IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D19-0300

CITY OF OPA-LOCKA, FLORIDA,
Appellant,

v.

GEORGE SUAREZ, et al.,
Appellees.

ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY.
HON. BEATRICE BUTCHKO, CIRCUIT JUDGE

CORRECTED ANSWER BRIEF OF APPELLANTS GEORGE SUAREZ, ET AL.

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III. Does Fla. R. App. P. 9.130 grant supplemental jurisdiction to address arguments presented in the initial brief that do not address the trial court's purported determination that the City was not entitled to sovereign immunity as a matter of law?

INTRODUCTION

This class action litigation arises from a 2016 report by a Florida Oversight Board that uncovered rampant overcharging for water services by the City of Opa Locka. The City also used water deposits collected from its customers to cover departmental operational expenses without authorization (App. 440-41, 446). The operative complaint alleges that the City's conduct breached its water services contract and deposit receipt contract (App. 13-15). Plaintiffs are water services consumers who sued the City for breach of the water services and deposit receipt contracts. Before discovery, the City filed its unsuccessful motion for summary judgment (App. 499). Since entry of the summary judgment order, the trial court certified two plaintiff classes, a "Deposit Class" and an "Overcharge Class," by an order that is currently on appeal by the City in Case No. 3D19-1323.

STATEMENT OF THE CASE AND FACTS

Florida law grants municipalities the authority to enter into contractual arrangements to provide water and sewer services. § 180.13, Fla. Stat. (granting cities authority to provide utility services for just and equitable rates); § 180.135, Fla. Stat. (defining the limits of the City's authority to contract for utility services). The City of Opa Locka is such a municipality. Its Code of Ordinances authorizes the water and sewer department to contract with consumers for the service of water pursuant to the Florida statutory authorization. Art. II, City of Opa Locka Code of

Ordinances.

At the summary judgment hearing, the City conceded (App. 564) that under its Code, a contract for water services is created by the consumer's submission of a signed application for water and the acceptance of that application by the water and sewer department, § 21-23, City of Opa Locka Code of Ordinances:

> Service is to be furnished only upon signed application accepted by the department, and the conditions of such application and the resulting contract for service are binding upon the consumer as well as upon the department.

The rates and charges for water service are mandated by the City Code. § 21-77, City of Opa Locka Code of Ordinances. The Code requires the collection of a customer deposit to guarantee payment for water services provided. §§ 21-80, 21-85, 21-97(b), City of Opa Locka Code of Ordinances. In line with the City Charter's prohibition against expending funds without an approved appropriation or authorizing ordinance, § 3.8, City of Opa Locka Charter (2012), the Code provides two circumstances in which the water deposits may be demised. First, the deposit must be returned to the consumer upon termination of the contract by the consumer. § 21-80(c), City of Opa Locka Code of Ordinances. Second, if the consumer is more than 30 days late in paying the water bill, the Code authorizes the City to discontinue the water service and apply the deposit toward settlement of the outstanding bill. § 21-85, City of Opa Locka Code of Ordinances.

When consumers submit the required deposit, they receive a deposit receipt, which the City has conceded is a contract (App. 556). Consumers are expected to timely pay for water services received, and the City Code expressly authorizes the City to sue any consumer for failure to pay the water bill in any court of competent jurisdiction. § 21-97(a)(2), City of Opa Locka Code of Ordinances.

The City sought summary judgment on both breach of contract claims. Regarding the overbilling claim, the City claimed that three of the nine named plaintiffs lacked standing (App. 206). Regarding the deposit claim, the City challenged the plaintiffs' standing by arguing that their deposits were not currently due back to them (App. 204). In general terms, the City alleged that the plaintiffs failed to identify a contract that is subject to their claim (App. 206). Despite the written documentation, the City contended that if the breach of contract claims were not based on an express written contract, then it was entitled to sovereign immunity (App. 206). The motion did not claim that the City was entitled to sovereign immunity because plaintiffs' claims did not arise from a written contract (App. 205-06). At the summary judgment hearing, the City conceded that plaintiffs' breach of contract claims arose from two contracts, the water services contract and the deposit receipt contract (App. 556).

In an unelaborated order submitted by the agreement of all parties, the trial court denied the summary judgment motion "for the reasons stated on the record."

(App. 499).

SUMMARY OF THE ARGUMENT

The City purports to appeal the order denying summary judgment under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(xi), which authorizes interlocutory appeals of nonfinal orders denying sovereign immunity as a matter of law. But neither the text of the unelaborated order nor the transcript of the summary judgment hearing contains a finding by the trial court that the City was not entitled to sovereign immunity as a matter of law. Accordingly, there is no Rule 9.130 jurisdiction and the appeal should be dismissed.

Notwithstanding, Points I-IV of the initial brief do not contend that the trial court erroneously denied the City sovereign immunity as a matter of law. Because Rule 9.130(a)(3)(C)(xi) does not grant supplemental jurisdiction to address arguments beyond the ruling denying sovereign immunity as a matter of law, the appeal should be dismissed.

Finally, the trial court properly denied the premature motion for summary judgment. The motion was filed before discovery for the express purpose of blocking plaintiffs from receiving discovery on their breach of contract claims. Still, even with the underdeveloped factual record, plaintiffs have established genuine issues of material fact as to whether the City breached the terms of its contracts.

ARGUMENT

The City's appellate brief misunderstands sovereign immunity. A summary of the relevant law is accordingly required. Under Section 768.28, Florida Statutes, the Legislature explicitly waived "sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property." *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 472 (Fla. 2005).

The Supreme Court in *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984), determined that the Legislature implicitly waived sovereign immunity when it authorized state entities to enter into contracts. *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997). Without a waiver of sovereign immunity, state entities could not enter into valid and binding contracts. *Id*.

