IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL DIVISION

MAREK W. PIEKOS,

Appellant,

v.

STEPHEN A. WITZER,

Appellee.
_____/

Lower Tribunal No. 2014-CC-004015-NC
Appeal No. 2014 AP 007099 NC

INITIAL BRIEF

On Appeal from the County Court of the Twelfth Judicial Circuit
in and for Sarasota County, Florida.

LAW FIRM OF JAMES L. ESSENSON

James L. Essenson, Esq.
Florida Bar No. 359033
Barbara J. Welch, Esq.
Florida Bar No. 624683
Matthew J. Kelly, Esq.
Florida Bar No. 112572
2071 Main Street
Sarasota, Florida 34237
Telephone: (941) 954-0303
Facsimile: (941) 951-7739
Primary email: essenson@essensonlaw.com
Secondary email: bwelch@essensonlaw.com
Counsel for Appellant, Marek W. Piekos

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I. PRELIMINARY STATEMENT

Appellant, Marek W. Piekos ("Piekos") appeals the Final Judgment for Possession and Dismissal of Counter-Claim, rendered by the County Court of the Twelfth Judicial Circuit in and for Sarasota County, on October 23, 2014 (the "Final Judgment"), dismissing Piekos' Counter-Claim and awarding possession of real property to Appellee, Stephen A. Witzer ("Witzer") on the following grounds: (1) that the Court lacked subject matter jurisdiction; (2) that the relief granted by the Final Judgment was not pled; and (3) that the Court's legal conclusions were erroneous and not supported by competent, substantial evidence.

There is only one volume to the record on appeal, so references thereto are designated by page numbers (R.____). References to the reconciled Statement of Proceedings (in lieu of a transcript) under Fla. R. App. P. 9.200(b)(4) are in the Record at R.79-81 and will be designated accordingly.

II. STATEMENT OF THE FACTS

A. The Pleadings.

On or about August 1, 2014, Witzer filed a Complaint against Piekos for a single count titled "Possession/Eviction" in the County Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida (the "County Court"). (R.3-6.) In his Complaint, Witzer alleged that he owned 7909 Midnight Pass Road, Sarasota, Florida 34242 (the "Property"), that Piekos was a tenant in possession, that Witzer

terminated the tenancy, and that Piekos failed to vacate. (R.3 ¶1; 3 ¶2; 4 ¶10; 4 ¶11, and 4-5 ¶¶13-18.) Piekos responded with an Answer, Affirmative Defense, and a Counterclaim (R.17-22.)

Piekos' Counterclaim began with the allegation that the action is for damages that "exceed $15,000.00" exclusive of attorney fees and costs. (R.19 ¶20.) The Counterclaim goes on to allege, among other things, that on February 19, 2004, Piekos and his wife purchased the Property. (R.19 ¶22.) In order to avoid a subsequent foreclosure commenced against Piekos on May 26, 2010 Piekos sold the Property to Witzer in a short sale on November 28, 2012. (R.19 ¶¶ 23-24.) Thereafter, in December of 2012, Piekos and Witzer entered into a verbal agreement (the "Verbal Agreement") whereby Piekos would be permitted to retain possession of the Property and repurchase the same for $1,650,000.00 on the following terms:

1. Piekos was required to tender to Witzer a total of $300,000 toward the purchase price in two $150,000 payments over the subsequent two years, which amounts would be refunded if the purchase did not occur; and

2. To keep the deal "alive" and under threat of eviction, Piekos was required to pay monthly "forbearance fees" to Witzer in the following amounts:

    a. $10,000 per month for the months of December of 2012, January of 2013 and February of 2013;

    b. $14,750 per month for the months of March of 2013 through June of 2013;

c. $12,500 per month for the months of July of 2013 through October of 2013; and

d. $11,500 per month for the months of November of 2013 through July of 2014.

(R.19-20 ¶25.) The Counterclaim further alleges that pursuant to the Verbal Agreement, Piekos paid the above sums until June of 2014, when Witzer wanted to increase the purchase price by $50,000. (R.20 ¶¶26-27.) Thereafter in July of 2014, Witzer tendered a contract that would make the $300,000 Piekos already paid non-refundable. The Counterclaim alleges that when Piekos refused to sign that contract, Witzer filed the action for eviction. (R.20 ¶28.) The Counterclaim seeks the return of the $300,000 refundable funds. (R.19-22.)

Witzer's Answer to Piekos' Counterclaim admitted that the action was for damages that exceed $15,000.00 exclusive of attorney fees and costs, (R.29 ¶20), admitted venue, and admitted Piekos sold the Property to Witzer (R.29 ¶24). Witzer denied each remaining allegation. (R.29-30.) Witzer's affirmative defenses included allegations that the $300,000 totaled non-refundable option payments and/or that any sums paid by Piekos to Witzer were in conjunction with a certain real estate contract signed on June 20, 2014 by Witzer and a person named Andy Cielsielski. (R.32, 34-38.) Contemporaneous with his Answer and Affirmative Defenses to Piekos' Counterclaim, Witzer filed a Motion to Sever Counterclaim from Witzer's eviction

action in County Court, since the amount in controversy exceeded the County Court's jurisdiction, (R.23-36.)

