appellate court, as the losing party at the trial, Airtech Service, was clearly the primary aggrieved party and on appeal challenged the legal propriety of any judgment being entered against it at all. Far from recognizing Airtech Service as an aggrieved appellant, the district court of appeal even questioned whether Airtech's "cross-appeal" was proper. Then it gave superficial and perfunctory consideration to the issues raised on appeal by Airtech Service. I find both of Airtech's appellate arguments meritorious and would direct reversal.

The action was brought by a party denominating itself as "Underwriters at La Concorde, as Subrogee of International Aircraft Sales and Leasing Corporation." By appropriate pleadings defendant Airtech Services, Inc., questioned whether the plaintiff was a legal person or entity with capacity to sue, sought to discover the identity and nature of the plaintiff, and gave notice that it questioned whether the plaintiff was such a legal person or entity and that it would demand proof of same at trial. *See* Fla.R.Civ.Pro. 1.120(a).

It is axiomatic that the capacity to sue in the courts of Florida attaches only to natural or legal *persons. See, e.g., Keehn v. Joseph C. Mackey and Co.,* **420 So.2d 398** (Fla. 4th DCA 1982); 39 Fla.Jur.2d *Parties* § 8 (1982). Groups of natural persons not taking on the corporate form of a separate legal entity, such as partnerships and unincorporated associations, are not legal persons and do not have such capacity unless it is specially conferred by statute. 39 Fla.Jur.2d *Parties* § 2 (1982). It was not established by competent, substantial evidence at trial that "Underwriters at La Page 430 Concorde" was a legal person entitled to bring a legal action in court.

It appears from the record that Underwriters at La Concorde is an unincorporated association of insurers and is not itself an entity engaged in the business of insurance or anything else. The district

court of appeal disposed of Airtech's contention on this point by reference to authorities dealing with the concept of the real party in interest. The issue is not whether plaintiff was the real party in interest; concededly, the insurer who paid the insured's casualty loss would be entitled to bring the negligence action in its own name as subrogee of the insured. The issue is whether the party calling itself Underwriters at La Concorde was a person, natural or legal, with capacity to sue. Until it is established that the party bringing the action is a person, the question of whether it is a real party in interest does not arise.

Plaintiff relies on section 624.04, Florida Statutes (1979), as support for the proposition that Underwriters at La Concorde is a legal person. That statute defines "person" for purposes of the Florida Insurance Code as follows:

"Person" includes an individual, insurer, company, association, organization, Lloyds, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent, general agent, broker, solicitor, service representative, adjuster, and every legal entity.

However, the fact that the statute gives a broad definition of "person" for purposes of the many and various regulatory provisions of the Florida Insurance Code has nothing whatsoever to do with a party's having the capacity to sue in Florida courts, which requires that the plaintiff be a natural or legal person.

There was testimony that Underwriters at La Concorde is an organization similar to Lloyd's of London. It is a matter of common knowledge that Lloyd's of London is not an insurer, nor is it a legal entity. It is an unincorporated association of insurers, the purpose of which is merely to facilitate brokerage, exchange, referral, and joint undertaking of insurance contracts by actual insurers. Because there was no proof that the plaintiff was a person, the appellate court should have reversed.

Airtech Service's other contention is that the trial court erred in instructing the jury that the failure to follow the procedures set forth in the Federal Aviation Authority's inspection regulations constituted negligence per se. On appeal, Airtech's specific argument was that the trial court had given an instruction based on a regulation not in effect at the time of the rendering of service.[fn3] The district court acknowledged that this mistake had been made, but found the error harmless on the ground that the substance of the instruction was consistent with the standards imposed by the administrative regulations in effect at the time of the repair work. I think the issue of the "negligence per se" instruction deserves a closer look.

An instruction that defendant's conduct was "negligence per se" is proper if there was a violation of (1) a statute "designed to protect a particular class of persons from their inability to protect themselves," or (2) a statute "which establishes a duty to take precautions to protect a particular class of persons froma particular injury or type of injury." *deJesus v. Seaboard Coastline Railroad Co.,* 281 So.2d 198, 201 (Fla. 1973). It is true that the "negligence per se" concept has been expanded by some courts to include violations of administrative regulations as well as statutes. *Florida Freight Terminals v. Cabanas,* 354 So.2d 1222 (Fla.3d DCA 1978). This treatment has been criticized, however, on the ground that administrative rules should not be raised "to the dignity of a penal statute or ordinance." *Jackson v. Harsco Corp.,* 364 So.2d 808, Page 431 810 (Fla.3d DCA 1978) (Barkdull, J., concurring specially).

The concept of "negligence per se" based on violations of statutes, ordinances, or rules must be applied carefully. Even when it is recognized that a violation of a statute, ordinance, or rule normally constitutes negligence, the application of the doctrine to support a jury instruction thereon may or may

not be proper depending on the circumstances. *See, e.g., Swoboda v.United States,* **662 F.2d 326** (5th Cir. 1981) (F.A.A.'s violation of its own regulation was excusable under the circumstances and did not support a finding of negligence); *Brown v. South Broward Hospital District,* **402 So.2d 58** (Fla.4th DCA 1981) (property owner's violation of building code did not support finding of negligent conduct toward employee of contractor working on premises). Moreover, even a violation of a penal statute will not support a "per se" instruction or even be admissible without a threshold legal determination of a causal connection between the statutory violation and the injury. *See Brackin v. Boles,* **452 So.2d 540** (Fla. 1984).

The F.A.A. regulations in question pertained to the requirement that maintenance and repairs performed in connection with required regular, periodic maintenance and inspection programs be carried out according to the maintenance and inspection manual adopted for a particular aircraft. The jury was instructed that if the landing-gear repair performed by Airtech Service was not accompanied by a step-by-step series of inspections set forth in the maintenance manual, then Airtech was guilty of negligence.

The instructions had the effect of requiring the jury to apply the requirements in the inspection manual submitted to them to the defendant's repair service provided prior to the crash. The problem with this, as defendant argued in the courts below and argues here, is that the lessee in possession of the aircraft brought it to Airtech Service for correction of a particular problem and not for routine, periodic, or progressive maintenance and inspection services. Because the customer had not requested an inspection in accordance with the periodic inspection manual or any portion thereof, no such routine or periodic inspection was performed by Airtech Service. Therefore it was unfair to instruct the jury that defendant was required to perform an inspection in accordance with the procedures set forth in the manual and that if it failed to do so, it was guilty of negligence. The instruction was not based on any requirements in the F.A.A. regulations, accurately read and properly understood. The erroneous instruction relieved the jury of the burden of examining the evidence of negligence and applying ordinary reason, logic, and common sense thereto. The effect of the instruction was to hold the defendant strictly liable for the malfunction of the landing gear simply because it had performed repair service to the landing gear. The landing gear has many components and features and the defendant did not undertake to perform an overall inspection of the entire landing gear. The mere possibility that a defendant's repair work may have been negligent and may have had some connection with a subsequent landing gear malfunction is not sufficient to establish negligence and causation. *See, e.g., Raritan Trucking Corp. v. Aero Commander, Inc.,* **458 F.2d 1106** (3d Cir. 1972). Here there may have been sufficient evidence to support the jury's verdict even absent the erroneously admitted exhibits and the erroneously given instructions, but we cannot tell with certainty what effect the errors had so they cannot be deemed harmless.

I would quash the decision of the district court of appeal and direct that the judgment be reversed on both of the foregoing separate and independent grounds. Page 432

[fn1] Contrary to the assertions in the motion to dismiss Airtech Service's cross-notice of review, the issues raised by such cross-notice are properly before the Court.

[fn2] The majority opinion courteously points out that the district court's decision was rendered prior to this Court's resolution of the issue in *Argonaut Insurance Co. v. May Plumbing Co.* However, the opinion in *Argonaut* makes clear that our decision was based on "the stare decisis controlling effect of Supreme

Court decisions from the past century, cases from which this Court has never receded." 474 So.2d at 214. Thus it is not unfair, though it may be unkind, to refer to the district court's conclusion as "erroneous."

[fn3] To instruct the jury on negligence per se based on violation of a statute or ordinance imposing a higher duty than that imposed by the statute or ordinance in effect at the time of the conduct charged as negligent is error. *Morrison Cafeterias Consolidated, Inc. v. Lee,* **215 So.2d 491** (Fla. 1st DCA 1968).

Klebanow v. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965)

KLEBANOW v. NEW YORK PRODUCE EXCHANGE, 344 F.2d 294 (2nd Cir. 1965)

Bernard KLEBANOW and George Lewis, Plaintiffs-Appellants, v. NEW YORK PRODUCE EXCHANGE, New York Produce Exchange Clearing Association, and Merrill Lynch, Pierce, Fenner & Smith Incorporated, Defendants-Appellees, and Ira Haupt & Company and Morton Kamerman as Liquidating Trustee, etc., Defendants.

No. 305, Docket 29270.

United States Court of Appeals, Second Circuit.

Argued January 20, 1965.

Decided April 2, 1965.

Page 295

Max Freund, New York City (Rosenman, Colin, Kaye Petschek & Freund, Jerome E. Sharfman, New York City, of counsel), for plaintiffs-appellants.

Donald Marks, New York City (Baer, Marks, Friedman & Berliner, New York City, Stephen F. Selig, New York City, of counsel), for defendant-appellee New York Produce Exchange Clearing Association.

William B. Shealy, New York City (Holtzmann, Wise & Shepard, New York City, Howard M. Holtzmann, New York City, of counsel), for defendant-appellee, New York Produce Exchange.

Richard C. Casey, New York City (Brown, Wood, Fuller, Caldwell & Ivey, New York City, Louis B. Eten, James B. May, New York City, of counsel), for defendant-appellee, Merrill Lynch, Pierce, Fenner & Smith Incorporated.

Before MOORE, FRIENDLY and MARSHALL, Circuit Judges.

FRIENDLY, Circuit Judge:

The novel issue, crucial to decision of this appeal, is whether limited partners of a New York partnership in dissolution can sue on its behalf for damage claimed to have been inflicted on it by conduct proscribed by the federal anti-trust laws, when the partnership and the liquidating partner allegedly have rendered themselves unable to sue and their delegate is claimed to be unwilling to do so because of affiliations with the defendants.

Plaintiffs were limited partners in the brokerage firm of Ira Haupt & Co., a New Page 296 York limited partnership whose term was to end December 31, 1963. The partnership agreement provided that upon any termination or dissolution of the partnership, liquidation should be effected by the managing partners (or the managing partner, if there were only one) as "Liquidating Trustees." After November 1, 1963, Morton Kamerman was sole managing partner.

The instant complaint, filed in the District Court for the Southern District of New York on March 4, 1964, alleged the foregoing and went on as follows: In late November, 1963, Haupt appeared to be currently unable to meet its obligations as they matured. On November 25, Kamerman and the other general partners entered into an agreement with various bank creditors and the New York Stock Exchange whereby they divested themselves of power to do any act in behalf of the partnership, and executed powers of attorney authorizing James P. Mahony, an employee of the Stock Exchange, as representative of the Exchange and the banks, to exercise all their powers with respect to the assets and business of Haupt. Since that date the Exchange and the banks have exercised full control over these assets and have been liquidating them. The three defendants (other than the partnership and Kamerman) — New York Produce Exchange, New York Produce Exchange Clearing Association, and Merrill Lynch, Pierce, Fenner & Smith Incorporated — were claimed to have engaged "in an illegal contract combination and conspiracy with others, unknown to the plaintiffs, to restrain and monopolize trade in, and to fix the price of, cottonseed oil," thereby damaging the partnership "in the sum of at least $11,000,000." The Stock Exchange, the complaint said, will not permit Haupt or Kamerman to prosecute this claim because (1) Merrill Lynch "and possible additional defendants" are members of that exchange and of the Produce Exchange, (2) members of the Board of Governors of the Stock Exchange are partners in firms that also have partners on the Board of Governors of the Produce Exchange and the Clearing Association, and (3) the Stock Exchange "has numerous members who are also members of the Produce Exchange." Demand on Haupt or Kamerman to prosecute the claim would thus have been futile.

Defendants moved under F.R.Civ. P. 12(b) to dismiss for failure to state a claim on which relief can be granted. They contended that plaintiffs lacked capacity to sue[fn1] and that the allegations of violation of the antitrust laws were insufficient. Sustaining the first ground, Judge Tyler granted the motions, without having to reach the second.

Section 4 of the Clayton Act, **15 U.S.C. § 15**, authorizes suit by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." We have no doubt, and the few authorities indicate, that when business is conducted by a partnership, the statute views the partnership rather than a partner as the person injured. Coast v. Hunt Oil Co., **195 F.2d 870** (5 Cir.), cert. denied, **344 U.S. 836**, 73 S.Ct. 46, 97 L.Ed. 651 (1952); Leh v. General Petroleum Corp., **165 F. Supp. 933** (S.D.Cal. 1958). Who may bring an action under § 4 of the Clayton Act on behalf of a partnership is a question within federal competence. But the parties agree, and we shall assume Page 297 they are right, that the provision in F.R.Civ.P. 17(b) — "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held" — refers this determination to the law, the "whole law," of the place of suit. Since New York, the forum in this case, is also the place where the limited partnership was formed and had its headquarters, we encounter no choice of law problem as between states.

Pointing to the description of the liquidator as a "trustee," appellants claim the case to be won for them by the principle, Restatement (Second), Trusts § 282(2) (1959), followed in New York, that a *cestui*

que trust may sue to enforce a claim of the trust when the trustee has wrongfully refused. Bonham v. Coe, **249 App. Div. 428**, 292 N.Y.S. 423, aff'd mem., **276 N.Y. 540**, 12 N.E.2d 566 (1937); Brooklyn Free Kindergarten Soc'y v. Elbran Realty Corp., **255 App. Div. 852**, 7 N.Y.S.2d 531 (1938). Appellees answer — satisfactorily insofar as the argument is claimed to be decisive — by saying that it unduly stresses the words of the Haupt partnership agreement; Kamerman's legal position was no different than if he had been called a liquidating partner or agent, or a liquidator *simpliciter*. But the point remains pertinent as an analogy; appellants properly ask why, if a *cestui que trust* may sue under such circumstances, a limited partner may not. See Klebanow v. Funston, 35 F.R.D. 518 (S.D.N Y 1964). They press also the example of the stockholder, an analogy which becomes the more forceful when we add that a preferred stockholder also may maintain a derivative action, Ashwander v. TVA, **297 U.S. 288**, 321-322, 56 S.Ct. 466, 80 L.Ed. 688 (1936).**[fn2]** This gains further force from the New York Court of Appeals' statement that the position of a limited partner is "analogous to that of a corporate shareholder." Ruzicka v. Rager, **305 N.Y. 191**, 197-198, **111 N.E.2d 878**, 39 A.L.R.2d 288 (1953).