This is because a foundational requirement of a valid contract is mutuality of obligations, and "a contract that is not mutually enforceable is illusory." *Florida Dept. of Envtl. Prot. v. Contract Point Florida Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008). Thus, if the state entity could retain the option of declining to fulfill a contractual obligation, then "there is no valid contract and neither side may be bound to it." *Pan-Am Tobacco Corp.*, 471 So. 2d at 5. Likewise, "a contract that grants one party the right to sue, but also affords the other party the right to declare that it has no legal obligation to pay, is void for lack of mutuality of remedy." *Contract Point*

Florida Parks, LLC, 986 So. 2d at 1270. For these reasons, the *Pan-Am Tobacco Corp.* Court determined that the legislative grant of authority to contract necessarily included a waiver of sovereign immunity.

Since *Pan-Am Tobacco Corp*., the Supreme Court has clarified that the waiver of sovereign immunity for breach of contract claims includes claims alleging a breach of the written contract's **express terms** as well as claims alleging a breach of the written contract's **implied terms**. Quoting the Fourth District's analysis in *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So. 2d 696 (Fla. 4th DCA 1988), with approval, the Supreme Court reasoned:

> Virtually every contract contains implied covenants and conditions. For example, every contract includes an implied covenant that the parties will perform in good faith. In construction contract law an owner has (a) an implied obligation not to do anything to hinder or obstruct performance by the other person, (b) an implied obligation not to knowingly delay unreasonably the performance of duties assumed under the contract, and (c) an implied obligation to furnish information which would not mislead prospective bidders.
>
> ….
>
> It seems neither logical nor within the principles of fairness enunciated in the *Pan-Am Tobacco* case to construe the restrictive language of that case to mean that the defense of sovereign immunity is waived only for the state's breach of an express covenant or condition of an express, written contract, but that the defense is not waived for the state's breach of an implied covenant or condition of such contract, while the other contracting party remains liable for a breach of both the express and the implied covenants and conditions.

County of Brevard v. Miorelli Eng'g, Inc., 703 So. 2d 1049, 1050-51 (Fla. 1997)

(quoting *Champagne-Webber*, 519 So. 2d at 697–98 (internal citations omitted)).[1]

The law in existence at the time of contracting is an example of one such type of implied term. "The laws which exist at the time and place of the making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge." *S. Crane Rentals, Inc. v. City of Gainesville*, 429 So. 2d 771, 773 (Fla. 1st DCA 1983). *See Found. Health v. Westside EKG Associates*, 944 So. 2d 188, 195 (Fla. 2006) (finding that Florida statute requiring prompt payment of claims by HMOs was an implied term of each HMO contract).

At the summary judgment proceeding below, the City conceded the water services application and deposit receipt were express contracts (App. 556, 565-66, 619).[2] The City's initial brief has, accordingly, not challenged the existence of a

[1] "A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words." *Waite Dev., Inc. v. City of Milton*, 866 So. 2d 153, 155 (Fla. 1st DCA 2004) (quoting *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Company*, Inc., 695 So. 2d 383, 385 (Fla. 4th DCA 1997) (internal citations omitted). "Where an agreement is arrived at by words, oral or written, the contract is said to be 'express.'" *Id*. (internal citations omitted).

[2] At the summary judgment hearing, the City conceded as follows (App. 556):

There is no dispute between the parties that the contract at issue in this

written contract but has affirmatively referred to both documents as contracts (Initial Br. 22). The existence of a written contract is, thus, not at issue on appeal.[3]

Likewise, the City has not challenged the trial court's finding that the complaint alleged the City breached both the express and implied terms of its written contract with its consumers (App. 624-625). Nor does the City disagree that it was required to fulfill both the express and implied terms of the written contracts. These issues are also not before the Court on appeal.

The City's appeal instead makes other arguments not relevant to any question of law for which this Court has jurisdiction. The appeal should therefore be dismissed for lack of jurisdiction. Even so, the summary judgment order must be affirmed. The motion, filed before discovery, was premature. And the limited information available reveals the existence of genuine issues of material fact that will be more fully developed after discovery (or trial) has been completed.

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case is the deposit receipt and the application.

Regarding the water services application, the City explained (App. 566):

> MS. SHAW-WILDER: Right. So what this means is the City – you do an application. You're going to pay for water. We're going to give you water. You're going to give a deposit and we're going to give it back. That's the contract that is of record. That's what's before Your Honor.

[3] To be sure, the correctness of this ruling is not at issue on appeal and **is therefore not properly part of the Answer Brief**. Appellees do not ask the Court to rule on the issue not presented on appeal by the City.

I. The question of sovereign immunity was not preserved for appeal.

At the outset, the City never sought summary judgment on the breach of contract claim on sovereign immunity grounds. Point II of the City's summary judgment motion contended that plaintiffs failed to "identify or prove the existence of a contract that is the subject of their claims." (App. 206). Making arguments better suited for a motion to dismiss, the City claimed that "Plaintiffs must produce the contract they allege to have been breached before they can proceed with their claims." (App. 206). The City then added the following statement at the end of its argument:

> To the extent Plaintiffs do not intend to base their claims on the existence of an express written contract, the City has sovereign immunity as to the breach of contract claim. *See, e.g., City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 447 (Fla. 4th DCA 2015) (holding that "a municipality waives the protections of sovereign immunity only when it enters into an express contract"). In fact, if no express written contract with terms Plaintiffs alleges to have been breached exists [sic], "sovereign immunity applies, and summary judgment is appropriate." *Strout v. Sch. Bd. of Broward Cty., Fla.*, No. 15-61257-CIV, 2016 WL 4804075, at *9 (S.D. Fla. Feb. 1, 2016).

Review of the motion accordingly makes clear that the City never affirmatively sought sovereign immunity on the breach of contract claim. Even more, the City ultimately conceded its Point II argument when it stipulated at the summary judgment hearing that plaintiffs' breach of contract claims arose from an express contract (App. 556, 619).