B. The Stipulated Settlement Agreement.

Subsequently, Witzer and Piekos entered into a Stipulated Settlement Agreement, which provided for the disposition of Witzer's eviction action and Piekos' Counterclaim and had, attached thereto, a Lease/Option Agreement, also signed by Witzer and Piekos (collectively, the "Agreement"). (R.39-52.) The Agreement provided that Piekos would pay $10,000 each month for the lease term (which ended on December 31, 2014), and, as long as current on such payments, Piekos may exercise an option to purchase the property for $1,800,000, against which the $300,000 already paid would be credited. (R.41 ¶2, 45 ¶1, 49-50 ¶15.)

The Agreement provided for an initial payment of $52,500.00 (R.41), of which $40,000 represented the $10,000 monthly rental payments for July, August, September and October, receipt of which was acknowledged by Witzer. (R.45 ¶1.) The Agreement also provided that Piekos' failure to make timely payments will "result in a final judgment, without the necessity of a notice or hearing, entered for Plaintiff for possession and on Defendant's counter-claim finding that the Defendant shall not recover and go hence without day." (R.41 ¶2.)

Piekos signed the Agreement on October 15, 2014, but Piekos' signature was not accompanied by the signature of two witnesses (as to the Lease/Option

Agreement) and a notary (as to the Stipulated Settlement Agreement). (R.44 and 52.) Witzer signed the Agreement (in front of witnesses and a notary who also signed) apparently on October 17, 2014. (R.43 and 51.)

C. The Motion and Final Judgment.

On Monday, October 20, 2014, one business day after the Agreement was fully executed by Witzer, Witzer filed a Motion for Final Judgment for Possession After Default of Stipulated Settlement Agreement ("Final Judgment Motion"). (R.53-61.) On that same day, Witzer filed the Agreement. (R.39-52.) The Final Judgment Motion alleges that the Agreement was signed and provided for payment, which was not received in full. (R.53.) Attached to the Motion was the Affidavit of Alexander Paderewski, counsel for Witzer, who averred that Piekos signed on October 15, 2014 and wired $20,000.00 to Paderewski's trust account that day. (R. 56.) Paderewski goes on to aver that the Agreement fully executed by Witzer was sent to counsel for Piekos on October 17, 2014, but the remaining funds were not received by Paderewski's deadline of 6:00 pm on October 17, 2014, resulting in default. (R.56.)

Attached to Paderewski's Affidavit were several exhibits, which included an email exchange between counsel that indicates that Piekos' counsel on October 16, 2014 was attempting to have Piekos re-sign the same in front of two witnesses and a notary and was attempting to ascertain from Witzer's counsel whether all the funds

were received. (R.60.) The email exchange further indicates that on Friday, October 17, 2014, at 3:04 pm, Witzer's counsel transmitted the Agreement fully executed by Witzer and demanded the transfer of the balance in the amount of $32,500.00 by 6:00 pm that day. (Id.)

After the Final Judgment Motion was filed on Monday, October 20, 2014, three days later, on October 23, 2014, the County Court heard the same. (R.64.) No Notice of Hearing on the Final Judgment Motion was filed or served.

At the hearing, Witzer argued that the parties entered into an Agreement, but Piekos breached the same by failing to timely pay the full initial payment of $52,500.00, only paying $20,000.00 of the $52,500.00 on a "timely basis". (R.79.) Witzer acknowledged that Piekos had in fact paid the remaining $32,500.00, but argued that the payment was untimely since it was not received by October 17, 2014. (Id.) Witzer also argued that since the Complaint was one for simple eviction, the County Court had jurisdiction. (Id.)

Piekos denied that the case was based on a mere landlord-tenant relationship, and explained that Piekos previously owned the property and remained in possession after sale to Witzer under an arrangement with Witzer. (R.80.) Piekos proffered to the County Court, without objection, a one page document entitled "Wire Instructions" which the parties acknowledged had been sent by Attorney Paderewski to counsel for Piekos for Piekos to follow in wiring the money. (R. 80 and 70.) Piekos

argued that he had attempted in good faith to wire the money but the Wire Instructions had omitted necessary information resulting in Piekos' bank's inability to complete the transaction. (Id.)

Piekos also proffered to the County Court, again without objection, bank documents which indicated Piekos had instructed Chase Bank to wire $20,000 on October 15, 2014 and had again instructed Bank Polski in Poland to wire $32,500 on October 21 with the proper wire instructions. (Id. and 71-73.) Piekos further argued that he was in substantial compliance with the Agreement, which only acknowledged Witzer's receipt of the funds upon execution, and a contrary finding would result in the forfeiture of Piekos' $300,000 down payment acknowledged in the Agreement, which result would be inequitable. (R. 80.)

The County Court found that Piekos executed the Agreement on October 15, 2014 and Witzer executed the Agreement on October 17, 2014. (R. 81.) Upon inquiry by the County Court, the parties both agreed that no specific date for full payment was set forth in either Agreement. (R.80.)