Appellees respond that limited partners are mere creditors who must work out their remedies through receivership or bankruptcy; appellants disclaim creditor status in this appeal, although on another, Klebanow v. Chase Manhattan Bank, **343 F.2d 726** (2 Cir. 1965), they assert they are that for the purpose of voting their claims as limited partners in the election of a trustee in bankruptcy. A limited partner, barred from using his name in the firm title, said to lack "property rights" in partnership assets, and presumed to have priority over other partners in thedistribution of assets, does have some resemblance to a creditor. See N.Y. Partnership Law, McKinney's Consol. Laws, c. 39, §§ 94, 112; Alley v. Clark, **71 F. Supp. 521** (E.D.N.Y. 1947). However, in the main, a limited partner is more like a shareholder, often expecting a share of the profits, subordinated to general creditors, having some control over direction of the enterprise by his veto on the admission of new partners, and able to examine books and "have on demand true and full information of all things affecting the partnership * *" See N.Y. Partnership Law §§ 98, 99, 112. That the limited partner is immune to personal liability for partnership debts save for his original investment, is not thought to be an "owner" of partnership property, and does not manage the business may distinguish him from general partners but strengthens his resemblance to the stockholder; and even as to his preference in dissolution, he resembles the preferred stockholder. Indeed, it makes considerably greater sense to clothe the instant appellants with whatever descriptive phrase is necessary to enable them to sue on behalf of the partnership than to entertain derivative suits by persons owning a few shares in giant corporations, especially if the shares are Page 298 non-participating redeemable preferred. Of course, the defendants in any suit brought by limited partners are entitled to process that will make any judgment binding on the partnership, but that has been accomplished here.

Appellees say that however all this may be, the issue has long since been decided otherwise by New York's legislature in § 115of the Partnership Law:

"Parties to actions. A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."

This provision came into New York law in 1922 when the legislature adopted the Uniform Limited Partnership Act, Laws 1922, ch. 640, § 1. The corresponding provision in the previous law, Laws 1897, ch. 420, § 38,**[fn3]** carried forward in the 1909 and 1919 Partnership Laws, Consol. Laws of 1909, ch. 39, § 38; Laws 1919, ch. 408, § 98, had read:

"Actions by and against the partnership — Actions and special proceedings in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners."

Appellees do not seriously contend that the framers of the Uniform Limited Partnership Act or the legislature of 1922 had focused on the problem here at issue. In reading the language we must remember that "Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed," Griffiths v. Helvering, 308 U.S. 335, 355, 60 S.Ct. 277, 278, 84 L.Ed. 319 (1939). The purposes of § 115, like that of its less minatory predecessor, were reasonably plain. General partners need not join limited partners in an action by the partnership; ordinarily limited partners may not sue since this will interfere with the management by the general partners, Lieberman v. Atlantic Mutual Ins. Co., **62 Wn.2d 922**, **385 P.2d 53** (1963); a suitor against the partnership need not join a limited partner; indeed, he may not do so if the partnership be solvent. See Fuhrman v. Von Pustau, **126 App. Div. 629**, 111 N.Y.S. 34 (1908). The words say all this and say it well. But they do not have to be read as saying that a limited partner cannot bring an action on behalf of the partnership when the general partners have disabled themselves or wrongfully refused; and, although they could be so read, we see no sufficient reason for doing so when in quite similar situations the *cestui que trust* or the preferred stockholder is allowed to do exactly that. The predecessor New York statute would hardly be read as going so far; we see no basis for thinking that, in its effort to achieve uniformity with other states, the legislature thought it would be altering New York law in this respect. Although the state decisions bearing directly on the point are from tribunals not high in the judicial hierarchy and may be susceptible of distinction, they at least reveal that the New York courts do not consider § 115 a clear mandate against limited partners' capacity to bring an action like this. Cooper Prods. Co. v. Twin-Bowl Co., N.Y.L.J., Aug. 21, 1962, p. 8, col. 7 (Sup.Ct.); Executive Hotel Associates v. Elm Hotel Corp., **41 Misc.2d 354**, **245 N.Y.S.2d 929** (Civ.Ct.), aff'd per curiam, **43 Misc.2d 153**, 250 N.Y.S. 351 (App.T. 1964);**[fn4]** and the only relevant statement by the Court Page 299 of Appeals that has been cited to us, see Ruzicka v. Rager, supra, although in no way decisive since the issue was hardly in the court's mind, is helpful to appellants. If New York returns only a murky answer to the question of capacity posed by F.R.Civ.P. 17(b), federal judges are entitled to resolve the doubt in a way that permits the assertion of a federal claim. See Leh v. General Petroleum Corp., supra, 165 F. Supp. at 937; Blake, The Shareholders' Role in Antitrust Enforcement, 110 U.Pa.L.Rev. 143, 145-52 (1961). Contrast Alley v. Clark, supra, 71 F. Supp. at 525.

The district judge was influenced to a contrary view by the limited partner's right to have a "dissolution and winding up by decree of court," N.Y. Partnership Law § 99, presumably for the same causes as a general partner, § 63, in which the court may, in its discretion, appoint a receiver. But we see no reason why such possibilities should prevent the speedier and more effective remedy of suit by a limited partner, any more than the beneficiary's right to ask that a trustee be instructed or removed prevents suit by him when the trustee has wrongfully refused. We would indeed expect that the New York courts would require strong allegations and proof of disqualification or wrongful refusal by the general partners before allowing a limited partner to sue on the partnership's behalf — a mere difference of opinion would be nowhere near enough. Compare Coast v. Hunt Oil Co., supra, 195 F.2d at 872. But the allegations in the instant complaint that the partners, including the liquidating partner, have completely divested themselves of power in favor of a stranger who is acting on behalf of creditors, and that one of these creditors, who is also the stranger's employer, has affiliations with the defendants, meet the test.

Appellees make a point that on June 26, 1964, Ira Haupt & Co. was adjudicated a bankrupt and the refereee nominated a trustee, in whom § 70, sub. a(5) and (6) of the Bankruptcy Act vest all

"property, including rights of action, which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered" and "rights of action arising upon * * * the unlawful * * * injury to his property." But Meyer v. Fleming, **327 U.S. 161**, 66 S.Ct. 382, 90 L.Ed. 595 (1946), held that the appointment of a trustee in reorganization for a railroad did not preclude prosecution of a stockholder's derivative action theretofore filed, and that principle seems entirely applicable here. As the Supreme Court said, the trustee is sufficiently protected by his rights to start a new suit, to intervene in the existing one, to settle the claim, or, if he deems its prosecution actually prejudicial, to cause the action to be abated. 327 U.S. at 167-168 and n. 14.

The district judge did not reach appellees' alternative point that the complaint did not set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," required by F.R.Civ.P. 8. As to this we agree with appellees. The statement, which we have quoted in full, although assuredly "short," is anything but "plain" — it furnishes not the slightest clue as to what conduct by the defendants is claimed to constitute "an illegal contract combination and conspiracy." While Nagler v. Admiral Corp., **248 F.2d 319**, 322-323 (2 Cir. 1957), repudiated the idea that "some special pleading * * * is required in antitrust cases," it is no authority that in such cases the pleader is specially privileged to plead nothing but the statutory words. A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently. See 2 Moore, Federal Practice ¶ 8.13 (2d ed. 1964). But it is equally clear that if the Page 300 district judge had properly taken this view, amendment of the complaint would nevertheless be allowed. See 3 Moore, Federal Practice ¶¶ 15.08[2], 15.10 (2d ed. 1964). It would thus be improper to affirm dismissal upon this ground.**[fn5]**

The judgment of dismissal for want of capacity to sue is reversed with instructions to grant leave to file an amended complaint, in default of which a new order of dismissal may be entered.

[fn1] Although the defense of lack of capacity is not expressly mentioned in rule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint. See Hershel Cal. Fruit Prods. Co. v. Hunt Foods, Inc., **119 F. Supp. 603** (N.D. Cal. 1954); Coburn v. Coleman, **75 F. Supp. 107** (W.D.S.C. 1947); compare Jacques Krinj En Zoon v. Schrijver, **151 F. Supp. 955** (S.D.N.Y. 1957), an approach widely employed for the statute of limitations defense, see 2 Moore, Federal Practice ¶ 12.10 (2d ed. 1964). In any event, the plaintiffs have not objected, and the portion of the motion relating to capacity could be regarded as a pre-answer motion for summary judgment, entertained by the judge in his discretion. F.R.Civ.P. 56(b).

[fn2] Note also the "double derivative" action by a stockholder of a corporation owning the stock of the injured corporation. See Holmes v. Camp, **180 App. Div. 409**, 167 N.Y.S. 840 (1917); Goldstein v. Groesbeck, **142 F.2d 422**, 425, 154 A.L.R. 1285 (2 Cir.), cert. denied, **323 U.S. 737**, 67 S.Ct. 36, 89 L.Ed. 590 (1944); 2 Hornstein, Corporation Law and Practice § 712 at 193-94 & n. 13-14 (1959).

[fn3] This was a minor revision of Rev.Stat., 1827-1828, pt. II, ch. IV, tit. I, § 14, which in turn had revised a somewhat different provision in Laws 1822, ch. 244, § 13 — the first limited partnership act in this country, Note, 36 Harv.L.Rev. 1017 n. 3 (1923).

[fn4] In Lightyger v. Franchard Corp., N.Y.L.J., Oct. 23, 1964, p. 16, col. 3; N.Y.L.J., Dec. 30, 1964, p. 16, col. 1 (Sup. Ct.), relied on by appellees, the judge first passing on the complaint seems to have assumed that the limited partners were seeking, or for some reason had to seek, to bring a class action; a second judge held the amended complaint inadequate for that purpose. We find little help in these decisions at motion term.

[fn5] We do not wish to be understood as necessarily accepting the implication of the concurring opinion that an amended complaint must allege that the trustee in bankruptcy has unwarrantedly refused to sue. But it surely would be advisable for the district court to invite the views of the trustee as to the effect of the suit upon the administration of the estate.

MOORE, Circuit Judge (concurring in the result):

I concur in the result which calls for the service of an amended complaint in default of which an order of dismissal may be entered. The factual situation appears to have changed, and to be changing, radically since charges were made that James P. Mahony was too closely connected with some of the defendants to bring any action against them with or without enthusiasm. In any amended complaint, the limited partners will have to disclose amongst other things (1) why Mahony's successor, Edward Feldman, is (if he be) similarly tainted; (2) why any representative of the courts or of the general partners is legally disqualified from trying to work out a solution of the rather complicated financial situation in which the parties find themselves or to bring any necessary lawsuits; and (3) the basis, if any, of any cause of action, apart from conclusory allegations which they, the limited partners, should have a right to bring or take over.

In short, by this concurrence, I do not concede the right of these limited partners to bring this action on the facts thus far alleged nor deny that there is any possibility that an amended complaint may not reveal such a right. This issue can only be determined in the light of the factual allegations of a new complaint. This is the result wisely reached by my colleague, Judge Friendly, in which I concur.

Shaw v. Stutchman, 105 Nev. 128 (1989)

SHAW v. STUTCHMAN, 105 Nev. 128 (1989)

771 P.2d 156

GERALD H. SHAW, EXECUTOR OF THE ESTATE OF ELIZABETH A. LYNN, APPELLANT,

v. THOMAS R. STUTCHMAN, AND FALLON CONVALESCENT CENTER, INC., A NEVADA

CORPORATION, RESPONDENTS.

No. 18944

Supreme Court of Nevada.

March 30, 1989

Appeal from Seventh Judicial District Court, White Pine County; Merlyn H. Hoyt, Judge.
Page 129

Gary D. Woodbury, Elko, for Appellant.

I.R. Ashleman, Reno, for Respondents.

OPINION

Per Curiam:

FACTS

On October 29, 1979, Elizabeth A. Lynn entered into an agreement with respondents Thomas R. Stutchman and Fallon Convalescent Center, Inc. ("FCC") whereby Stutchman, individually and on behalf of FCC, assigned to Lynn certain debts allegedly owed to them. In return, Lynn promised, *inter alia*, not to enforce any judgment that might be entered against Stutchman in a pending action.[fn1] Lynn died testate on April 4, 1984. Thereafter, the King County Superior Court, State of Washington, entered an order admitting Lynn's Last Will and Testament to probate, appointing appellant Gerald H. Shaw executor of Lynn's Estate, and issuing Letters Testamentary to Shaw.

On October 24, 1985, John M. Woodley, on behalf of the Lynn Estate, brought the suit that is the subject of this appeal against Stutchman and FCC.[fn2] The complaint alleged that Woodley was "the duly authorized and acting executor of the estate of Elizabeth A. Lynn," and that Stutchman and FCC had never satisfied portions of the 1979 agreement. In answering the complaint, Stutchman and FCC stated they were "without knowledge or information sufficient to form a belief as to the truth of the

[allegation that Woodley was the executor of the Lynn Estate], and therefore, upon such lack of knowledge or information, deny the same."

Subsequently, Gary Woodbury, the Nevada attorney employed to pursue the action, learned that Shaw, rather than Woodley, was the executor of Lynn's Estate and should have been named plaintiff. Pursuant to a stipulation between the parties, the district Page 130 court ordered that Shaw be substituted for Woodley. Counsel for Stutchman and FCC later learned that neither Woodley nor Shaw ever obtained authorization to act as executor of Lynn's Estate in this state.

On September 11, 1987, almost two years after the complaint was filed, Stutchman and FCC moved for summary judgment. They argued that Woodley, who never had authority to act on behalf of Lynn's Estate, lacked "standing" to bring the suit and that Shaw, although executor of Lynn's Estate in Washington, had neither initiated ancillary administration nor qualified to act as executor of Lynn's Estate in Nevada. Thus, according to Stutchman and FCC, the district court was without subject matter jurisdiction and they were entitled to summary judgment as a matter of law.

Following a hearing on the motion, the district court ruled that Shaw's authorization to act as executor in Washington lacked effect in this state and, therefore, Shaw could not have initiated the suit. Apparently agreeing that it lacked jurisdiction, the district court granted summary judgment in favor of Stutchman and FCC. This appeal followed.

DISCUSSION

Shaw concedes that in the absence of authorization by statute, a foreign executor's commencement of suit in this state is defective. He argues, however, that the defect is one of capacity, not jurisdiction. We agree.

Most courts that have addressed the issue Shaw raises have concluded that a foreign representative's failure to obtain authorization to act on behalf of an estate involves a defect of capacity rather than subject matter jurisdiction. *See* Lefebure v. Baker, 220 P. 1111 (Mont. 1923). *See also* Canfield v. Scripps, **59 P.2d 1040**, **1042** (Cal.Dist.Ct.App. 1936) (right of foreign administrator to maintain action involves only question of capacity to sue); 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1559 (1971) ("Capacity has been defined as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest or is the real party in interest.").

NRCP 17(b) provides that "[t]he capacity of an individual, *including one acting in a representative capacity*, to sue or be sued shall be determined by the law of this State. . . ." (emphasis supplied). As the district court correctly noted in its order granting summary judgment, the Nevada Revised Statutes contain no statutory provision permitting suit by a foreign executor, and, in the absence of statutory law, the common law controls. *See* NRS **1.030**. Under the common law, Page 131 [e]very grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, de jure, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interest of its own citizens. . . . Hence it has become an established

doctrine that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate in the courts of another state. . . .

Vaughan v. Northrup, 40 U.S. (15 Pet.) 1, 6 (1841). *See also* Matter of the Estate of Widemeyer, **741 S.W.2d 758**, **760** (Mo.App. 1987) ("an administrator, appointed in state A, cannot sue in his representative capacity in state B in the absence of a statute in state B authorizing him to do so. . . ."). Thus Shaw, and a fortiori Woodley, lacked legal *capacity* to bring suit in this state on behalf of Lynn's Estate. Shaw also argues that if the defect is one of capacity, then it may be waived. Again, we agree. NRCP 9(a), in pertinent part, provides:

> It is not necessary to aver the capacity of a party to sue or to be sued or the authority of a party to sue or be sued in a representative capacity. . . . When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, *he shall do so by specific negative averment*, which shall include such supporting particulars as are peculiarly within the pleader's knowledge. (emphasis supplied).