The requirements of preservation are not perfunctory. It is a matter of fairness to the hard-working members of the trial judiciary. This Court has a long history of requiring that trial judges be given an opportunity to rule on a matter before a claim is first raised on appeal. Since 1966, this Court has operated under the principle that "[i]t is elementary that before a trial judge will be held in error, he must be presented with an opportunity to rule on the matter before him." *Bus. Success Group, Inc. v. Argus Trade Realty Inv., Inc.*, 898 So. 2d 970, 972 (Fla. 3d DCA 2005) (quoting *Margolis v. Klein*, 184 So. 2d 205, 206 (Fla. 3d DCA 1966). The Supreme Court agrees. "The requirement of a timely objection is based on practical necessity and basic fairness in the operation of the judicial system." *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1134 (Fla. 1989). "Preservation rules are designed to prevent a party from blindsiding the judge by raising an issue on appeal that was not brought to the trial court's attention." *Fox v. Fox*, 262 So. 3d 789, 794 (Fla. 4th DCA 2018).

Strict adherence to the rule of preservation for trial judges is of particular importance for judges overseeing summary judgment proceedings. Trial judges are affirmatively prohibited from ruling on matters not raised in the summary judgment motion by Fla. R. Civ. P. 1.510(c). *See Alexopoulos v. Gordon Hargrove & James, P.A.*, 109 So. 3d 248, 249 (Fla. 4th DCA 2013) ("It is reversible error to enter summary judgment on a ground not raised with particularity in the motion."); *Raissi*

v. Valente, 247 So. 3d 629, 631 (Fla. 2d DCA 2018) (same). In applying Rule 1.510(c), the trial court is required to "take a strict reading of the papers filed by the moving party." *Williams v. Bank of Am. Corp.*, 927 So. 2d 1091, 1093 (Fla. 4th DCA 2006).

An appellate court should be reticent to stamp a trial judge's order as reversible error when the appellate claim is one not raised in the summary judgment motion.

In addition to fairness to the judiciary, the preservation of error rules protect the due process rights of the nonmovant. "Adequate notice is a fundamental element of the right to due process." *Hall v. Marion County Bd. of County Commissioners*, 236 So. 3d 1147, 1153 (Fla. 5th DCA 2018). In the context of motions for summary judgment, the Florida Supreme Court has articulated the due process a non-movant is entitled to on summary judgment. The movant for summary judgment must "state with particularity the grounds upon which it is based and the substantial matters of law to be argued." Fla. R. Civ. P. 1.510(b). "The purpose of this rule is 'to prevent 'ambush' by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing.'" *Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211, 215 (Fla. 5th DCA 2011) (quoting *City of Cooper City v. Sunshine Wireless Co.*, 654 So.2d 283, 284 (Fla. 4th DCA 1995)).

Upon receiving notice of the summary judgment claims, the non-movant has

until two business days before the summary judgment hearing to gather, collect, and hand deliver evidence disputing what the movant has claimed are undisputed material facts entitling it summary judgment. Fla. R. Civ. P. 1.510(b). The trial court may only rule on matters presented in the summary judgment motion. *Alexopoulos*, 109 So. 3d at 249; *Raissi*, 247 So. 3d at 631. This Court has restricted trial judges from considering theories not raised in the written summary judgment motion. *Gorrin v. Poker Run Acquisitions, Inc.*, 237 So. 3d 1149, 1155 n.6 (Fla. 3d DCA 2018) (explaining that "this theory of recovery could not form the basis for summary judgment in favor of Poker Run because it was not raised by Poker Run in its motion").

Unlike the federal rule counterpart, Florida's summary judgment procedure does not authorize a trial court to rule on matters outside the summary judgment motion. *See* Fed. R. Civ. P. 56(f)(2) ("After giving notice and a reasonable time to respond, the court may . . . grant the motion on grounds not raised by a party."). Nor can a court consider argument and evidence raised for the first time at the summary judgment hearing. *S. Developers & Earthmoving, Inc. v. Caterpillar Fin. Services Corp.*, 56 So. 3d 56, 61 (Fla. 2d DCA 2011); U*.S. Bank N.A. on Behalf of Holders of J.P. Morgan Alternative Loan Tr. 2007-S1 Mortgage Pass-Through Certificates v. Holbrook*, 226 So. 3d 363, 364 (Fla. 2d DCA 2017).

The Second District in *John K. Brennan Co. v. Cent. Bank & Tr. Co.*, 164 So.

2d 525, 530 (Fla. 2d DCA 1964), articulated the due process protections enshrined in Rule 1.510(b):

> Due process requires that before a summary judgment is authorized to be entered against a non-moving party, it must be shown that he has had a full and fair opportunity to meet the proposition that there is no genuine issue of a material fact and that the party for whom the summary judgment is rendered or ordered to be entered is entitled thereto as a matter of law.

Significantly, the *John K. Brennan Co.* Court noted that the due process articulated in Rule 1.510(b) "governs the trial courts and likewise governs the appellate courts." *Id*. (emphasis added). When an appellate court orders summary judgment on a ground not raised in the summary judgment motion, the court denies the non-movant the due process protections afforded by Rule 1.510(b). Specifically, the appellate court denies the non-movant the right to notice that a fact is being presented as an undisputed fact requiring summary judgment and the appellate court denies the non-movant the opportunity to prove the fact is not an undisputed material fact. *See Fountain v. Filson*, 336 U.S. 681, 682–83 (1949) (holding that the appellate court deprived the non-movant of an opportunity to dispute a material fact when the appellate court directed summary judgment against the non-movant on a claim never raised in the trial court).

Here, the City's motion for summary judgment did not seek sovereign immunity on the breach of contract claim. It only sought immunity on the civil theft

claim (App. 208). The question of sovereign immunity as to the breach of contract claim was accordingly not preserved for appellate review.

II. This Court lacks jurisdiction under Fla. R. App. P. 9.130(a)(3)(C)(xi), because the order did not deny sovereign immunity as a matter of law.