In Kucharski v. Pope & Talbot, 4 F.R.D. 208 (S.D.N.Y. 1944), a fact situation similar to the instant matter was presented. There, a foreign administratrix, appointed in Pennsylvania, brought suit in New York. The defendant answered denying knowledge or information sufficient to form a belief concerning the plaintiff's allegation that she was the administratrix of the decedent's estate. Subsequently, the defendant moved for summary judgment on the ground that the plaintiff lacked capacity to sue in New York. In denying the motion, the district court stated: "Such a denial of knowledge or information did not satisfy the requirements of [FRCP] Rule 9(a) and consequently by the terms of the Rule it Page 132 failed to raise an issue as to plaintiff's legal capacity." *Id.* at 209. *See also* Tractortechnic Gebrueder Kulenkempft & Co. v. Bousman, **301 F. Supp. 153**, **155** (E.D.Wis. 1969) ("A mere denial of information is not the equivalent of a specific negative averment."); Brown v. Music, Inc., **359 P.2d 295**, **301** (Alaska 1961) (answer denying allegation based on want of knowledge or information not sufficient to raise issue of capacity, and failure to raise issue in manner specified in rule results in waiver of defense); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1294 (1969) ("[A]n issue of capacity cannot be raised by a general denial. Nor can the issue be raised by a denial of knowledge or information sufficient to form a belief, at least not when the information concerning capacity is a matter of record or is readily accessible to the party attempting to put the matter in issue.").

Here, the complaint affirmatively alleged Woodley to be the executor of the Lynn Estate. Approximately five months after the complaint was filed, and after making a demand and motion for a change of venue and a motion for a more definite statement, Stutchman and FCC answered. In their answer, Stutchman and FCC stated: "Defendants are without knowledge or information sufficient to form a belief as to the truth of the [allegation that Woodley is the executor of the Lynn Estate], and therefore, *upon such lack of knowledge or information, deny the same."* (emphasis supplied). Not until September 11, 1987, almost two years after the complaint was filed, did Stutchman and FCC in their motion for summary judgment raise the issue of Woodley/Shaw's "standing."

We believe that the authorities cited above are correct in suggesting that respondents' denial of Woodley's authority to sue was insufficient to raise the issue of Woodley's representative capacity. Respondents, with a minimum of effort, could have determined the identity of the executor of Lynn's Estate and whether that person had qualified to act as executor in Nevada. Having failed to raise the issue of capacity by "specific negative averment," as required by NRCP 9(a), Stutchman and FCC waived

their objection. *See* Tobler & Oliver Constr. v. Nevada St. Bank, **89 Nev. 269**, **510 P.2d 1364** (1973);**[fn3]** *Music, Inc.*, Page 133 395 P.2d at 301. The subsequent substitution of Shaw for Woodley did not affect respondents' previous waiver.

CONCLUSION

We conclude that the district court erred in granting summary judgment in favor of Stutchman and FCC. Although a foreign representative's commencement of suit in this state without authorization is defective, the defect is one of capacity. As such, if the opposing party does not raise the issue of capacity in the manner provided in NRCP 9(a), the objection is waived.

Accordingly, we reverse the district court's order granting Stutchman and FCC summary judgment, and remand the case to that court for further proceedings.

[fn1] The action referred to eventually reached this court as Lynn v. Ingalls, **100 Nev. 115**, **676 P.2d 797** (1984).

[fn2] Woodley, an attorney licensed in Washington, represents the Lynn Estate. He employed local counsel here to pursue the action.

[fn3] In *Tobler*, we stated that NRCP 8(c) and NRCP 9(a) require allegations of lack of standing and capacity to be pled affirmatively and with particularity. *Tobler*, 89 Nev. at 271, 510 P.2d at 1365. This was not entirely correct. We note here that NRCP 9(a)'s requirement of a "specific negative averment" is not an affirmative defense governed by Rule 8(c). *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1294 n. 32 (1969). When the issue of lack of capacity is properly raised by a specific negative averment, the burden of persuasion rests with the party claiming capacity.

Sun Val. v. American Land Lease, 927 So.2d 259 (Fla. 2nd DCA 2006)

SUN VAL. v. AMERICAN LAND LEASE, 927 So.2d 259 (Fla.App. 2 Dist. 2006)

SUN VALLEY HOMEOWNERS, INC., a Florida not-for-profit corporation,

Appellant, v. AMERICAN LAND LEASE, INC., a foreign corporation; and Asset

Investors Operating Partnership, L.P., a foreign limited partnership,

Appellees.

No. 2D05-2829.

District Court of Appeal of Florida, Second District.

May 10, 2006.

Appeal from the Circuit Court, Pinellas County, James R. Case, J. Page 260

Christopher S. Kuhn of Justin G. Joseph, P.A., Tarpon Springs, for Appellant.

David D. Eastman, and Carol S. Grondzik of Lutz, Bobo, Telfair, Eastman, Tallahassee, for Appellees.

CANADY, Judge.

In this case involving a dispute arising under chapter 723, Florida Statutes (2004), the Florida Mobile Home Act, Sun Valley Homeowners, Inc., appeals the final summary judgment in favor of American Land Lease, Inc., and Asset Investors Operating Partnership, L.P. (collectively referred to as American Land Lease), the owner and operator of Sun Valley Estates, a mobile home park in Pinellas County. The summary judgment was based on the circuit court's ruling that Sun Valley Homeowners was without legal authority to bring suit on behalf of the homeowners residing in Sun Valley Estates. Because we conclude that the circuit court correctly determined that Sun Valley Homeowners had not complied with a statutory provision that a homeowners' association has standing to bring suit under chapter 723 only if the association has obtained the written consent of a majority of the homeowners, we affirm.

In its motion for summary judgment, American Land Lease challenged the status of Sun Valley Homeowners as a homeowners' association established under the requirements of section 723.075. The motion also challenged Sun Valley Homeowners' compliance with the standing requirement set forth in section 723.037(1). The circuit court ruled that American Land Lease was entitled to summary judgment Page 261 on both grounds. In view of our conclusion that the trial court correctly granted the summary judgment on the basis of Sun Valley homeowners' failure to comply with section 723.037(1), we will not address the challenge based on section 723.075. Before discussing the requirement set forth in section

723.037(1) and its application to this case, we will address Sun Valley Homeowners' claim — which we reject — that American Land Lease waived the issue of Sun Valley Homeowners' compliance with section 723.037(1) by failing to raise the issue in its answer to Sun Valley Homeowners' complaint.

Waiver of the Lack of Capacity to Sue Issue

Sun Valley Homeowners' amended complaint contained an allegation in paragraph 2 that Sun Valley Homeowners was "operating as a [h]omeowners [a]ssociation" under chapter 723 and was "acting on behalf of all mobile homeowners in the [Sun Valley Estates Mobile Home] Park concerning a matter of common interest." The amended complaint alleged in paragraph 4 that at a meeting on a specified date, "an overwhelming majority of [Sun Valley Homeowners'] members supported [Sun Valley Homeowners'] bringing this action." In its answer, American Land Lease responded to the allegations in paragraphs 2 and 4 by stating: "Without knowledge and therefore denied." None of the affirmative defenses stated in the answer made reference to Sun Valley Homeowners' standing or capacity to bring suit in a representative capacity.

At the hearing on American Land Lease's motion for summary judgment, counsel for Sun Valley Homeowners argued that the issues presented in the motion "were not raised in their [a]nswers [and] [a]ffirmative [d]efenses." Counsel for Sun Valley Homeowners further argued: "I believe that under Rule 1.140(b), Florida Rule of Civil Procedure, they are precluded from raising these issues at this particular time." Counsel for American Land Lease argued in response that the owner had raised the issue by way of a specific negative averment in answering paragraph 2 of the amended complaint: "We stated we were without knowledge which is of course a denial." Counsel for Sun Valley Homeowners then stated to the court that "you will find absolutely nothing regarding lack of standing or any standing issue" in the answer or affirmative defenses.

The trial court's response to argument of counsel was twofold. First, the court observed that "[w]ithout knowledge is a denial with respect to that issue." Second, the court pointed out to counsel for Sun Valley Homeowners that "the [summary judgment] motion itself . . . puts you on notice" and that "the real question is whether or not you are prejudiced and surprised here today which doesn't bear into your argument." Counsel for Sun Valley Homeowners made no response to the court's comments.

Florida Rule of Civil Procedure 1.120(a) provides, in pertinent part, that "[w]hen a party desires to raise an issue as to the . . . authority of a party to sue . . . in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge." The Author's Comment with respect to this provision states: "Lack of capacity must be raised . . . by specific negative averment (not merely by pleading lack of knowledge)." The view expressed in this commentary that pleading lack of knowledge is not sufficient to raise the issue of capacity to sue follows the federal case law interpreting Federal Rule of Civil Procedure 9(a), from which rule 1.120(a) is Page 262 derived. *See Plumbers Local Union No. 519 v. Serv. PlumbingCo.*, 401 F.Supp. 1008, 1011 (S.D.Fla. 1975) (stating that defendant's "deni[al of] its knowledge of plaintiffs' capacity . . . is insufficient to raise the issue of plaintiffs' capacity"); *Tractortechnic Gebrueder Kulenkempft & Co. v. Bousman*, 301 F.Supp. 153, 155 (E.D.Wis. 1969) ("A mere denial of information is not the equivalent of a specific negative averment."). We agree that a denial based on lack of knowledge is not sufficient to state a "specific negative averment."

It is unquestionable that a failure to comply with the requirement of rule 1.120(a) for a specific negative averment *may* result in a waiver of the capacity issue that precludes a party from raising the issue subsequently. *See McDonough Equip. Corp. v. Sunset Amoco West, Inc.*, **669 So.2d 300** (Fla. 3d DCA 1996). It is equally unquestionable that a party's failure to make a specific negative averment in an answer may — in appropriate circumstances — be remedied by a subsequent pleading. This flows from the provisions of Florida Rule of Civil Procedure 1.190, under which "[l]eave of court [to amend pleadings] shall be given freely when justice so requires," rule 1.190(a), and "the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties," rule 1.190(e).

Rule 1.120(c) contains a provision similar to the "specific negative averment" requirement of rule 1.120(a). Under rule 1.120(c), "[a] denial of performance or occurrence [of a condition precedent] shall be made *specifically and with particularity.*" (Emphasis added.) In *Ingersoll v. Hoffman*, **589 So.2d 223** (Fla. 1991), a medical negligence case, the court considered whether a defendant had failed to comply with the requirement of rule 1.120(c) and had thereby waived the right to subsequently challenge the plaintiffs' failure to satisfy a condition precedent to bringing suit. At issue was the plaintiffs' failure to comply with the applicable medical malpractice prelitigation notice requirements. The plaintiffs' complaint "contained a specific allegation that the [plaintiffs] had complied with all conditions precedent to the filing of the suit." *Id.* at 224. "In his answer, [the defendant] made only a general denial of the allegation of compliance with all conditions precedent. The answer contained no reference to the [plaintiffs'] failure to comply with [the applicable pre-suit notice requirements]." *Id.* The court held that such a general denial was not sufficient to meet the requirement of rule 1.120(c): "A general denial is not one `made specifically and with particularity.'" *Id.*

The court went on to hold that the defendant's failure to comply with the requirements of rule 1.120(c) had resulted in the waiver of the issue by the defendant. In reaching this conclusion, the court focused on the existence of prejudice to the plaintiff resulting from the raising of the issue after the statute of limitation had run. The court stated: "We do not suggest that under appropriate circumstances a defendant could not amend the answer so as to specifically deny the performance of a condition precedent. The test as to whether an amendment to a pleading should be allowed is whether the amendment will prejudice the other side." *Id.* at 225.

The *Ingersoll* court's focus on prejudice is consistent with rule 1.190's policy of permitting liberal amendment of pleadings.

Public policy favors the liberal amendment of pleadings so that cases can be tried on their merits. [Rule] 1.190 provides that `leave of court [to amend Page 263 pleadings] shall be given freely when justice so requires.' . . . The failure to permit amendment constitutes an abuse of discretion unless it clearly appears the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.

EAC USA, Inc. v. Kawa, **805 So.2d 1**, **5** (Fla. 2d DCA 2001) (citations omitted). "A denial of leave to amend a pleading is an abuse of discretion where the proffered amendment indicates that a plaintiff can state a cause of action. The same holds true where a defendant demonstrates he could prevail with the assertion of a properly available defense." *Wayne Creasy Agency, Inc. v. Maillard*, **604 So.2d 1235**, **1236** (Fla. 3d DCA 1992) (citations omitted).

In the instant case, the trial court erred in stating that the answer contained a specific negative averment concerning Sun Valley Homeowners' capacity to sue in a representative capacity. But the trial court remedied this error by focusing on the absence of any showing of prejudice to Sun Valley Homeowners. In effect, after first ruling that the denial in the answer was a sufficient specific negative averment, the trial court then ruled that, in any event, Sun Valley Homeowners had failed to establish that it was prejudiced by American Land Lease's raising the capacity to sue issue in its motion for summary judgment. In doing so, the trial court effectively treated the summary judgment motion as encompassing a motion for leave to amend. *See Block v. First Blood Assocs.*, **988 F.2d 344**, **350** (2d Cir. 1993) (affirming action of trial court which "construed [defendant's] summary judgment motion also as a motion to amend" to assert the statute of limitations as an affirmative defense). Because there was no effect "[on] the substantial rights of the parties," the trial court was justified in "disregard[ing]" the technical "defect" in American Land Lease's pleading. Rule 1.190(e).

Sun Valley Homeowners has at no point — either before the trial court or in this appeal — presented any argument that it was prejudiced by American Land Lease's raising the capacity issue in its motion for summary judgment. Indeed, when the trial court raised the issue of prejudice, Sun Valley Homeowners' counsel stood mute. Since Sun Valley Homeowners failed in the trial court proceedings to make any showing of prejudice, the trial court properly permitted American Land Lease to raise the capacity to sue issue by way of the motion for summary judgment.

*The Standing Requirement of Section **723.037**(1)*

Section **723.037** deals with the resolution of disputes concerning "any increase in lot rental amount or reduction in services or utilities provided by the park owner or change in rules and regulations." § **723.037**(1). The statute begins with a requirement that a park owner give advance written notice of such increases in rental amount, reductions in services or utilities, or changes in rules and regulations. The statute outlines a process for conducting meetings for the discussion of disputes. § **723.037**(4). The statute also sets forth the process for the initiation of formal mediation. § **723.037**(5). The details of the mediation process are set forth in section **723.038**. Section **723.0381** authorizes the filing of actions in circuit court when mediation has failed.

The question at issue here turns on the interpretation of the concluding sentence of section **723.037**(1), which states: "The homeowners' association shall have *no standing to challenge* the increase in lot rental amount, reduction in services or utilities, or change of rules or regulations Page 264 *unless a majority of the affected homeowners agree, in writing*, to such representation." (Emphasis added.) Sun Valley Homeowners argues that this provision of the statute applies to challenges raised in *mediation* proceedings but not to challenges brought by filing suit in circuit court. The undisputed facts before the trial court established that a majority of the affected homeowners had *not* agreed in writing to being represented by Sun Valley Homeowners in the lawsuit against American Land Lease. Accordingly, if the standing requirement of section **723.037**(1) applies to *lawsuits*, the trial court correctly determined as a matter of law that Sun Valley Homeowners did not have standing to bring suit. Section **723.037**(1) does two things. First, it sets forth the notice requirements imposed on park owners with respect to rental increases, reductions in services or utilities, and changes in rules and regulations. Second, it sets forth the standing requirement imposed on homeowners' associations which seek to "challenge" such an action by park owners. The legislature quite logically chose to begin the statutory provisions governing disputes between park owners and homeowners with the notice requirements imposed on park owners and the standing requirement for the participation of homeowners' associations in such disputes.

Under the statutory scheme, the filing of a lawsuit constitutes a "challenge" to which the standing requirement of section 723.037(1) applies. The verb *challenge* means "to take exception to" or to "call in question." *Random House Unabridged Dictionary* 343 (2d ed. 1993). Initiating a lawsuit is no less of a *challenge* to, for example, an increase in lot rental amount than is the initiation of mediation. If the legislature had intended for the standing provision to apply only to mediation proceedings, the provision in section 723.037(1) would have specifically referred to mediation and would not have used the broad term *challenge.*

The fact that the initiation of mediation is addressed in section 723.037 while the initiation of litigation is addressed in section 723.0381 does not affect the analysis of the meaning of the standing provision in section 723.037(1). Given its broad formulation, the reach of the standing provision is neither explicitly nor implicitly limited to the particular statutory section in which it appears.[fn1]

Finally, we observe that it would be an odd policy indeed to have a more restrictive standing requirement for the initiation of mediation — which by its very nature is not binding — than for the institution of litigation. Nothing in the statutory scheme indicates that the legislature adopted such a policy.

Conclusion

The trial court correctly permitted American Land Lease to challenge Sun Valley Homeowner's capacity to sue in a representative capacity by way of the motion for summary judgment. The trial court also correctly determined that the undisputed evidence established that because Sun Valley Homeowners had failed to comply with the applicable standing requirement of section 723.037(1), it lacked the capacity to bring suit in a representative Page 265 capacity. Accordingly, the final summary judgment is affirmed.

Affirmed.

NORTHCUTT and SALCINES, JJ., Concur.

[fn1] We note that the court in *Amber Glades, Inc. v. Leisure Associates Ltd. Partnership*, 893 So.2d 620, 625 (Fla. 2d DCA 2005), made the following statement in dicta: "Section 723.037(1) requires written authorizations to commence mediation. It is unclear in the statute whether a mobile homeowners association must also have such authorization to bring a lawsuit once the mediation fails." As is apparent from our explanation of our holding in the instant case, we have concluded that the statutory provisions are not unclear. Page 890

Asociacion, Perjudicados v. Citibank, 770 So.2d 1267 (Fla. 3rd DCA 2000)

ASOCIACION, PERJUDICADOS v. CITIBANK, 770 So.2d 1267 (Fla.App. 3 Dist. 2000)

ASOCIACION DE PERJUDICADOS POR INVERSIONES EFECTUADAS EN U.S.A.,

Appellant, v. CITIBANK, F.S.B., CITIBANK, N.A., THE PARTNERS FINANCIAL

GROUP, INC.,

and GERRY BURNS, Appellees.

No. 3D99-2800.

District Court of Appeal of Florida, Third District.

Opinion filed November 15, 2000.

An Appeal from the Circuit Court for Dade County, Fredricka G. Smith, Judge, Lower Tribunal No. 98-28754.
Page 1268

Affirmed.

Rodriguez & Angelo and Paulino A. Nin~ez, Jr., and Jorge L. Guerra, for appellant.

Boose Casey Ciklin Lubitz Martens McBane & O'Connell and John D. Boykin; Mark A. Kamilar, for appellees.

Before Jorgenson, Cope, and Ramirez, JJ.

Jorgenson, Judge.

The appellant is an association of foreign investors ("the association") organized under the laws of Spain to recover damages for its members ("the members"), resulting from alleged securities fraud. The association sued Citibank F.S.B., and Citibank N.A. (Citibank) alleging they permitted certain Citibank account holders to use their accounts in furtherance of their securities fraud scheme. The association also sued Partners Financial Group ("Partners"), the stock brokers who opened and maintained the members' accounts.

Upon motion the trial court dismissed the case with prejudice on the grounds of lack of standing and lack of capacity to sue. We affirm the trial court's order dismissing the complaint with prejudice.

At common law, unincorporated associations were treated as partnerships. *See*, e.g., Florio v. State of Florida, 119 So.2d 305, 309 (Fla. 2d DCA 1960); Guyton v. Howard, 525 So.2d 948 (Fla. 1st DCA 1988).

A partnership (and therefore an unincorporated association) could sue or be sued only in the name of its members, not in the name of the partnership. The Florida legislature has since empowered partnerships to sue or be sued in their own name. § 620.8307(1), Fla. Stat. (1995). The association asserts that section 620.8307(1) of the Revised Uniform Partnership Act (RUPA) should be extended to confer standing on unincorporated associations because the common law rule that unincorporated associations are to be treated like partnerships has not been abrogated by statute.[fn1] We disagree. Page 1269

The legislature clearly intended RUPA to apply only to for-profit organizations: "An unincorporated nonprofit organization is not a partnership under RUPA, even if it qualifies as a business, because it is not a `for profit' organization." Uniform comment to § 620.8202(2), Fla. Stat. (1995). The association, as its title implies,[fn2] is not a for-profit association, as it was organized only to recover damages for its members, not to conduct business for profit.

Because there is no statutory authority conferring on the association the capacity to sue,[fn3] the common law rule, that associations cannot sue or be sued in their own name, applies in this case. Accordingly, the association does not have capacity to sue. Moreover, the court properly denied leave to amend, as the association's capacity defect cannot be cured. Only the individual members or a properly certified class would have standing under these circumstances. Because the capacity issue is dispositive, we need not address the standing issue.

Affirmed.

[fn1] The association alternatively argues that chapter 622, titled "Foreign Unincorporated Associations," applies. We find that argument without merit. The association clearly does not meet the definition of "foreign unincorporated association" as used in section 622: the association is not a joint stock association, was not formed in the United States, and does not have capital stock. *See* § 622.02, Fla. Stat. (1947).

[fn2] The association's name in English means "association of parties injured due to investments made in the U.S.A."

[fn3] "An unincorporated . . . association has no legal existence and generally does not have the capacity to sue or be sued as an entity; thus in the absence of an enabling or permissive statute conferring associational standing, such an association must sue or be sued in the names of the individuals composing it rather than its firm name." Fla. Jur. 2d, Associations and Clubs § 15 (1994) (citing Hunt v. Adams, 111 Fla. 164, 149 So. 24 (Fla. 1933); Johnston v. Albritton, 101 Fla. 1285, 134 So. 563 (Fla. 1931); I. W. Phillips & Co. v. Hall, 99 Fla. 1206, 128 So. 635 (Fla. 1930); Guyton v. Howard, 525 So.2d 948 (Fla. 1st DCA 1988); Walton-Okaloosa-Santa Rosa Medical Soc. v. Spires, 153 So.2d 325 (Fla. 1st DCA 1963); Florio v. State, 119 So.2d 305 (Fla. 2d DCA 1960)).

Batavia, LTD. v. United States Etc., 393 So.2d 1207 (Fla. 1st DCA 1980)

BATAVIA, LTD. v. UNITED STATES, ETC., 393 So.2d 1207 (Fla.App. 1 Dist. 1980)

BATAVIA, LTD., APPELLANT, v. UNITED STATES OF AMERICA, BY AND THROUGH ITS AGENCY, THE DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, APPELLEE.

No. UU-468.

District Court of Appeal of Florida, First District.

December 31, 1980.

On Motion for Clarification February 13, 1981.

Appeal from the Walton County Circuit Court, Clyde E. Wells, J.

George Ralph Miller, DeFuniak Springs, for appellant.

Marika Lancaster, Tax Division, Dept. of Justice, M. Carr Ferguson and Russell Mather, Washington, D.C., for appellee.

LILES, WOODIE A., Associate Judge (Retired).

Appellant, Batavia, Ltd., a foreign corporation apparently registered in the Page 1208 Cayman Islands, seeks review by interlocutory appeal of an order staying further prosecution of its mortgage foreclosure action pending its compliance with Section 607.354(1), Florida Statutes.[fn1] Such an order staying the proceedings is not a specified appealable order under Rule 9.130, Florida Rules of Appellate Procedure. However, because appeal from an eventual final order would not necessarily provide Appellant with a complete and adequate remedy, we treat this appeal as a petition for writ of certiorari pursuant to Rule 9.040(c), Florida Rules of Appellate Procedure.

Appellant seeks to foreclose on a mortgage note and mortgage deed for certain real property executed by one Danny L. Wright, who has defaulted and has filed no response to Appellant's complaint nor otherwise appeared in the action. Because it has a federal tax lien against Wright which is inferior and subordinate to the mortgage being foreclosed upon, Appellee was joined as a party defendant. Appellant requested in its complaint that an accounting of the funds due from Wright be made and, if the amount due was not paid within time limits established by the court, that the property be sold to satisfy Appellant's claim; and, if the proceeds of the sale are insufficient to pay this claim, that a deficiency judgment be entered against Wright for the sum remaining unpaid, and that the estate of Wright and persons claiming under or against him since the filing of the notice of lis pendens be foreclosed.

In response to the complaint, Appellee filed a motion to dismiss it as a party defendant upon the ground that Appellant has not obtained the authority to transact business in this state. The trial judge did not dismiss Appellee as a party defendant but did stay the proceeding until Appellant has obtained authority to transact business in Florida. Section 607.354(1), Florida Statutes, prohibits a foreign corporation from maintaining any action, suit, or proceeding in any court of this state until the corporation has obtained authority to transact business in this state. However, creating, as borrower or lender, or acquiring indebtedness, mortgages, or other security interests in real or personal property [Section 607.304(2)(g)] or securing or collecting debts or enforcing any rights in property securing the same [Section 607.304(2)(h)] are not considered to be transacting business in this state. We are therefore required for the first time to construe Section 607.304(2)(g) and (h), Florida Statutes. The express wording of the statute, obviously enacted for the purpose of attracting foreign corporate investments, specifically excludes from registration Batavia, Ltd., which is seeking to foreclose on a mortgage note and mortgage deed. An examination of *Corporate Air Fleet of Tennessee, Inc. v. Ellis,* **324 So.2d 719** (Fla. 2nd DCA 1975) and *Al Wilson's Power-Ful Displays, Inc. v. Morgan Adhesive, Inc.,* **259 So.2d 166** (Fla. 3rd DCA 1972) reveals that the enactment of Section 607.304(2)(g) and (h) does what these cases already permitted, i.e., that foreign corporations may sue on notes executed and delivered in Florida without qualifying to do business in Florida. However, this complaint makes no allegation that this is the only type of business transacted by Batavia, Ltd., in Florida, thus entitling it to the benefits, if any, afforded under this statute. This shall be rectified upon remand.

Appellant takes the position that the trial judge could require nothing more than the filing of a law suit. Appellee relies on *Kar Products, Inc. v. Acker,* **217 So.2d 595** (Fla. 1st DCA 1969) to support the trial court's Page 1209 order requiring Appellant to register under Section 607.354(1), Florida Statutes. We disagree on both counts. *Kar Products,* a case decided prior to the enactment of Section 607.304(2)(g) and (h), stands for the proposition that, if the activity carried on by a foreign corporation is to be categorized as interstate commerce, it is excluded from registration. That court held that the activity there involved did not constitute interstate commerce and, thus, that foreign corporation's right to institute and maintain the action was not exempt from the registration requirements of Chapter 613, Florida Statutes.**[fn2]** We have no such factual situation here. Interstate commerce is not a factor, nor is this suit being maintained under the provision excluding interstate commerce, which is also excluded from registration. Section 607.304(2)(i), Florida Statutes.

Therefore, we hold that the trial judge cannot force Batavia, Ltd., to register as a foreign corporation in order to maintain this suit. However, we do not hold that the trial judge can make no further inquiry into Batavia, Ltd.'s activities as a foreign corporation. A trial judge has the inherent power to prevent abuse of its process and procedures, and we note that the trial judge here was concerned over the unusual nature of the corporation, an apparent Grand Cayman Island corporation. Nothing in Section 607.304, Florida Statutes, prohibits the trial judge from inquiring into the nature of Appellant's activities. Accordingly, the trial judge may require Batavia, Ltd., to provide such limited information as would alleviate his concerns short of registration.

REVERSED and REMANDED for proceedings not inconsistent with this opinion.

THOMPSON, J., concurs.

WENTWORTH, J., concurs and dissents with opinion.

[fn1] No foreign corporation transacting business in this state without authority to do so shall be permitted to maintain any action, suit, or proceeding in any court of this state until such corporation shall have obtained authority to transact business in this state. Nor shall any action, suit, or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim, or demand arising out of the transaction of business by such corporation in this state until authority to transact business in this state shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

[fn2] The predecessor statute to Chapter 607, Florida Statutes.

WENTWORTH, Judge, concurring and dissenting.

I concur in the majority opinion except insofar as it requires Batavia, a foreign corporate plaintiff, to initially allege that it is not transacting business in Florida. Sections 607.304(2)(g) and (h), Florida Statutes, provide that Batavia's activities involved in the present action as stated by the complaint do not constitute "transacting business" in this state, and neither the record nor the pleadings suggest that this case involves more than an isolated transaction within the state. In these circumstances it is incumbent upon the defendant to put in issue the point that Batavia is otherwise transacting business in the state; absent such an initial defensive showing Batavia is not required by Chapter 607, Florida Statutes, to allege or prove a negative. *See Al Wilson's Power-Ful Displays, Inc. v. Morgan Adhesive Inc.,* **259 So.2d 166** (Fla. 3d DCA 1972); *see also McMullen v. Inland Realty Corp.,* **113 Fla. 476**, **152 So. 740** (1933); *Corporate Air Fleet of Tennessee v. Ellis,* **324 So.2d 719** (Fla. 2d DCA 1975).

I agree with the majority that the trial court may prevent abuse of its process or procedures by requiring Batavia to provide information sufficient to alleviate the court's concern regarding the nature of the corporate entity.

ON MOTION FOR CLARIFICATION

LILES, WOODIE A. (Retired), Associate Judge.

On December 31, 1980, this Court entered its decision in the above-captioned case, reversing the decision of the Circuit Court of Walton County and remanding the cause for further proceedings. Paragraph two of the opinion states, in part, that:

> Because it has a federal tax lien against Wright which is inferior and subordinate to the mortgage being foreclosed upon, Appellee was joined as a party defendant.

Appellee points out that this may be read to indicate an opinion on the merits of the case, which has yet to be tried.

Accordingly, Page 1210 to eliminate any potential for confusion, we modify the above statement to read:

> Because it has a federal tax lien against Wright, which was alleged to be inferior and subordinate to the mortgage being foreclosed upon, Appellee was joined as a party defendant.

WENTWORTH and THOMPSON, JJ., concur.

Wittington Condominium v. Braemar, 313 So.2d 463 (Fla. 4th DCA 1975)

WITTINGTON CONDOMINIUM v. BRAEMAR, 313 So.2d 463 (Fla.App. 4 Dist. 1975)

WITTINGTON CONDOMINIUM APARTMENTS, INC., ET AL., APPELLANTS, v. BRAEMAR

CORPORATION, ETC., ET AL., APPELLEES.