The appeal should in any event be dismissed for lack of jurisdiction. The order before this Court is a nonfinal order denying the City's motion for summary judgment. The City erroneously contends this Court has jurisdiction under Rule 9.130(a)(3)(C)(xi), which authorizes interlocutory appeals of otherwise nonfinal, non-appealable orders denying sovereign immunity as a matter of law.[4] The plain language of the rule makes the lack of appellate jurisdiction clear. The Rule

[4] A determination that a party is not entitled to sovereign immunity as a matter of law is a dispositive ruling that in practice precludes the issue from being raised elsewhere in the litigation. For example, a trial court order denying a motion to dismiss on grounds that a governmental entity is not entitled to sovereign immunity as a matter of law renders factual discovery on the defense unnecessary. Similarly, a summary judgment ruling that a governmental entity is not entitled to sovereign immunity as a matter of law removes the defense from the list of issues left for the trier of fact to decide. In each of these circumstances, the trial court's ruling is dispositive and preclusive. Yet, the order is not a final appealable order. *State, Dept. of Transp. v. Paris*, 665 So. 2d 381, 382 (Fla. 4th DCA 1996) (pre-Rule 9.130 case finding the order is a nonfinal, non-appealable order). Nor is the order subject to certiorari appellate review. *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 355 (Fla. 2012) (order denying sovereign immunity not subject to review by petition for writ of certiorari).

The Florida Supreme Court resolved this quandary with an amendment to Rule 9.130 of the Florida Rules of Appellate Procedure. The order before this Court is not such an order. This order does not dispose of the City's sovereign immunity claim. And the City does not contend that the trial court's order is a final, dispositive ruling on its sovereign immunity claim.

provides: "Appeals to the district courts of appeal of nonfinal orders are limited to those that . . . determine that . . . as a matter of law, a party is not entitled to sovereign immunity." Fla. R. App. P. 9.130(a)(3)(C)(xi).

In order to invoke this Court's jurisdiction under this subsection, "[t]he denial of immunity must be made on the **face** of the order and must be **explicit**." *Florida Agency for Health Care Admin. v. McClain*, 244 So. 3d 1147, 1149 (Fla. 1st DCA 2018) (emphasis added). "[A]n order that simply denies the defendant's motion for summary judgment, but does not determine, as a matter of law, that summary judgment is improper, is not appealable." *Taival v. Barrett*, 204 So. 3d 486, 487 (Fla. 5th DCA 2016). Applying this definitive rule, this Court has consistently looked to the four corners of the order and dismissed any appeal of an order that did not "explicitly" determine a party was not entitled to sovereign immunity as a matter of law:

- *City of Miami Firefighter' & Police Officers' Ret. Tr. & Plan v. Castro*, 279 So. 3d 803, 806 (Fla. 3d DCA 2019) – "The trial court's initial order, denying the Pension Defendants' motion to dismiss the breach of contract claims, did not specifically and expressly determine as a matter of law that the Pension Defendants were not entitled to sovereign immunity from the respective breach of contract claims; and therefore, we dismissed the Pension Defendants' initial appeals of the November 28, 2017 order for lack of jurisdiction."
- *Key v. Almase*, 253 So. 3d 713, 714 (Fla. 3d DCA 2018) – Finding no jurisdiction under Rule 9.130(a)(3)(C)(xi) to review an order that "fail[ed] to specifically state that Appellants, as a matter of law, were not entitled to immunity."

- *City of Miami Gen. Employees' & Sanitation Employees' Ret. Tr. v. Rodriguez*, 246 So. 3d 567 (Fla. 3d DCA 2018) – "Despite the length of the non-final order, the order fails to address the issue of sovereign immunity and there is nothing in the order which reflects that the trial court has ruled on the immunity issue. Thus, this non-final order is not appealable pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(x)."

- *City of Miami v. Peralta*, 271 So. 3d 27 (Fla. 3d DCA 2018) – "Because the trial court did not determine whether the City of Miami was entitled to, or not entitled to, sovereign immunity as a matter of law, and in fact ruled without prejudice to the City raising the application of sovereign immunity in further proceedings, we dismiss the appeal as one taken from a non-final, non-appealable order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(xi)."

- *City of Coral Gables v. Blanco*, 248 So. 3d 1211, 1212 (Fla. 3d DCA 2018) – No jurisdiction over order which found that "sovereign immunity is not self-evident under the facts pled," because the order was not a "determin[ation] that, as a matter of law, the City is not entitled to sovereign immunity."

- *Miami–Dade County v. Pozos*, 242 So. 3d 1152, 1156-57 (Fla. 3d DCA 2017) – Dismissing appeal for lack of jurisdiction where trial court's unelaborated order denying summary judgment motion did not determine that, as a matter of law, appellant was not entitled to sovereign immunity.

- *Eagle Arts Acad., Inc. v. Tri-City Elec. Co., Inc.*, 211 So. 3d 1083, 1084 (Fla. 3d DCA 2017) – "Although Florida Rule of Appellate Procedure 9.130(a)(3)(C)(xi) authorizes appeals of non-final orders that determine, as a matter of law, that a party is not entitled to sovereign immunity, the order on appeal makes no explicit or implicit finding as a matter of law that EAA is not entitled to sovereign immunity."

- *Citizens Prop. Ins. Corp. v. Sosa*, 215 So. 3d 90, 91 (Fla. 3d DCA 2016) – "Here, the trial court's order fails to state that, as a matter of law, sovereign immunity is not available to Citizens. As such, the trial court's order is not appealable pursuant to Rule 9.130(a)(3)(C)(xi)."

  The order before this Court is no different, requiring a dismissal of this appeal.

The corrected order states as follows: "For the reasons stated on the record, the

motion for summary judgment is DENIED." (App. 499). This unelaborated order does not confer jurisdiction. *See Pozos*, 242 So. 3d at 1156-57 (unelaborated order did not confer appellate jurisdiction); *Dep't of Children & Families v. Feliciano*, 259 So. 3d 957, 958 (Fla. 3d DCA 2018) (district court lacked jurisdiction over order where trial court denied the motion to dismiss, "but declined to state in open court or the written order that the basis was the denial of sovereign immunity" even though sovereign immunity was the only issue raised in the motion).