No. 74-424.

District Court of Appeal of Florida, Fourth District.

May 23, 1975.

Rehearings Denied June 26, July 2, 1975.

Appeal from the Circuit Court, Broward County, L. Clayton Nance, J. Page 464

H. Winston Hathaway of Lavalle Wochna & Rutherford, P.A., Boca Raton, for appellants.

Perry S. Itkin of Kirsch & Mills, P.A., Fort Lauderdale, and Joseph P. Averill of Knight, Peters, Hoeveler, Pickle, Niemoeller & Flynn, Miami, for appellees.

MAGER, Judge.

This is an appeal by Wittington Condominium Apartments, Inc. and Victor P. Matthews, individually and as president of Wittington Condominium Apartments, Inc., plaintiffs below, from a final judgment on the pleadings entered on behalf of Braemar Corporation one of several defendants below.

The plaintiffs filed a complaint containing numerous counts seeking money damages and injunctive relief as occasioned by the alleged improper design and construction of the Wittington Condominium Apartments by Braemar (the developer) and other named defendants. The suit was instituted by the Wittington Condominium Association in its individual capacity joined by Victor Matthews in his individual and corporate capacity as president of the Wittington Condominium Association. In addition, Victor Matthews also alleged that the suit was being maintained by him as a class action for other condominium unit owners.[fn1]

The complaint, which alleged improper design and construction of the Wittington Condominium contrary to plans, specifications and representations made by Braemar and its employees, sets forth various alleged defects in the common elements and seeks recovery predicated upon various legal theories such as, implied warranty; negligent construction; breach of contract; fraud and deceit; breach of a fiduciary duty. Page 465

Answers were filed by Braemar and other defendants in which the material allegations of the complaint were denied. Subsequently, various motions were filed including motions for judgment on the pleadings, motion to strike, motion to dismiss, and motion for summary judgment. The primary thrust of

the motions was directed at the propriety of maintaining a representative or class action. Ultimately, the court ruled *only* on the motion for judgment on the pleadings entering a final judgment thereon concluding that "the actions as presented by plaintiffs herein do not properly lie . . ." citing authorities dealing with representative and class actions.

Based upon a review of the case law and pertinent texts and authorities it is our opinion that the entry of a final judgment on the pleadings was erroneous. See Fla. Civil Practice Before Trial, sec. 13.14.

In Bradham v. Hayes Enterprises, Inc., First District Court of Appeal, **306 So.2d 568** opinion filed January 23, 1975, the court observed:

". . . A motion to dismiss and a motion for judgment on the pleadings are not the same and are not governed by the same rules of procedure. (Davis v. Davis, Fla.App. 1st 1960, **123 So.2d 377**) A motion for judgment on the pleadings must be determined *on the pleadings.* (For a thorough discussion on the meaning of the term `pleadings' see Metcalf v. Langston, Fla.App. 1st 1974, **296 So.2d 81**, cert. den., Sup.Ct. Fla. 1974, **302 So.2d 414**) The purpose of the motion for judgment on the pleadings is to permit a trial judge to examine the allegations of the bare pleadings and determine whether there are any issues of fact *based thereon.* If the bare pleadings reveal that there are no facts to be resolved by a trier of facts then the trial judge is authorized to enter a judgment based upon the uncontroverted facts appearing from the pleadings as applied to the applicable law. *Needless to say, if the pleadings reveal issues of fact then a judgment on the pleadings may not be properly entered.*" (Emphasis added.)

It is further pointed out in Butts v. State Farm Mutual Automobile Ins. Co., Fla.App. 1968, **207 So.2d 73**, 75:

". . . Upon a hearing on defendant's motion for a judgment on the pleadings, after defendant has answered, matters outside the pleadings may not be considered. (citations omitted) In considering such a motion, *all material allegations of the opposing party's pleading are taken as true,* and all of the movant's allegations which have been denied are taken as false. Since the answer requires no responsive pleading, all allegations contained therein are deemed denied. (citations omitted) The test to be applied in this instance is the same as if defendant were to have moved to dismiss the complaint for failure to state a cause of action. . . ." (Emphasis added.)

In this connection it was stated in Davis v. Davis, Fla.App. 1960, **123 So.2d 377**, 380:

"Although the test to be applied in disposing of a motion for judgment or decree on the pleadings is the same as in disposing of a motion to dismiss for failure to state a cause of action, the office of the two different type motions is entirely different and should not be confused. *If a motion for final decree on the pleadings is granted, the decree entered pursuant thereto is a final adjudication on the merits of the cause.* If a motion to dismiss a complaint is granted, the unsuccessful party is privileged to seek leave of court for permission to file an amended pleading in which the defects of the dismissed pleading may be supplied by additional allegations." (Emphasis added.)

Measured by the foregoing principles, a thorough examination of the pleadings reflects the existence of disputed questions of fact and allegations in the complaint, Page 466 the truthfulness of which are admitted for the purpose of the motion raising issues of fact for the court's determination precluding the entry of a judgment on the pleadings. It is difficult to conclude that notwithstanding the plaintiffs' allegations of breach of implied warranty, negligent construction and breach of contract (which for the

purpose of the motion are taken as true), the defendants are entitled, as a matter of law, to a judgment on the merits "without regard to what the findings may be on the facts on which issue is joined". AIA Mobile Home Park, Inc. v. Brevard County, Fla.App. 1971, 246 So.2d 126. By the very nature of the defendant's motion and the admissions made thereby regarding the allegations in the complaint a judgment on the pleadings cannot be granted.

If, in reality, the defendants seek to challenge and defeat the capacity of the plaintiffs to maintain a particular action, it cannot be accomplished through the vehicle of a motion for judgment on the pleadings. As Rule 1.120(a), FRCP, clearly states:

"(a) *Capacity.* It is not necessary to aver the capacity of a party to sue or to be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. W*hen a party desires to raise an issue as to* the legal existence of any party or the *capacity of any party to sue* or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so *by specific negative averment* which shall include such supporting particulars as are peculiarly within the pleader's knowledge." (Emphasis added.)

The "specific negative averment" referred to in Rule 1.120 may be reflected in a responsive pleading (answer) or presumably in what might be described as a "speaking motion" whether denominated as a motion to dismiss, a motion to drop improperly joined parties, or a motion to strike. See Fla. Civil Practice Before Trial, Sections 11.4 and 11.5, published by Continuing Legal Education of The Florida Bar. See also Equitable Life Assurance Society of United States v. Fuller, Fla.App. 1973, 275 So.2d 568; Wilson v. First National Bank of Miami Springs, Fla.App. 1971, 254 So.2d 362; Gordon Finance, Inc. v. Belzaguy, Fla.App. 1968, 216 So.2d 240. The improper joinder of parties or the insufficiency of the pleadings to allege the proper representative capacity is not a basis for a *final* dismissal of the action or a final adjudication on the merits, which would be the resulting effect of a final judgment entered pursuant to a motion for judgment on the pleadings, see Davis v. Davis, supra; at least not until an opportunity to amend has been granted and there is an inability to comply therewith. See Equitable Life Assurance Society v. Fuller, supra; Wilson v. First National Bank of Miami Springs, supra; and Gordon Finance, Inc. v. Belzaguy, supra; see also Hargraves v. Costin, First District Court of Appeal, Case Nos. V-57, W-324 and W-336 opinion filed February 13, 1975 and Rosenwasser v. Frager, Third District Court of Appeal, 307 So.2d 865 opinion filed February 4, 1975.

In examining the complaint we cannot conclude that it is totally deficient insofar as the standing or capacity of the named parties are concerned. The plaintiffs' effort to take a "shotgun" approach in the description and joinder of party-plaintiffs, although somewhat cumbersome, is not fatal so as to preclude at least *one* of the named plaintiffs from being able to maintain a cause of action against the defendants. Cf. Harrell v. Hess Oil and Chemical Corporation, Fla. 1973, 287 So.2d 291. The net effect of the final judgment on the pleadings is a judicial determination that *none* of the named parties has any cause of action against the defendant developer and others resulting from alleged negligent design and construction; we cannot subscribe to the broad legal effect this Page 467 determination would have based upon the pleadings in this case.

Considering, first, the status of the Wittington Condominium Association we do not perceive of any valid legal impediment to the Association's ability to maintain a suit, *individually,* against the defendants. Section 711.12, F.S., of the "Condominium Act" provides in part as follows:

"(1) The operation of the condominium shall be *by the association,* the name of which shall be stated in the declaration. The declaration may require the association to be organized as a particular entity, such as but not limited to a corporation for profit or corporation not for profit, in which the owners of units shall be stockholders or members.

"(2) *The association,* whether or not incorporated, *shall be an entity which shall act through its officers and shall have the capability of* contracting *bringing suit* and being sued. If not incorporated the association shall be deemed to be an entity existing pursuant to this act and shall have the power to execute contracts, deeds, mortgages, leases and other instruments by its officers. . . .

* * * * * *

"(4) Unless limited by the declaration the powers and duties of the association shall include those set forth in this law. The powers and duties of the association *shall include also those set forth in the declaration and by laws.*

* * * * * *

"(6) The association shall have the power to make and collect assessments, and to lease, maintain, repair and replace the common elements."[fn2]

Under the provisions of Article VII, section 3, of the Declaration of Condominium (attached to the complaint below) it is provided that:

"The duties and powers of the Association (Wittington) shall be those set forth in this *Declaration, the Articles of Incorporation and the By-Laws,* together with those reasonably implied to effect the purposes of the Association and this Declaration; . . .".

Under the provisions of Article III, section G of the Articles of Incorporation (attached to the complaint below) the Association is granted the additional power "to enforce by legal means the provisions of the condominium documents, these Articles or the By-Laws of the Association and the regulations for use of the property in the condominium".

Article I, section 5, of the Declaration of Condominium (referred to in the instant complaint) provides in part that "The entire structure to be located on the Property will be built substantially in accordance with Plans and Specifications therefor prepared . . .".

The foregoing statutory and documentary provisions clearly reflect and contemplate that a condominium association has a duty and responsibility to operate and maintain the condominium facility;[fn3] to act on behalf of all unit owners in connection therewith; and *has the capacity as an individual entity to bring suit* in furtherance of its statutory and documentary powers, duties and responsibilities. The language set forth in sec. 711.12(2), in clear and unmistakable Page 468 English, states that the association "shall have the capability of . . . bringing suit"; and under the provisions of sec. 711.12(4) the association shall have those powers and duties also set forth "in the declaration and bylaws".

Therefore, regardless of the propriety vel non of the motion for judgment on the pleadings, Wittington Condominium Association does have the authority to bring suit in its individual capacity to

enforce the provisions of the by-laws and condominium documents; and in particular to predicate an action based upon the allegation that construction of the condominium shall be "substantially in accordance with certain plans and specifications referred to therein . . .".[fn4] The point is not the ability of the association to *prove* its allegations but rather the ability of the association to *plead and maintain* a cause of action, which it can and has done here, at least insofar as such action is predicated upon claims of negligent construction and breach of contract.[fn5]

As to the status of Victor Matthews, individually, we are satisfied that the allegations contained in the complaint (in particular the allegation that he is a condominium unit owner) are sufficient to demonstrate his interest and standing; and coupled with the other allegations pertaining to the multiple claims for relief are sufficient to withstand a motion for judgment on the pleadings.

As to the status of Victor Matthews in his capacity to maintain the instant suit "as a class action for those one hundred forty four (144) owners more or less, similarly situated", see footnote 1, supra, we are also of the view that the allegations set forth in the complaint have properly pled a class action within the standards enunciated in Port Royal, Inc. v. Conboy, Fla.App. 1963, **154 So.2d 734**, 736, set forth, in part, as follows:

"It is fundamental that an action is not a class suit merely because the plaintiff designates it as such in the complaint and uses the language of the rule. *Whether it is or is not a class suit depends upon the circumstances surrounding the case.* However, the complaint should allege facts showing the necessity for bringing the actions as a class suit and the plaintiff's right to represent the class. *The plaintiff should allege that he brings the suit on behalf of himself and others similarly situated. The complaint should allege the existence of a class, described with some degree of certainty, and that the members of the class are so numerous as to make it impracticable to bring them all before the court. It should be made clear that the plaintiff adequately represents the class,* and Page 469 whether a party adequately represents the persons on whose behalf he sues depends on the facts of the particular case. Generally, *the interest of the plaintiff must be co-extensive with the interest of the other members of the class.* A class suit is maintainable where the subject of the action presents a *question of common or general interest,* and where all members of the class have a similar interest in obtaining the relief sought. *The common or general interest must be in the object of the action,* in the result sought to be accomplished in the proceedings, or in the question involved in the action. There must be a *common right of recovery* based on the same essential facts." (Emphasis added.)

See also Harrell v. Hess Oil and Chemical Corporation, supra. Paragraph 18 of the plaintiffs' complaint demonstrates that the plaintiff adequately represents the class to which he refers.[fn6] (See footnote 1, supra.)

In concluding that the Wittington Condominium Association has standing to maintain a suit individually we have not overlooked the recent decisions in Hendler v. Rogers House Condominium, Inc., Fla. App. 1970, **234 So.2d 128**, and Commodore Plaza, etc. v. Saul J. Morgan Ent., Inc., Fla.App. 1974, **301 So.2d 783**. We would point out that the facts in both suits render these decisions distinguishable. In *Hendler* and in *Commodore* the condominium association was seeking to *quiet title* to the common elements of the condominium project which feature is not present here. Additionally, in *Hendler* the condominium association sought to maintain a *class* action as distinguished from the individual action sought here. Moreover, we doubt Hendler's continued viability in light of the recent amendment to the Condominium Act. (Chap. 74-104; see f.n. 2, supra.)[fn7]

Accordingly, the final judgment on the pleadings is reversed and the cause remanded to the trial court for such further proceedings as may be consistent herewith.[fn8]

CROSS, J., concurs.

DOWNEY, J., specially concurs, with opinion.

[fn1] The complaint as to the class action contained the following allegation:

"18. That the Plaintiff, Victor P. Matthews, is a shareholder member of the Wittington Condominium Apartments, Inc., by virtue of his fee interest in that condominium parcel known as unit 6-E of the Wittington Condominium and has a one (1/84) eighty fourth individual interest on the common elements of the Wittington Condominium, bringing this action as a class action for those one hundred forty four (144) owners more or less, similarly situated, those persons being too many to bring conveniently before the Court; further, was elected to the Board of Governors of the Wittington Condominium by the members as well as elected to the office of President of the Wittington Condominium Apartments, Inc."

[fn2] Chap. 711 and in particular § 711.12 was amended during the 1974 regular legislative session, effective October 1, 1974 (chap. 74-104, Laws of Florida). In particular, the amendment to sec. 711.12, as set forth in sec. 7 of chap. 74-104 now recognizes the standing of an association to maintain "a class action . . . on behalf of unit owners of a condominium with reference to matters of common interest . . .". As to the effect generally of a change in the law during the pendency of litigation see Ingerson v. State Farm Mutual Automobile Ins. Co., Fla.App. 1973, 272 So.2d 862.

[fn3] See Point East Man. C. v. Point East One Condominium C., Inc., Fla. 1973, 282 So.2d 628.