The additional fact that the City consented to the entry of the unelaborated order strengthens plaintiffs' claim for dismissal. After the denial of its motion, the City offered to prepare an order (T. 123). The trial court responded by asking the parties if a "reasons stated on the record" order was "fine." (T. 123). The City did not object (T. 123-24). Nor did the City request the entry of an order denying sovereign immunity as a matter of law (T. 123-24). The City accordingly invited the entry of the subject order by submitting to the trial court with plaintiffs' counsel a handwritten, unelaborated proposed order[5] that foreclosed the possibility of an

[5] This Court has found that an order denying a motion "for reasons stated on the record" is an "otherwise unelaborated order." *Data Payment Sys., Inc. v. Caso*, 253 So. 3d 53, 56 (Fla. 3d DCA 2018). *See Tome v. Herrera-Zenil*, 273 So. 3d 140, 141 (Fla. 3d DCA 2019) ("The order on review is an unelaborated order denying the appellants' rule 1.061 motion 'for the reasons stated in the record.'").

interlocutory appeal (Answer Br. Addendum).[6] Given the clear precedent from this Court on the requirements for appellate jurisdiction over such non-final orders, the City is hard pressed to argue for an exception.

Finally, *Florida Highway Patrol v. Jackson*, No. SC18-468 (pending decision after August 30, 2019, oral argument), which is pending review before the Florida Supreme Court on the question of whether a court may look beyond the text of the order, does not allow a different result. As this Court explained in *Dep't of Children & Families v. Feliciano*, 259 So. 3d 957, 960 (Fla. 3d DCA 2018), this Court remains obedient to its own precedent until further guidance on the question from the Supreme Court, or an amendment to the applicable rule.

Still, even if the Court could look to the hearing transcript, the trial court never ruled as a matter of law that the City was not entitled to sovereign immunity (App. 624-26). In the context of answering the City's question about plaintiffs' standing, the trial court explained that it determined that there was a written contract and that the City was required to fulfill both the express terms in the contract as well as the implied at law terms (App. 625-26):

> **MS. SHAW-WILDER**: And Your Honor, for purposes of Count I, are you finding that they have alleged the specific terms that have been breached? Because this is an important point because this is a standing

[6] The reason a Corrected Order with the same text language (App. 499-500) was signed by the trial judge was that the original handwritten order inadvertently misidentified the case style.

issue.

> **THE COURT**: This is an important point. So I find that there is an express contract that is a written contract. I find that they have alleged breaches as enumerated in their complaint, even though they are not expressly written in the so-called receipt.

The City never sought a ruling on its entitlement to sovereign immunity as a matter of law. This should not come as a surprise. As previously argued, the City never claimed entitlement to sovereign immunity in its summary judgment motion.

Finally, not to be overlooked is the City's initial brief. Nowhere in it does the City contend the trial court erroneously determined as a matter of law that it was not entitled to sovereign immunity (Initial Br. 14-26). Words to the effect – "The trial court erroneously determined as a matter of law that the City was not entitled to sovereign immunity" – appear nowhere in the initial brief. This is because the trial court made no such findings.

"The enumerated categories of permissible nonfinal review stated in rule 9.130 must be limited to their plain meaning." *Jenne v. Maranto*, 825 So. 2d 409, 413 (Fla. 4th DCA 2002) (citations omitted). "The rule does not authorize judges to enlarge its provisions to permit review of nonfinal orders not specified within its provisions." *Id*. This Court must accordingly dismiss this appeal.

III. Even if the Court has jurisdiction over the order attached to the notice of appeal, the Court does not have jurisdiction to consider Points I-IV of the initial brief.

"The Court's appellate jurisdiction to review nonfinal orders is limited to

those categories of orders identified in Florida Rule of Appellate Procedure 9.130." *Fisher v. Int'l Longshoremen's Ass'n*, 827 So. 2d 1096, 1097 (Fla. 1st DCA 2002) (en banc). Rule 9.130 does not confer supplemental/ancillary appellate jurisdiction or otherwise grant a district court discretion to consider any and all issues affecting the case once its jurisdiction is determined.[7] For example, although a trial court's order may resolve issues related to personal jurisdiction and subject matter jurisdiction, Rule 9.130's grant of appellate jurisdiction over the personal jurisdiction ruling does not confer appellate jurisdiction over the subject matter jurisdiction ruling. *See L.A.D. Prop. Ventures, Inc. v. First Bank*, 19 So. 3d 1126, 1128 (Fla. 2d DCA 2009) (noting that the trial court ruled on the issues of personal jurisdiction and subject matter jurisdiction and explaining that "[a]s to the issue of whether the trial court had subject matter jurisdiction over First Bank's motion for deficiency judgment, this court does not have jurisdiction over the issue in this appeal [because] '[s]ubject matter jurisdiction is not one of the categories' of nonfinal orders that may be appealed under rule 9.130(a)(3)") (citation omitted)).

As such, the jurisdictional inquiry does not end with a determination that the

[7] Appellate jurisdiction in the district courts of appeal is different from the allowable scope of Supreme Court review. "Once [the Supreme] Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case." *Nock v. State*, 256 So. 3d 828, 832 (Fla. 2018) (quoting *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986)).

order is appealable under Rule 9.130. The appellate court must also look to the specific arguments raised on appeal and decide its jurisdiction to address the specific arguments raised in the brief. *See Horton v. Horton*, 179 So. 3d 459, 460 (Fla. 1st DCA 2015) (after finding jurisdiction over the first argument, the appellate court determined that "We lack jurisdiction to address the Former Husband's second and third arguments."); *Hitt v. Homes & Land Brokers, Inc.*, 993 So. 2d 1162, 1164–65 (Fla. 2d DCA 2008) (finding Rule 9.130 appellate jurisdiction to address the personal jurisdiction appellate argument, but no Rule 9.130 appellate jurisdiction to address the subject matter jurisdiction ruling, because subject matter jurisdiction is not an appealable order under Rule 9.130).