[fn4] It is to be noted that the complaint alleges that the Wittington Condominium Association owns an individual unit within the condominium. This allegation, although it may later prove to be incorrect, must be taken as true insofar as the motion for judgment on the pleadings is concerned. As such, the Wittington Condominium Association would possess a sufficient "interest" to maintain a suit in its individual capacity quite apart from the standing of the association to bring a suit under the aforementioned statutory and documentary provisions. The foregoing reflects an additional basis for determining the issue of Wittington's "standing" to maintain an action predicated upon the claims of negligent construction and breach of contract.

[fn5] The recent decision in Gable v. Silver, Fla. App. 1972, 258 So.2d 11, recognizes that the implied warranties of fitness of merchantability extends to the *purchaser* of a *new* condominium (adopted and approved by the Supreme Court of Florida in Gable v. Silver, Fla. 1972, 264 So.2d 418). The complaint does not indicate whether the interest of the condominium association is that of a *new* condominium owner as distinguished from a remote purchaser. If it is shown that the association *does not even own* a unit, a claim predicated upon implied warranty would not be applicable although such a claim might be asserted by an individual unit owner. Additionally, we doubt that the association could maintain an action based upon allegations of fraud and deceit for those reasons set forth in Osceola Groves v. Wiley, Fla. 1955, 78 So.2d 700.

[fn6] Although it may be said that a class action has been properly plead we seriously doubt that the counts relating to implied warranty and fraud and deceit can be maintained (see f.n. 4, infra.)

[fn7] It is interesting to note that although *Hendler,* supra, concluded that a class action could not be maintained the case was remanded for the purpose of affording the plaintiff an opportunity to amend his pleadings.

[fn8] It appears that the other matters assigned as error are rendered moot; to the extent that any trial court order predicated upon the entry of a judgment on the pleadings for the defendants is inconsistent herewith, such order is vacated and set aside.

DOWNEY, Judge (specially concurring).

I agree with the conclusion that a judgment on the pleadings was inappropriate in this case and that Wittington Condominium Apartments, Inc., can maintain the cause of action alleged in the complaint. However, it is my view that the condominium association has standing to sue for said cause of action either as a unit owner, as alleged in paragraph 16 of the complaint, or as a result of section seven of Chapter 74-104, Laws of Florida 1974, which section amended § 711.12, F.S. so as to authorize for the first time a condominium association to bring a class suit on behalf of the unit owners. The amended statute is procedural and remedial and should be applied to this case on appeal. City of Lakeland v. Catinella, Fla. 1961, **129 So.2d 133**; Grammer v. Roman, Fla.App. 1965, **174 So.2d 443**. Absent said amendment to § 711.12, F.S. or the allegation that the association owned an apartment unit, I do not believe the condominium association had standing to assert the cause of action pleaded in the complaint. Rubenstein v. Burleigh House, Inc., Fla.App. Page 470 1974, **305 So.2d 311**; Commodore Plaza At Century 21 Condominium Association, Inc. v. Morgan Enterprises, Inc., Fla.App. 1974, **301 So.2d 783**; Hendler v. Rogers House Condominium, Inc., Fla.App. 1970, **234 So.2d 128**.

I also believe that on remand it would seem appropriate to eliminate the asserted class action by appellant Victor Matthews since the condominium association will be representing the class in question.

Accordingly, I concur in the decision to reverse the judgment appealed from.

Seminole Tribe of Fla, Inc v. Courson, 183 So.2d 569 (Fla. 2nd DCA 1966)

SEMINOLE TRIBE OF FLA. INC v. COURSON, 183 So.2d 569 (Fla.App. 2 Dist. 1966)

SEMINOLE TRIBE OF FLORIDA, INC., A CORPORATION OF THE UNITED STATES OF AMERICA, APPELLANT, v. CLINTON S. COURSON, AS TRUSTEE IN BANKRUPTCY FOR C. MEHDER COMPANY AND MEHDER-AIRCON, INC., BANKRUPTS, APPELLEE.

No. 5338.

District Court of Appeal of Florida, Second District.

March 2, 1966.

Appeal from the Court of Record, Broward County, Russell E. Seay, Jr., J.

A.J. Ryan, Jr., Dania, for appellant.

Carl V. Wisner, Jr., Fort Lauderdale, for appellee. Page 570

MORROW, R.O., Associate Judge.

Appellant-defendant brings a timely interlocutory appeal from an order denying appellant's motion to dismiss, for want of jurisdiction, appellee's fourth amended complaint.

Appellee sought to obtain a judgment against the appellant for $4,944 for installation of air conditioning equipment pursuant to a contract with appellant, Seminole Tribe of Florida, Inc. Appellee points out that this contract was accepted by appellant's president and approved by the Superintendent of The Seminole Indian Agency.

Lack of jurisdiction is properly raised by a Motion to Dismiss (Rule 1.11(b), Fla. R.C.P., 30 F.S.A.). Capacity of a party to sue or be sued shall be raised by a specific negative averment (Rule 1.9(a), Fla.R.C.P.). These two rules are related, in that the rule on "capacity" provides that it is not necessary to aver capacity except to the extent required to show the jurisdiction of the Court. The appellee's Fourth Amended Complaint brings suit against certain defendants, "* * * and Seminole Tribe of Florida, Inc., hereinafter called `owner,' is a corporation of the United States, having their principal offices and place of business in Broward County, Florida; * * *."

The only question raised by this appeal is whether the trial Court has jurisdiction over the appellant in accordance with said Rule 1.9(a).

The above description, as set forth in the Complaint, shows the Appellant to be a legal entity, to-wit: the Seminole Tribe of Florida, Inc., a United States corporation, having their principal offices and place of

business in Broward County, Florida. This shows apparent jurisdiction in the trial Court of the Appellant. Any question as to the capacity of the Appellant corporation to be sued must be raised by a specific negative averment of the Appellant.

In support of the Court's apparent jurisdiction is the following authority:

Section 82a, Title 25, U.S. Code:

"Contracts involving the payment or expenditure of any money or affecting any property belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes of Indians, including contracts for professional legal services, may be made by said tribes, with the approval of the Secretary of the Interior, or his authorized representative, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the provisions of this section shall not apply to contracts for professional legal services involving the prosecution of claims against the United States."

Section 477, Title 25, U.S. Code:

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress."

The trial court was eminently correct in denying the Appellant's Motion to Dismiss Page 571 under said Rule 1.9(a) for lack of jurisdiction.

The Order appealed is affirmed.

Affirmed.

SHANNON, Acting C.J., and ANDREWS, CHARLES O., Jr., Associate Judge, concur.

Arky, Freed, Starns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988)

ARKY, FREED, ET AL. v. BOWMAR INSTRUMENT, 537 So.2d 561 (Fla. 1988)

ARKY, FREED, STEARNS, WATSON, GREER, WEAVER & HARRIS, P.A., PETITIONER, v.

BOWMAR INSTRUMENT CORPORATION, ETC., RESPONDENT.

BOWMAR INSTRUMENT CORPORATION, ETC., PETITIONER, v. ARKY, FREED, STEARNS,

WATSON, GREER, WEAVER & HARRIS, P.A., RESPONDENT.

Nos. 71719, 71720.

Supreme Court of Florida.

December 22, 1988.

Rehearing Denied February 24, 1989.

Appeal from the Circuit Court, Dade County.

Joel D. Eaton of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami, for petitioner/respondent.

Andrew C. Hall and Richard O'Brien of Hall, O'Brien and Cohen, P.A., Miami, and Harold E. Kohn, Dianne M. Nast and Stanley M. Shur of Kohn, Savett, Klein and Graf, P.C., Philadelphia, for respondent/petitioner.

BARKETT, Justice.

We have for review *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 527 So.2d 211 (Fla. 3d DCA 1987), based on certified conflict with *Freshwater v. Vetter,* 511 So.2d 1114 (Fla. 2d DCA 1987); *Designers Tile International Corp. v. Capitol C Corp.,* 499 So.2d 4 (Fla. 3d DCA 1986), *review denied,* 508 So.2d 13 (Fla. 1987); *Dean Co. v.U.S. Home Corp., Inc.,* 485 So.2d 438 (Fla. 2d DCA 1986); and *Citizens National Bank v. Youngblood,* 296 So.2d 92 (Fla. 4th DCA 1974). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

This review arises from a lawsuit in which the firm of Arky, Freed, Stearns, Page 562 Watson, Greer, Weaver & Harris, P.A. ("Arky, Freed") sued Bowmar Instrument Corporation ("Bowmar") for legal fees, and Bowmar countersued on a claim of legal malpractice, alleging general negligence. The action arose from a dispute in which Arky, Freed had represented Bowmar in a prior lawsuit involving Fidelity Electronics ("Fidelity").

Twelve days before trial, Bowmar disclosed that its general negligence claim encompassed the specific charge that Arky, Freed negligently had failed to assert and prove a particular defense against Fidelity, despite Bowmar's direct instructions to do so. Arky, Freed immediately moved for a continuance or, in the alternative, to exclude all evidence relating to this belated claim. The motion for continuance was heard on Friday, the last scheduled working day prior to the trial, and denied. Trial commenced on the following Monday, and at the outset, Arky, Freed's motion to exclude evidence of this specific claim was heard and also denied. The trial concluded with a jury verdict in Bowmar's favor.

On appeal, the Third District addressed three issues arising from these facts. First, it held that the trial court erred in deciding that Bowmar's general allegations stated a cause of action for Arky, Freed's specific failure to present the defense requested by Bowmar. Second, it held that the trial court acted improperly in failing to grant the continuance, since Arky, Freed effectively was unable to prepare an adequate defense.

Third, the Third District considered and rejected Arky, Freed's request to order the trial court to direct a verdict in its favor. On this issue, the District Court certified conflict with *Freshwater, Designers Tile, Dean Co.* and *Citizens National* to the extent that they might require a directed verdict in every case where a plaintiff pleads one cause of action and proves another. We decline to address those issues outside the scope of our conflict jurisdiction and confine this opinion solely to the third point.

Arky, Freed contends that the Court's holding in *Dober v.Worrell,* **401 So.2d 1322** (Fla. 1981), and its progeny required that the trial court on remand direct a verdict in the firm's favor. In *Dober,* the Court considered a decision where the Fourth District concluded that the defendant was entitled to prevail on the issues framed by the pleadings, yet remanded the case to allow the plaintiff to amend. This Court quashed the decision of the district court in the interests of judicial economy and finality:

It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings *to assert matters not previously raised* renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure. *Id.* at 1324 (emphasis added).

This policy is reiterated throughout this state's precedent. In *Citizens National,* for instance, the plaintiff had pled a breach of agreement but had based its evidence at trial entirely on failure to sell stock in a commercially reasonable manner. 296 So.2d at 94. Thus, the Fourth District found that the trial court as a matter of law should have directed a verdict for the defendant. *Id.*

The case of *Dean Co.,* 485 So.2d at 438, involved a third-party defendant who defended an action for indemnification but was found liable at the conclusion of trial for a fifty percent "contribution." Finding the theories of indemnification and contribution entirely different, the Second District held that the cause of action against the third-party defendant must be dismissed on remand. *Id.* at 440.

In *Designers Tile,* 499 So.2d at 4, the plaintiff had presented its entire case under a theory of negligent hiring. The trial court, however, had permitted it to amend its complaint at the close of all evidence to include an action for vicarious liability. There had been no evidence to support the negligent hiring claim. On these facts, the Third District ordered the complaint dismissed. *Id.* at 5-6. Page 563

In *Freshwater,* 511 So.2d at 1114, the cause had proceeded to trial under a theory that a corporation was the alter ego of the defendant, but the plaintiff had failed to present any evidence on this point. The trial court directed a verdict in favor of the defendant on this question, but then permitted the plaintiff to amend his complaint to include a personal fraud allegation. On these facts, the Second District held that the fraud count must be dismissed on remand. *Id.* at 1115.

We cannot say that the matter before us is sufficiently different from the facts presented in these prior cases to support a different result. In this case, Bowmar did not prove the allegation of the counterclaim, but rather proved a claim *not* pled with sufficient particularity for Arky, Freed to prepare a defense. Under our law, Bowmar is thus precluded from recovery on this essentially unpled claim.

Bowmar argues, however, that the Third District correctly distinguished this precedent. It bases this contention on the trial judge's error in finding that the specific allegations made by Bowmar were encompassed in the original counterclaim, thus rendering an amendment unnecessary. Bowmar argues that "reliance" on this error distinguishes this case and warrants a remand to permit the appropriate amendment to the pleadings.

We cannot agree. Had Arky, Freed waited to object until the presentation of evidence and then moved for a directed verdict, Bowmar would *not* have been entitled to amend its pleadings and start the case anew. We cannot see the difference between objecting to the introduction of the evidence pertaining to an unpled claim at trial or by a motion in limine immediately prior to the trial. The effect is the same — calling the court's attention to the fact that an unpled claim is not being tried by consent, since consent would permit Bowmar to amend its pleadings to conform to the proof.

In this case, Bowmar was on notice that Arky, Freed considered Bowmar's evidence beyond the scope of the pleadings. Rather than reevaluating this position, Bowmar opposed the motion for continuance and chose to proceed to trial under the risk that Arky, Freed might have been correct. This "reliance" is no different than that of any lawyer who, at trial, chooses to present evidence over opposing counsel's overruled objection. By "relying" on the trial court's ruling, counsel always proceeds at the clear risk of reversal if the trial court was wrong.

For the same policy reasons underlying *Dober,* we conclude that litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared. Our growing, complex society and diminishing resources mandate the requirement that litigants present all claims to the extent possible, at one time, and one time only. We disapprove the opinion of the Third District below to the extent it conflicts with this decision, and approve the opinions in *Freshwater, Designers Tile, Dean Co.* and *Citizens National.* On remand, the district court shall order that a verdict be directed in favor of Arky, Freed.

It is so ordered.

EHRLICH, C.J., and OVERTON and KOGAN, JJ., concur.

GRIMES, J., dissents with an opinion, in which McDONALD and SHAW, JJ., concur.

GRIMES, Justice, dissenting.

In each of the cases cited for conflict, there was no effort to amend the pleadings to state a new cause of action until after the plaintiff had presented its evidence. In each instance, the court properly held that to permit an amendment at this point would unfairly prejudice the defendant.

The instant case is much different. Twelve days before the commencement of the trial, Bowmar disclosed that it intended to prove at trial a theory which was arguably beyond the scope of the allegations of its counterclaim. Arky, Freed moved for a continuance on the ground that it did not have adequate time to prepare to defend against the new claim. The trial judge Page 564 ruled that Bowmar's new claim was sufficiently embraced within the existing counterclaim and denied the motion for continuance.

I do not quarrel with the conclusion that the new claim went beyond the allegations of the counterclaim and that a continuance should have been granted. However, Bowmar was justified in relying upon the trial court's ruling and should not now be penalized for failing to amend. As Judge Pearson succinctly stated in the opinion below:

Any other rule would be absurd. A party who relies on a favorable trial court ruling should not be placed at risk of being worse off than had the ruling been unfavorable in the first instance. For example, had the trial court ruled in the present case that Bowmar's "failure-to-present-a-cover-defense" claim was *not* embraced within its existing pleadings, Bowmar could have moved to amend its pleadings, and had amendment been permitted (and, necessarily, the trial continued), there would have been no variance between the pleading and proof and, hence, no possibility of a directed verdict because of one. It would be anomalous indeed if the favorable ruling that no amendment was needed were to deprive Bowmar of the opportunity to prove its claim simply because the ruling is reversed on appeal.

Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., **527 So.2d 211**, 215 (Fla. 3d DCA 1987).

I respectfully dissent.

McDONALD and SHAW, JJ., concur.

Goldschmidt v. Holman, 571 So.2d 422 (Fla. 1990)

GOLDSCHMIDT v. HOLMAN, 571 So.2d 422 (Fla. 1990)

MARK N. GOLDSCHMIDT, M.D., PETITIONER, v. JERRI TALETHA HOLMAN, ET AL.,

RESPONDENTS.

No. 75172.

Supreme Court of Florida.

November 29, 1990.

Appeal from the District Court, Duval County.
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Charles Cook Howell, III of Commander, Legler, Werber, Dawes, Sadler & Howell, P.A., Jacksonville, for petitioner.

Eugene Loftin, Jacksonville, for respondents.

BARKETT, Justice.

We have for review *Holman ex rel. Holman v. Goldschmidt,* 550 So.2d 499 (Fla. 1st DCA 1989), based on asserted conflict with *Tamiami Trail Tours, Inc. v. Cotton,* 463 So.2d 1126 (Fla. 1985), and *Designers Tile International Corp. v. Capital CCorp.,* 499 So.2d 4 (Fla. 3d DCA 1986), *review denied,* 508 So.2d 13 (Fla. 1987).[fn1] The primary issue presented in this case is whether a complaint charging malpractice against a treating physician for the acts of a "covering" physician must specifically allege the vicarious liability of the treating physician.[fn2]

On behalf of their daughter Taletha, Jeff and Sandra Holman filed a malpractice action against Dr. Mark Goldschmidt for alleged failure to diagnose and treat Taletha's appendicitis. The alleged incidents of malpractice spanned several days and included events of August 14, 1983, when Dr. Gary Soud was "covering" for Goldschmidt and responded to the Holmans' call in Goldschmidt's absence. The trial court refused to permit the jury to consider whether Goldschmidt was liable for Soud's alleged negligence because the plaintiff's complaint did not specifically allege that Goldschmidt was vicariously liable for Soud's actions. The jury found in favor of Goldschmidt, and respondents appealed. The district court reversed, holding that the complaint did not need to specifically allege that the substitute physician was an agent who committed some of the challenged acts of negligence and that the evidence created a jury question as to whether the substitute physician was an agent of the treating physician. The district court also held that the Holmans were entitled to an instruction on concurring causes, which the trial court refused to give.

The threshold issue presented is whether a principal's vicarious liability for the negligence of another is a separate cause of action that must be specifically pled in the complaint. We find that this issue has

already been decided by this Court adversely to respondents in *Tamiami Trail Tours, Inc. v. Cotton,* 463 So.2d 1126 (Fla. 1985), in which we held that the defendant could not be found liable under a theory of vicarious liability that was not specifically pled.

Florida Rule of Civil Procedure 1.110(b)(2) requires that "[a] pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." In this case, the Holmans would have been entitled to relief against Goldschmidt for the negligence of Soud only through vicarious liability. Thus, rule 1.110(b)(2) required the Holmans to allege Goldschmidt's vicarious liability in the complaint. *See Tamiami,* 463 So.2d at 1128; *Designers Tile,* 499 So.2d at 5 (concluding that a separate cause of action for vicarious liability must be pled). Because the complaint failed to set forth any ultimate facts that establish either actual or apparent agency or any other basis for vicarious liability, the Holmans did not allege any grounds entitling them to relief.
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We are not unmindful of the cases cited by the respondents and the district court in Annotation, *Necessity of pleading that tort was committed by servant, in action against master,* 4 A.L.R.2d 292 (1949), supporting the proposition that agency need not be specifically pled. We find those cases, for the most part, inapplicable to the situation before us. The majority of those cases involve corporate defendants who can commit torts only through their servants or agents, a distinction recognized in the annotation itself. *Id.* at 296-97 n. 2. Other cases in the annotation involve the liability of an employer for acts of an employee, a relationship not present in this case.[fn3]

Because no basis for vicarious liability was pled, the jury could consider that claim only if evidence supporting it had been admitted without objection and an appropriate motion to amend the pleadings to conform to the evidence had been made pursuant to Florida Rule of Civil Procedure 1.190(b). *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So.2d 561 (Fla. 1988). The Holmans argue that they did move to amend the pleadings and that the trial court erred in denying the motion. At the charge conference, the Holmans requested a jury instruction on actual agency.[fn4] The trial court denied the request because the agency claim had not been pled. At that point, the Holmans moved to amend the pleadings to support their request for the actual agency instruction. The trial court denied the motion, stating that no evidence had been presented on this claim. We find that the trial court correctly denied the requested instruction and the motion to amend.

In reversing the trial court's decision to refuse the instruction, the district court correctly noted that the Holmans presented some evidence through one expert that Soud was negligent. However, the Holmans failed to take the necessary next step of alleging and proving a sufficient basis for any relationship that would make Goldschmidt responsible for Soud's actions. Although we agree the existence of an agency relationship is normally one for the trier of fact to determine, *see Orlando Executive Park, Inc. v. Robbins,* 433 So.2d 491, 494 (Fla. 1983), there was no evidentiary question in this case for the jury to resolve. We agree with the trial court that the evidence reflecting the relationship between Goldschmidt and Soud is insufficient to support either the motion to conform or the instruction on actual agency.[fn5] Thus the district court erred in reversing the trial court on the issues related to vicarious liability.

The pleading issue does not fully dispose of this case, however, because even if Goldschmidt was not vicariously liable for Soud's actions, the district court found the trial court's failure to instruct the jury on concurring causes was also reversible error.

Concurring causes are two separate and distinct causes that operate contemporaneously to produce a single injury. *See Hernandez v. Pensacola Coach Corp.,* **141 Fla. 441**, **193 So. 555** (1940). Florida's standard jury instruction on concurring causes states:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates
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in combination with [the act of another] [some natural cause] [or] some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such [loss] [injury] [or] [damage]. Fla.Std.Jury Instr. (Civ.) 5.1b. The "Note on Use" following the instruction provides:

Charge 5.1a (legal cause generally) is to be given in all cases. Charge 5.1b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage.

The district court determined that a concurring causes instruction was necessary to advise the jurors that they could still find Goldschmidt liable even if Soud's actions or the appendicitis were a concurring cause of Taletha's injury.**[fn6]**

Decisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error. Prejudicial error requiring a reversal of judgment or a new trial occurs only where "the error complained of has resulted in a miscarriage of justice." § **59.041**, Fla. Stat. (1989). A "miscarriage of justice" arises where instructions are "reasonably calculated to confuse or mislead" the jury. *Florida Power & Light Co. v. McCollum,* **140 So.2d 569**, 569 (Fla. 1962).

Under the circumstances presented in this case, we find there was no "reasonable possibility that the jury could have been misled by the failure to give the instruction." *Ruiz v. Cold Storage & Insulation Contractors, Inc.,* **306 So.2d 153**, 155 (Fla. 2d DCA), *cert. denied,* **316 So.2d 286** (1975); *see Wilson v. Boca Raton Community Hosp., Inc.,* **511 So.2d 313**, 314 (Fla. 4th DCA), *review denied,* 519 So.2d 988 (Fla. 1987).

The thrust of the entire trial centered solely upon whether Goldschmidt was negligent in misdiagnosing Taletha's appendicitis. At all times Goldschmidt defended on the ground that he was not negligent. No one argued or presented evidence that any other operative cause was present. Neither Goldschmidt nor the Holmans ever asserted that the preexisting appendicitis caused any part of Taletha's injury. To the contrary, the Holmans' own expert testified that had Goldschmidt not been negligent, Taletha would have been "operated on and [sent] home in a couple of days completely well."

Likewise, there was no evidence or argument to the jury that Soud's alleged negligence was a cause of the injury separate and apart from Goldschmidt's negligence. While the Holmans' expert testified that Soud was negligent, no one testified what effect, if any, Soud's alleged negligence had on Taletha's injury or how it operated in relation to Goldschmidt's alleged negligence.**[fn7]** Because the evidence was insufficient to support a concurring causes instruction on either the preexisting appendicitis or Soud's alleged negligence, the district court erred in reversing the trial court's denial of the instruction.

Accordingly, we quash the decision of the First District Court of Appeal and direct the court to reinstate the jury verdict in favor of Goldschmidt. We adhere to the rule of *Tamiami Trail Tours, Inc.* and approve *Designers Tile* to the extent it is consistent with this opinion.

It is so ordered.

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SHAW, C.J., and OVERTON, McDONALD, EHRLICH, GRIMES and KOGAN, JJ., concur.

[fn1] We have discretionary jurisdiction. Art. V, § 3(b)(3), Fla. Const.

[fn2] This case was presented solely on the pleading issue. Accordingly, we do not address the question of when or if a covering physician can be the agent of the treating physician.

[fn3] No one has argued, or even suggested, that Soud was an employee of Goldschmidt.

[fn4] Since respondents neither argued nor requested an instruction on apparent agency, we decline to consider its applicability to this case.

[fn5] Essential to the existence of an actual agency relationship is (1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent. Restatement (Second) of Agency § 1 (1957). The record is devoid of any evidence to support a finding of the third element.

Although Goldschmidt may have known that the Holmans wanted to hold him liable for Soud's actions, *see Holman ex rel. Holman v. Goldschmidt,* **550 So.2d 499**, 504 n. 4 (Fla. 1st DCA 1989), this cannot excuse the Holmans' failure to appropriately plead or present the necessary evidence to support actual agency.

[fn6] There is some mention in the Holmans' brief that the concurring causes instruction was also applicable to the Holmans' negligence in communicating with Goldschmidt's nurse and in their follow-up care. However, the record shows that the Holmans' negligence was not an issue in this case.

[fn7] We do not suggest that Soud's actions could not be a concurring cause, but simply hold that, in this case, the evidence presented was insufficient to support the instruction.

770 PPR, LLC v. TJCV Land Trust, 4D08-4796 (Fla. 4th DCA 2010)

770 PPR, LLC v. TJCV LAND TRUST, 4D08-4796 (Fla.App. 4 Dist. 3-10-2010)

770 PPR, LLC, a Florida limited liability company, and GREGORY K.

TALBOTT, individually, Appellants, v. TJCV LAND TRUST, a Florida

Land Trust, Appellee. 140 ASSOCIATES, LTD., a Florida limited

liability company, and GREGORY K. TALBOTT, individually, Appellants,

v. SEACOAST NATIONAL BANK, a National Banking Association, Appellee.

Nos. 4D08-4796, 4D08-4797.

District Court of Appeal of Florida, Fourth District.

March 10, 2010.

Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack H. Cook, Judge; L.T. Case Nos. 502008CA4419XXXXMBAW and 502008CA4416XXXXMBAW.

Robert A. Sweetapple of Sweetapple, Broeker & Varkas, P.L., Boca Raton, for appellants.

Richard A. Kupfer, Delray Beach, and Harvey R. Schneider, Boca Raton, for appellee TJCV Land Trust, a Florida Land Trust.

John H. Pelzer, Morris G. Miller and Eric C. Christu of Ruden, McClosky, Smith, Schuster & Russell, P.A., West Palm Beach, for appellee Seacoast National Bank, a National Banking Association.

CIKLIN, J.

Because the issues presented by the parties are virtually identical, we sua sponte consolidate these cases.

In October of 2006, 770 PPR, LLC obtained a loan from Seacoast National Bank, a national banking association ("the bank") in exchange for a mortgage on its restaurant site. Also, in October of 2006, the bank extended a loan to 140 Associates, LTD., in exchange for a mortgage on its office building. Both loans were personally guaranteed by Gregory Talbott. After both loans went into default, the bank sued to foreclose the mortgage lien and recover the personal guaranty made by Talbott. On October 29, 2008, the trial court entered final summary judgment against each mortgagor as well as against Talbott (hereinafter referred to Page 2 collectively as "the borrowers").[fn1]

While the borrowers admit their respective loans were in default, they contend reversal is warranted for two reasons. First, they argue that the bank's failure to obtain and hold a "certificate of authority" from the Florida Department of State precluded the bank from transacting business in Florida including securing, collecting, and enforcing debts, mortgages, and security interests. Second, the borrowers assert that inconsistencies as to the monies owed to the bank contained in the bank's verified complaint, loan statements, and affidavits in support of the bank's motion for summary judgment created a genuine issue of material fact, thereby precluding summary judgment.

The bank contends that the National Bank Act preempts Florida's requirement that all foreign corporations doing business in Florida obtain a "certificate of authority" in order to, among other things, maintain lawsuits in this state. The bank further argues that the affidavits filed in support of its motion for summary judgment provided competent and substantial evidence to establish that no genuine issues of material fact existed, entitling it to summary judgment as a matter of law. We affirm.

"When faced with questions of statutory application and federal preemption, we apply a de novo standard of review." *Marcy v. DaimlerChrysler Corp.*, **921 So. 2d 781**, **783** (Fla. 5th DCA 2006). Review of an order granting summary judgment is *de novo. See Fla. Bar v. Greene*, **926 So. 2d 1195**, **1200** (Fla. 2006).

Florida's Requirement of Certificate of Authority

Section **607.01401**(12), Florida Statutes (2009), defines a foreign corporation as "a corporation for profit incorporated under laws other than the laws of this state." Section **607.1501**(1), Florida Statutes, states that "[a] foreign corporation may not transact business in this state until it obtains a certificate of authority from the Department of State." Therefore, pursuant to Florida law, the bank was seemingly required to register and obtain a so-called certificate of authority from the Department of State. It is not disputed that at all times material hereto, the bank did not obtain or otherwise hold such a certificate.
Page 3

"In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, **479 U.S. 272**, **280** (1987). "In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision." *Nat'l State Bank, Elizabeth, N.J. v. Long*, **630 F.2d 981**, **985** (3d Cir. 1980).

"Under the Supremacy Clause, federal law may supersede state law in several different ways." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, **471 U.S. 707**, **713** (1985). First, Congress can preempt state law by so stating in express terms; known as "express preemption." *Menefee v. State*, **980 So. 2d 569**, **571** (Fla. 5th DCA 2008); *see also Jones v. Rath Packing Co.*, **430 U.S. 519**, **525** (1977). Second, "Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress `left n o room' for supplementary state regulation." *Hillsborough County, Fla.*, **471 U.S. at 713** (citing *Rice v. Santa Fe Elevator Corp.*, **331 U.S. 218**, **230** (1947)). Referred to as "implied preemption," this can also occur when an entire field is dominated by federal law. *See Hines v. Davidowitz*, **312 U.S. 52**, **61** (1941). Finally, state law can be nullified if it actually conflicts with federal regulation in the same area; known as "conflict preemption." *Liggett Group, Inc. v. Davis*, **973 So. 2d 467**, **471** (Fla. 4th DCA

2007). "Such a conflict arises when `compliance with both federal and state regulations is a physical impossibility,' or when state law `stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County, Fla.*, **471 U.S. at 713**. (internal citations omitted).

"The supremacy question is generally met with a presumption against preemption. However, this presumption is not implicated when the area of law analyzed is subject to significant federal presence." *Aguayo v. U.S Bank*, 658 F. Supp. 2d 1226, No. 08-CV-2139 W(LSP), 2009 WL 3149607, *3 (S.D.Cal. Sept. 24, 2009) (citing *United States v. Locke*, **529 U.S. 89**, **108** (2000)). National banking is an example. *Bank of America v. City & County of San Francisco*, **309 F.3d 551**, **558** (9th Cir. 2002).