In *City of Fort Lauderdale v. Hinton*, 276 So. 3d 319, 325–26 (Fla. 4th DCA 2019), the Fourth District determined it had jurisdiction to review a trial court finding that as a matter of law a party was not entitled to sovereign immunity. However, such jurisdiction did not extend to allow the appellate court to address "[q]uestions about whether the statutory caps in section 768.28(5) apply to medical monitoring and questions about how many incidents or occurrences the [plaintiff] can recover." *Id*.

Similarly, in *Florida Ins. Guar. v. Sill*, 154 So. 3d 422, 424 (Fla. 5th DCA 2014), an insurance company invoked appellate jurisdiction under Rule 9.130(3)(C)(iv) to review a nonfinal order compelling it to participate in an appraisal

under an insurance policy. The district court declined to address other issues raised by the insurance company, including the company's "concerns regarding the limits on its liability and having to directly pay the insureds in contravention of section 631.54(3), Florida Statutes (2011)." The Fifth District reasoned that the scope of its review was limited to Rule 9.130(3)(C)(iv)'s grant of jurisdiction to determine the appropriateness of ordering an appraisal.

Quite recently, this Court in *Citizens Prop. Ins. Corp. v. Sampedro,* 275 So. 3d 744, 745 (Fla. 3d DCA 2019), determined that Rule 9.130 did not confer jurisdiction to review the portion of the dismissal order determining that the insureds' separate count for breach of the residential insurance policy could proceed. This Court noted that its jurisdiction was limited to the question of whether the claims were barred by sovereign immunity.

Here, although the City purports to invoke this Court's jurisdiction under Rule 9.130(a)(3)(C)(xi), the City has not argued in its initial brief that the trial court erroneously determined as a matter of law that it was not entitled to sovereign immunity. The City instead raises the following four completely different points on appeal:

I. The City Was Entitled to Summary Judgment Because Plaintiffs Did Not Meet Their Burden to Produce an Express Contract That Was Breached.

II. The Plaintiffs Lack Standing to Challenge the City's Sovereign

Immunity with Respect to the Deposit Allegations.

III. Sovereign Immunity Bars Plaintiffs' Breach of Contract Claim Because Plaintiffs Failed to Establish the Existence of a Contract with Terms They Seek to Enforce Against the City.

IV. The City Code Supports the City's Sovereign Immunity Defense to Plaintiffs' Claims.

Regarding Point I, the City argues that plaintiffs failed to produce evidence creating a genuine issue of material fact, as required by Florida Rule of Civil Procedure 1.510(c) (Initial Br. 18-19, 24) (citations omitted):

> In the present case, the City was entitled to summary judgment because after nearly two years of discovery; months of discovery after submission of the summary judgment motion; and Plaintiffs' filing of depositions, affidavits, and declarations, Plaintiffs failed to disclose the terms of an express contract that the City breached. Plaintiffs had to produce the contract they alleged to have been breached before they could proceed with their claims.
>
> Not only had Plaintiffs failed to submit any evidence of any express contract that the City breached, but the affidavits of former City officials were not competent to establish the terms of a contractual obligation related to the treatment of water deposits.
>
> …
>
> This Court must reverse summary judgment on this deficient record alone and for this reason alone. *See Knowles,* 346 So. 2d at 1043; *see also* Fla. R. Civ. P. 1.510(c). There is simply no contract in the summary judgment record that is the basis for any of Plaintiffs' claims that they wish to present to a jury.

Rule 9.130(a)(3)(C)(xi) does not confer interlocutory appellate jurisdiction to review a trial court's determination that plaintiffs sufficiently produced evidence

establishing a genuine issue of material fact, as required by Florida Rule of Civil Procedure 1.510(c). That ruling by the trial court is well-grounded in the record and is not an allowable issue in this appeal.

Likewise, Rule 9.130 does not confer jurisdiction to address Point II, the City's contention that plaintiffs lacked standing to challenge the City's sovereign immunity. To be sure, "An order denying a motion to dismiss for lack of standing is not listed as an appealable non-final order under Florida Rule of Appellate Procedure 9.130." *Frank v. Comerica Bank*, 134 So. 3d 1050 (Fla. 4th DCA 2013). Point II also asserts that the trial court lacked subject jurisdiction to "consider these attacks on the City's sovereign immunity in this instance." (Initial Br. 20). Rule 9.130 similarly does not confer appellate jurisdiction to address subject matter jurisdiction by interlocutory appeal. *See L.A.D. Prop. Ventures, Inc. v. First Bank*, 19 So. 3d 1126, 1128 (Fla. 2d DCA 2009) ("Subject matter jurisdiction is not one of the categories of nonfinal orders that may be appealed under rule 9.130(a)(3) (internal citations omitted)). Importantly, the trial court's determination on standing is supported in the record and is not subject to review in this non-final appeal.

As to the third and fourth appellate points, the City similarly does not claim the trial court erroneously determined as a matter of law that it was not entitled to sovereign immunity. It instead argues that plaintiffs failed to establish that the City breached the terms of the contract at issue in this case (Initial Br. 22-23) (emphasis

added):

> These contracts, however, do not contain any terms, express or implied, that support Plaintiffs' breach of contract allegations against the City.
>
> To the contrary, the deposit slip established as a matter of law that the Plaintiffs' breach of contract allegations regarding water deposits fail. Plaintiffs claimed that the City was obligated to segregate residents' deposits and were prohibited from spending those funds. The contractual provisions in the deposit contract belie those notions. The clear and unambiguous terms of the deposit contract provide that the City could act as the "absolute owner" of deposited funds until a resident discontinued water utility services, at which point the City must refund the deposited amounts net any amounts owed to the City.

Likewise, in the fourth point on appeal, the City contends that its code establishes that there was no breach of the subject contracts (Initial Br. 25-26).

"The occurrence of a breach, or breaches, is a question of fact." *Access Ins. Planners, Inc. v. Gee*, 175 So. 3d 921, 924 (Fla. 4th DCA 2015) (citing *Moore v. Chodorow*, 925 So. 2d 457, 461 (Fla. 4th DCA 2006); *Haiman v. Fed. Ins. Co.*, 798 So. 2d 811, 812 (Fla. 4th DCA 2001)). Rule 9.130 does not authorize interlocutory review of summary judgment orders that merely determine there are genuine issues of material fact for a jury to resolve. *See Gionis v. Headwest, Inc.*, 799 So. 2d 416, 417-18 (Fla. 5th DCA 2001) (order denying summary judgment was non-final, non-appealable order, where the trial court's ruling was based upon disputed issues of fact, not a conclusion of law); *Florida Power & Light Co. v. Rehab. Ctr. at Hollywood Hills, LLC*, 4D19-1063, 2019 WL 6720793, at *2 (Fla. 4th DCA Dec.

11, 2019) ("Nonfinal review is not available where immunity turns on disputed issues of fact."). There is, accordingly, no jurisdiction to address issues three and four by interlocutory appeal.

In sum, the text of the unelaborated order does not provide a basis for appellate review under Rule 9.130(a)(3)(C)(xi). Nor does the record of the trial court's ruling. However, even if there was jurisdiction over the order, the City has not argued in its brief that the trial court erroneously determined as a matter of law that it was not entitled to sovereign immunity. The appeal raises other issues that this Court lacks jurisdiction to review at this juncture. The appeal must be dismissed.

IV. As far as the merits, the trial court correctly denied the premature motion for summary judgment where there were genuine issues of material fact.

The City's appeal does not address the trial court's determination that the deposit receipt and water services application are written contracts. Nor does the City address whether its obligation to provide water, to accurately charge its customers for that water, and to maintain their customer deposits are implied at law terms that form a part of the express written contracts. These questions are not at issue on appeal and not before the Court on review. The appellees only address these points as they are raised in the initial brief.

A. The trial court properly denied the prematurely filed motion for summary judgment. There had been zero discovery.

As a threshold matter, the motion for summary judgment was filed before

discovery was completed (App. 573). At the summary judgment hearing, counsel for plaintiffs reminded the trial court that there had been no discovery (App. 574). And the City conceded it was attempting to eject certain legal issues before discovery and depositions were completed (App. 618-19). The trial court could not have granted summary judgment at this stage. *See Ray's Plumbing Contractors, Inc. v. Trujillo Const., Inc.*, 847 So. 2d 1086, 1088–89 (Fla. 1st DCA 2003) ("error to grant summary judgment before allowing appellant an opportunity for meaningful discovery"). The trial court's denial of summary judgment was accordingly appropriate.

B. Whether the City was entitled to summary judgment because plaintiffs did not meet their burden to produce an express contract that was breached.[8]

The City first argues that it was entitled to summary judgment because "after nearly two years of discovery; months of discovery after submission of the summary judgment motion; and Plaintiffs' filing of depositions, affidavits, and declarations, Plaintiffs failed to disclose the terms of an express contract that the City breached."

[8] The applicable standard of review is *de novo*, and summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *MGM Const. Services Corp. v. Travelers Cas. & Sur. Co. of Am.*, 57 So. 3d 884, 887 (Fla. 3d DCA 2011); *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The existence of an unresolved or disputed issue of material fact precludes summary judgment. *MacKendree & Co., P.A. v. Pedro Gallinar & Assocs., P.A.*, 979 So. 2d 973, 976 (Fla. 3d DCA 2008).

(Initial Br. 19). The City closes its argument, claiming "There is simply no contract in the summary judgment record that is the basis for any of Plaintiffs' claims that they wish to present to a jury." (Initial Br. 20).

The argument is bewildering. First, there had been no discovery at this point. Second, the first contract at issue in this case (the deposit receipt) was included in Exhibit A to the City's summary judgment motion (App. 216). And the City itself presented the second contract (water services application) to the trial court at the summary judgment hearing (App. 559-60). The City has not only conceded that these are express contracts (App. 619), but its initial brief leaves open the possibility that other contractual writing might be uncovered during discovery (Initial Br. 23).

Plaintiffs' only obligation at summary judgment was to produce evidence establishing that there were genuine issues of material fact. Rule 1.510 conferred no obligation upon the nonmovant to reproduce evidence already produced by the defense. Without any discovery, the plaintiffs fulfilled its obligations.

C. Whether the plaintiffs have standing to sue for breach of contract.[9]

In Point II, the City contends that plaintiffs were not injured by the handling of their water deposits because they are not presently entitled to a return of their

[9] "A *de novo* standard of review applies when reviewing whether a party has standing to bring an action." *Boyd v. Wells Fargo Bank, N.A.*, 143 So. 3d 1128, 1129 (Fla. 4th DCA 2014).

security deposits (Initial Br. 21). According to the City, the plaintiffs had water service and thus no entitlement to a refund (Initial Br. 21). The argument is devoid of relevant legal analysis and confuses standing with the ultimate merits of this case. "Standing should not be confused with the merits of a claim." *Brunson v. McKay*, 905 So. 2d 1058, 1062 (Fla. 2d DCA 2005) (quoting *Sun States Utils., Inc. v. Destin Water Users, Inc.*, 696 So. 2d 944, 945 n. 1 (Fla. 1st DCA 1997)).

"To satisfy the requirement of standing . . . individuals must allege some threatened or actual injury resulting from the putatively illegal action." *Olen Props. Corp. v. Moss*, 981 So. 2d 515, 517 (Fla. 4th DCA 2008) (citations and quotations omitted). To have standing to sue for breach of contract under Florida contract law, a party must show either contractual privity or third-party-beneficiary status. *See Weiss v. Johansen*, 898 So. 2d 1009, 1012 (Fla. 4th DCA 2005) (discussing contractual privity requirement); *Mulligan v. Wallace*, 349 So. 2d 745, 746 (Fla. 3d DCA 1977) (analyzing third-party-beneficiary status in deciding standing to sue).