The National Bank Act ("NBA"), enacted over 150 years ago, was created to facilitate a national banking system and protect national banks from intrusive regulation by the States. *See Kroske v. U.S. Bank Corp.*, **432 F.3d 976**, **982** (9th Cir. 2005) (citing *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, **439 U.S. 299**, **315** (1978)). **12 U.S.C. § 24** Page 4 outlines the powers of a national bank incorporated pursuant to the NBA and states:

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power — . . . .

Fourth. To sue and be sued, complain and defend, in any court of law and equity, *as fully as natural persons*.

(emphasis added).

Because this case presents a novel issue in Florida, we find the holdings in numerous foreign jurisdictions to be persuasive.

In *Bank of America, Nat'l Trust & Savings Ass'n v. Lima*, **103 F. Supp. 916** (D. Mass. 1952), the defendant alleged that the plaintiff was doing business in Massachusetts without complying with Massachusetts General Laws Chapter 181. The court stated that "[s]ection 24 of 12 U.S.C.A. includes among the powers of national banks the power `to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.' The effect of this provision is to place national banks in the same category as individuals in suits by and against them." *Id.* at 918. The court further held:

[I]f the provisions of Chapter 181 are held to include national banks within the scope of their coverage, then the effect of that statute is to place national banks on the same level as foreign corporations as regards capacity to sue. Such a result is plainly unconstitutional. [sic] since it conflicts with the federal statute empowering national banks to sue as fully as natural persons.

Id. In *Ind. Nat'l Bank v. Roberts*, **326 So. 2d 802**, **802** (Miss. 1976), the plaintiff-national bank filed suit in Mississippi state court to recover the balance due on a promissory note executed by the defendant. The defendant filed a motion to dismiss arguing that the plaintiff-national bank was a foreign corporation not qualified to do business in Mississippi and thus, not entitled to maintain suit in state court. *Id.* The plaintiff-national bank, citing **12 U.S.C. § 24**, stated that as a Page 5 national bank created under the NBA, they were not subject to such state requirements. The Mississippi court agreed, noting that

because the language of 12 U.S.C. § 24 "is so clear and explicit, this Court has not been called upon to construe it." *Id.* The court held that a statute "prohibiting a foreign corporation not qualified to do business in the State from maintaining any action in any court of the State, does not apply to a national banking corporation." *Id.* at 803; *see also First Nat'l Bank of Tonasket v. Slagle*, 5 P.2d 1013 (Wash. 1931) (holding that state statute prohibiting foreign corporation from maintaining suit in Washington for failure to pay annual licensing fees did not apply to national banks in view of 12 U.S.C. § 24, Subdivision Fourth); *State Nat'l Bank of Conn. v. Laura*, 256 N.Y.S.2d 1004, 1006 (Westchester County Ct. 1965) ("[S]ince a national bank is brought into existence under federal legislation, it does not come within New York's statutory requirements limiting the right of foreign corporations to sue. Specific authority to institute such an action as this plaintiff brings is provided in . . . 12 U.S.C.A. § 24, Subdivision fourth.").

These cases demonstrate the law is well-established that a state cannot require a national bank to register or file as a "foreign corporation" in order to maintain a lawsuit in state court. In view of these holdings and the plain language of 12 U.S.C. § 24, Subdivision Fourth, we find that section 607.1502(1) is expressly preempted as applied to all national banking associations.

Issues of Material Fact Precluding Summary Judgment

The borrowers contend that conflicts as to the monies owed the bank contained in the bank's verified complaint, loan statements and affidavits filed in support of its motion for summary judgment create a genuine issue of material fact.

"On a motion for summary judgment, the moving party bears the burden to show the nonexistence of any disputed issues of material fact." *Delandro v. Am's. Mortg. Servicing, Inc.*, 674 So. 2d 184, 186 (Fla. 3d DCA 1996); *see also Landers v. Milton*, 370 So. 2d 368 (Fla. 1979). `"The party moving for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law.'" *Leal v. Deutsche Bank Nat'l Trust Co.*, 21 So. 3d 907, 909 (Fla. 3d DCA 2009) (citation omitted). Once the moving party "tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist." *Landers*, 370 So. 2d at 370. Page 6

In the instant case, the bank contends that any inconsistencies in the amount of monies owed by the borrowers are a reflection of new information obtained through discovery and the fluidity of interest and late fees accruing on a debt. Indeed, the affidavits filed in support of the bank's motion for summary judgment provided a breakdown of the monies owed, including principal, interest and late fees.

The bank's affidavits also asserted that the borrowers were in default on the loans and demands for payment had been repeatedly ignored. Upon the presentation of the bank's motion for summary judgment and supporting affidavits, the borrowers had an opportunity to refute those amounts. *See Walker v. Midland Mortg. Co.*, 935 So. 2d 519, 520 (Fla. 3d DCA 2006) (court held there was no disputed issue of fact regarding the amount owed on a mortgage where mortgagor was presented with the amount owed one week before foreclosure action).

At no time have the borrowers offered a contrary calculation of the monies owed; they merely contend, by way of an affidavit in opposition to the bank's motion for summary judgment, that they do not owe the amounts alleged by the bank. Such conclusory assertions are insufficient counter-evidence to avoid summary judgment. *See TSI Southeast, Inc. v. Royals*, 588 So. 2d 309, 310 (Fla. 1st DCA 1991)

("Counter-affidavits filed for purposes of avoiding summary judgment must be made on personal knowledge and must set forth the facts upon which the affiant relies. Mere conclusions by the affiant are insufficient, and a party does not create a fact question merely by placing his assertions in affidavit form.") (citing *Carter v. Cessna Fin. Corp.*, **498 So. 2d 1319**, **1321** (Fla. 4th DCA 1986) (internal citation omitted)).

Therefore, the trial court's order entering final summary judgment was appropriate and thus, we affirm.

Affirmed.

GROSS, C.J., and MAY, J., concur. Page 7

Not final until disposition of timely filed motion for rehearing.

[fn1] In December of 2008, the bank gave TJCV Land Trust, a Florida Land Trust, an "Absolute and Irrevocable Assignment of Judgment" for the claims against 770 PPR, LLC and the personal guaranty by Talbott on that loan.

Page 1

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

WACHOVIA MORTGAGE, FSB F/K/A
WORLD SAVINGS BANK

CASE NO. 08-16936-CI-13

PLAINTIFF

v.

ANNE MATACCHIERO
DEFENDANT /

ORDER

THIS MATTER, having come on consideration from the Defendant's Motion to Dismiss, filed by counsel for Defendant Matthew Weidner, this Court having reviewed the pleadings filed in this matter and accepted argument of counsel who appeared before the Court, it is hereby,

ORDERED AND ADJUDGED that:

1. In its Motion to Dismiss, counsel for Defendant noted that the only identification of the Plaintiff appears in the caption of the Complaint and the first paragraph where the Plaintiff is identified simply as, "Wachovia Mortgage, FSB, F.K.A., World Savings Bank". The Plaintiff's name is not set off or specified within the body of the Complaint or in any other pleading nor is any description provided to explain the legal nature of the entity or to define what the initials "FSB" stand for.

2. Counsel for Defendant, in its Supplemental Memoranda in Support of Motion to Dismiss, cited Florida Rules of Civil Procedure Rule 1.120(a) Pleading Specific Matters which provides that:

> (a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court....When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative

capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

3. Counsel for Defendant also cited Florida Rules of Civil Procedure Rule 1.110(b) which requires that a Complaint include a "short and plain statement of the grounds upon which the court's jurisdiction depends..." Counsel for Defendant asserted that by failing to plead or specify in what capacity the Plaintiff brings suit and by failing to define or identify in any way the nature of its legal entity, the Plaintiff has not plead that it has the capacity to maintain suit before this Court. [1]

4. Counsel for Defendant represented to the Court that his research revealed few Florida Court opinions which address the issue of capacity to sue, but urged this Court to consider Federal Court opinions interpreting Federal Rule of Civil Procedure 9(a) from which Florida Rule of Civil Procedure Rule 1.120(a) is derived.

5. The issue of capacity to sue may be raised by motion to dismiss where the defect appears on the face of the complaint. Hershel California Fruit Products Co. v. Hunt Foods 111 F. Supp. 603 (1975), quoting Coburn v. Coleman 75 F. Supp. 107 (1974); Klebano v. New York Produce Exchange, 344 F.2d (2nd Cir. 1965).

6. Failure to raise the issue of a Plaintiff's capacity by a specific negative averment has been held to constitute a waiver of that defense. McDonough Equip. v. Sunset Amoco West, 669 So.2d 300 (Fla.App. 3 Dist. 1996); Plumbers Loc. U.N. 519, Miami Fla. v. Serv. Plbg., 401 F. Supp. 1008 (1975); and see Sun Val. American Land Lease, 927 So.2d 259 (Fla.App. 2 Dist. 2006); Shaw v. Stutchman, 105 Nev. 128 (1989).

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[1] "Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d *Parties* § 31 (1971). This is in contrast to "standing" which requires an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position. Keehn v. Joseph C. Mackey and Co., 420 So.2d 398 (Fla.App. 4 Dist. 1982)

7. Because the Plaintiff failed to plead capacity, the Defendant's Motion to Dismiss is GRANTED and the case is dismissed without prejudice except that the Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint to address the matters raised within the Defendant's Motion to Dismiss.

8. If the Plaintiff Amends its Complaint the Defendant shall have twenty (20) days from the date of receipt of Amended Complaint to file its responsive pleading.

DONE AND ORDERED in chambers, Pinellas County, Florida on this the _____ day of December, 2009 by

_____
Hon. Anthony Rondolino

cc: Brianna Finch, Esq.
Matthew Weidner, Esq.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

HSBC BANK, USA, NATIONAL ASSOICATION,
NOT IN ITS INDIVIDUAL CAPACITY, BUT
SOLEY AS TRUSTEE ON BEHALF OF GSAA HOME
EQUITY TRUST 2005-12
PLAINTIFF

CASE NO. 09-005190-CI-19

v.

KIMBERLY BOLIN, ET AL.
DEFENDANT /

AGREED ORDER

THIS MATTER having come on consideration from the Defendant's Motion to Dismiss, it is hereby

ORDERED AND ADJUDGED that:

1. The Defendant's Motion to Dismiss is hereby GRANTED.
2. The Plaintiff shall have twenty (20) days from the date of this Order to Amend and file its Complaint in response to the matters raised in the Defendant's Motion to Dismiss. If the Plaintiff Amends and files its Complaint within twenty (20) days from the date of this Order, the case shall not be dismissed.
3. The Defendant shall have twenty (20) days from the date of receipt of Plaintiff's Amended Complaint to file its Answer or responsive pleading.

DONE AND ORDERED in chambers, Pinellas County, Florida on this the _____ day of August, 2009

Original Signed
AUG 17 2009
AMY M. WILLIAMS
Circuit Judge

Hon. Amy Williams

cc: Matthew Weidner, Esq.
Kristia Bared, Esq.

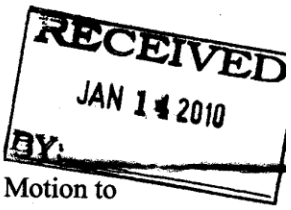
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

HSBC BANK, USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE ACE SECURITIES CORPORATION
HOME EQUITY LOAN TRUST, SERIES 2005-AG1, ASSET
BACKED PASS THROUGH CERTIFICATES
PLAINTIFF

CASE NO. 52-2009-CA-005696

V.

ANNABEL E. MONTGOMERY, ET. AL.
DEFENDANT /



ORDER

THIS MATTER, having come on consideration from the Defendant's Motion to Dismiss, filed by counsel for Defendant Matthew Weidner, this Court having reviewed the pleadings filed in this matter and accepted argument of counsel, it is hereby,

ORDERED AND ADJUDGED that:

1. In its Motion to Dismiss, counsel for Defendant noted that the only identification of the Plaintiff appears in the caption of the Complaint and the first paragraph where the Plaintiff is identified simply as, "HSBC BANK, USA, NATIONAL ASSOCIATION AS TRUSTEE FOR TH ACE SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES 2005-AG1, ASSET BACKED PASS-THROUGH CERTIFICATES". The Plaintiff's name is not set off or specified within the body of the Complaint or in any other pleading nor is any description provided to explain the legal nature or registered agent or address of the named Plaintiff.

2. Counsel for Defendant, in support of its Motion to Dismiss, cited Florida Rules of Civil Procedure Rule 1.120(a) Pleading Specific Matters which provides that:

> (a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the

extent required to show the jurisdiction of the court....When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

3. Counsel for Defendant also cited Florida Rules of Civil Procedure Rule 1.110(b) which requires that a Complaint include a "short and plain statement of the grounds upon which the court's jurisdiction depends..." Counsel for Defendant asserted that by failing to plead or specify in what capacity the Plaintiff brings suit and by failing to define or identify in any way the nature of its legal entity, the Plaintiff has not plead that it has the capacity to maintain suit before this Court.

4. "Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d *Parties* § 31 (1971). This is in contrast to "standing" which requires an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position. Keehn v. Joseph C. Mackey and Co., 420 So.2d 398 (Fla.App. 4 Dist. 1982)

5. Counsel for Plaintiff introduced a Response to Defendant's Motion to Dismiss in which it alleged that it had standing, but the Response failed to respond or address in any way the arguments related to capacity presented by Defendant.

6. Counsel for Defendant represented to the Court that his research revealed few Florida Court opinions which address the issue of capacity to sue, but urged this Court to consider Federal Court opinions interpreting Federal Rule of Civil Procedure 9(a) from which Florida Rule of Civil Procedure Rule 1.120(a) is derived.

7. The issue of capacity to sue may be raised by motion to dismiss where the defect appears on the face of the complaint. Hershel California Fruit Products Co. v. Hunt Foods

111 F. Supp. 603 (1975), quoting Coburn v. Coleman 75 F. Supp. 107 (1974); Klebano v. New York Produce Exchange, 344 F.2d (2nd Cir. 1965).

8. Failure to raise the issue of a Plaintiff's capacity by a specific negative averment has been held to constitute a waiver of that defense. McDonough Equip. v. Sunset Amoco West, 669 So.2d 300 (Fla.App. 3 Dist. 1996); Plumbers Loc. U.N. 519, Miami Fla. v. Serv. Plbg., 401 F. Supp. 1008 (1975); and see Sun Val. American Land Lease, 927 So.2d 259 (Fla.App. 2 Dist. 2006); Shaw v. Stutchman, 105 Nev. 128 (1989).

9. Because the Plaintiff failed to plead capacity, the Defendant's Motion to Dismiss is GRANTED and the case is dismissed without prejudice except that the Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint to address the matters raised within the Defendant's Motion to Dismiss.

9. If the Plaintiff Amends its Complaint the Defendant shall have twenty (20) days from the date of receipt of Amended Complaint to file its responsive pleading.

DONE AND ORDERED in chambers, Pinellas County, Florida on this the _____ day of January, 2010 by

TRUE COPY
Original Signed
JAN 2 2010

Hon. Anthony Rondolino

cc: Katherine Benninger, Esq.
Matthew Weidner, Esq.