Here, plaintiffs are parties to the water deposit contract and have sued the City for damages caused by the City's breach of that contract. They have standing. *See Terzis v. Pompano Paint & Body Repair, Inc.*, 127 So. 3d 592, 596 (Fla. 4th DCA 2012) ("Here, the plaintiff alleged an actual injury resulting from the putatively illegal action. Specifically, the plaintiff alleged that the defendant breached its contract to keep his boat free from damage or theft, which caused him damages.").

D. There are genuine issues of material fact as to whether the City breached the contracts.

The City, in its third and fourth points on appeal (as with its first and second points), does not contend that the breach of contract claims do not arise from a valid written contract between the City and its customers. The City in fact concedes the existence of a contractual relationship between the City and the plaintiffs created by the water service application and deposit receipt (Initial Br. 21-22).[10]

[10] The City properly concedes that the water services application created a contract. Section 21-23 of the City of Opa Locka Code of Ordinances expressly provides that the signed application, once accepted by the City, creates a binding contract between the City and the consumer. The City Code sets forth both the City and consumer's obligations under the contract as well as the circumstances under which the contract can be cancelled. § 21-38, City of Opa Locka Code of Ordinances ("Contracts for water service shall be subject to cancellation, and service thereunder discontinued by the city, for any of the following reasons . . . ."). "Several writings may constitute a valid and binding written contract when they evidence a complete meeting of the minds of the parties and an agreement upon the terms and conditions of the contract." *Waite Dev., Inc. v. City of Milton*, 866 So. 2d 153, 155 (Fla. 1st DCA 2004) (acknowledging that a city ordinance could be a written contract and claims concerning a breach of the contract would not be subject to sovereign immunity).

Even more significant, the City Code also authorizes the City to sue its consumers for the recovery of water charges and late charges due and owing to it in a court of law. § 21-97, City of Opa Locka Code of Ordinances. The City's suggestion that its customers cannot also sue under the water services contract is not well taken.

The water services application accordingly creates a valid contract. *Cf. Spierer v. City of N. Miami Beach*, 560 So. 2d 1198, 1201 (Fla. 3d DCA 1990) (explaining that because the water services "contract is between the owner of the premises and the city, the city is the proper party to be sued in a dispute deriving from contractual rights").

The City instead devolves into an argument on the merits of whether it breached its contractual obligations, the ultimate issue in the trial court that has not yet been resolved. As previously stated, this Court has no jurisdiction to consider whether the trial court correctly determined there were factual issues concerning the City's breach of the terms of the contract. Even so, the argument is premature because there had been no discovery. Still, the argument is misguided as there are genuine issues of material fact based on the limited information plaintiffs have received in advance of discovery. Without waiving or otherwise inviting this Court to address issues for which it has no appellate jurisdiction and for which there had been no discovery, plaintiffs briefly address the claim.

The City was obliged to comply with Florida law and its local ordinances that all water charges be fair, reasonable, and an accurate reflection of the water actually used by the consumer. It was similarly required to comply with the City Charter and City Code's restrictions on the use of water deposit funds in the City treasury. It is a clearly established rule that "[t]he laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it." *Nat'l Franchisee Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232, 1244 (S.D. Fla. 2010) (quoting *Fla. Beverage Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Bus. Reg.*, 503 So. 2d 396, 398 (Fla. 1st DCA 1987)). "In this regard, the law imported into a contract does not create an

independent agreement, but makes the instrument itself express the full agreement of the parties." *Wilcox v. Atkins*, 213 So. 2d 879, 882 (Fla. 2d DCA 1968). When parties enter into a contract for the performance of a service, there is an implied at law expectation that the performing party will carry out its responsibilities in accordance with the applicable law. That obligation becomes a part of the terms of the express contract. *See id*.

Applied to the facts here, the City breached its obligations to charge fair and reasonable rates when it charged its customers for water services it did not provide them. It also breached its obligations when it charged its customers rates for water service that were higher than that authorized by the City Code. Discovery had yet to begin at the time of summary judgment and the damages caused by the City overcharging its customers remain to be determined. The overcharging scheme seems likely to have particularly affected its poor customers who may have lost water service after being unable to pay the City's exorbitant water bills.

The City also breached the terms of its deposit agreement by using its customers' deposits to cover operational expenses, where there was no appropriation approving the expense or an ordinance authorizing the expense (App. 440-41). The deposits no longer exist, and the water and sewer services department could not return all the deposits if it had to (App. 440-41). Again, appellees do not waive the jurisdictional argument or otherwise ask the Court to address issues before

discovery. But, even if the Court determined it had jurisdiction, the decision denying summary judgment is due to be affirmed in light of the genuine issues of material fact as to whether there was a breach.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. To the extent the Court decides it has jurisdiction, the decision denying the City's motion for summary judgment must be affirmed. There had been no discovery at the time of summary judgment and based on the limited information available, there are genuine issues of material fact.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 27, 2019, the foregoing document was filed via the Court's e-filing Portal and served this day on all counsel of record or *pro se* parties identified on the below or attached Service List via email.

S/ Benedict P. Kuehne
BENEDICT P. KUEHNE

ADDENDUM

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY

CIRCUIT CIVIL DIVISION

OPA LOCKA WAREHOUSE CONDOMINIUM ASSOCIATION, INC.,

CASE NO.: **18-2828 CA (43)**

Plaintiff,

vs.

CITY OF OPA-LOCKA, FLORIDA,
a municipal corporation authorized to do business in the State of Florida,

Defendant.
_____/

ORDER

THIS CAUSE, having come before the Court on Janvary 9, 2019, and the Court having reviewed the Motion, the Court file, and after hearing argument of counsel, and otherwise being advised fully in the premises, it is hereby ORDERED and AJUDGED:

For the reasons stated on the record, The motion for summary judgment is DENIED. Count 2 is dismissed without prejudice with leave to replead in ten (10) days.

DONE and ORDERED in Chambers in Miami, Miami-Dade County, Florida, this 9th day of January 2019.

THE HONORABLE BEATRICE BUTCHKO
CIRCUIT COURT JUDGE, 11th Judicial Circuit

Copies furnished counsel of record

ADDENDUM 1