Nonetheless, the County Court found that payment was due on October 17, 2014 (R.81) and that Piekos, who had a duty to inquire whether or not the Wire Instructions were sufficient to accomplish the transfer, was in default for failure to timely make the required payments. (R.80.) Based on the terms of the Agreement, the County Court entered Final Judgment for eviction in favor of Witzer, a final

judgment against Piekos on his Counterclaim for the return of the $300,000.00, and ordered Witzer to return the $52,500.00 under the Agreement to Piekos. (R.62.) Piekos appeals this Final Judgment.

III. STANDARD OF REVIEW

Piekos argues herein that the County Court had no subject matter jurisdiction to enter the Final Judgment; that the County Court exceeded its statutory jurisdictional authority by granting relief based on matters outside the pleadings, which is a departure from the essential requirements of law; and that no competent, substantial evidence was presented to the County Court from which the County Court could make findings of fact and draw from them the conclusions of law, and that the County Court reached incorrect conclusions of law. Accordingly, the Final Judgment is reviewed *de novo*. See *Artz ex rel. Artz v. City of Tampa*, 102 So.3d 747, 749 (Fla. 2d DCA 2012) (reviewing *de novo* the trial court's subject matter jurisdiction); *Motzenbecker v. State Farm Mut. Auto. Ins. Co.*, 123 So.3d 600, 602 (Fla. 2d DCA 2013) (determining whether or not a provision in a contract applies to the facts of the case is a question of law and is reviewed de novo).

IV. SUMMARY OF THE ARGUMENT

The Final Judgment is void inasmuch as the County Court fundamentally lacked subject matter jurisdiction to entertain a Counterclaim in which the amount in controversy exceeded $15,000, much less enter a Final Judgment disposing of a

Counterclaim in which the sum at issue was $300,000. Even if the County Court had subject matter jurisdiction over this action, the County Court disposed of the Complaint and the Counterclaim by motion based upon matters that were outside the pleadings, which no court is authorized to do. Even if the County Court had subject matter jurisdiction over this action and had authority to dispose of the Complaint and the Counterclaim by motion based upon matters that were outside the pleadings, in doing so, the County Court reached an erroneous conclusion of law, disregarding Piekos' defenses under the Agreement, and failed to make factual findings that were based on competent, substantial evidence.

V. ARGUMENT

A. THE COURT LACKED SUBJECT MATTER JURISDICTION TO DISPOSE OF PIEKOS'S COUNTERCLAIM.

In this case, in response to Witzer's Complaint for "Possession/Eviction" (R.4), Piekos filed a Counterclaim seeking judgment in the amount of $300,000 (R.18-22). Witzer admitted "for jurisdictional purposes" that Piekos' action exceeds $15,000.000 exclusive of attorney's fees and costs, (R. 19 ¶20 and R.29 ¶20), and moved to sever Piekos' Counterclaim (R.23-26), since the same is seeking an amount "far in excess of this Court's statutory and constitutional jurisdiction limits". (R. 24 ¶6.) Under these circumstances, the County Court lacked non-waivable subject matter jurisdiction to adjudicate this controversy.

Subject matter jurisdiction is defined as "the power of the court to deal with the class of cases to which the particular case belongs." *Lovett v. Lovett*, 93 Fla. 611, 112 So. 768, 775 (Fla. 1927). "Subject matter jurisdiction is conferred upon a court by a constitution or statute, and cannot be created by waiver, acquiescence or agreement of the parties." *Snider v. Snider*, 686 So.2d 802, 804 (Fla. 4th DCA 1997). When a court acts without jurisdiction, its action is void and subject to collateral attack. *Lutz v. Rutherford*, 139 So.3d 501, 502 (Fla. 2d DCA 2014) (citing to *Strommen v. Strommen*, 927 So.2d 176, 179 n. 4 (Fla. 2d DCA 2006). Accordingly, a court's lack of subject matter jurisdiction can be challenged at any time and may be considered independently by the appellate court, even if the issue was never raised in the trial court. *Stone v. Stone*, 873 So.2d 628, n1 (Fla. 2d DCA 2004).

The jurisdiction of the county courts in Florida is established by legislation implementing the provisions of Article V, section 6(b) of the Florida Constitution. Sections 34.01 and 34.011 are the statutes that define the jurisdiction of the county courts generally. In Florida, county courts have jurisdiction over "all actions at law in which the matter in controversy does not exceed the sum of $15,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts." § 34.01(1)(c), Florida Statutes. The instant case was styled as a one count complaint for eviction under a landlord-tenant relationship and sought

possession of the subject property. Such cases, however, are not within the exclusive subject matter jurisdiction of the county court under Florida Law.

County courts in Florida specifically have jurisdiction to consider landlord and tenant cases, but the jurisdiction is concurrent with the circuit court and the county court's jurisdiction over landlord and tenant cases is limited to those "involving claims in amounts which are within its jurisdictional limitations." § 34.011(1), Florida Statutes. Similarly, the county court has exclusive jurisdiction of proceedings relating to the right of possession of real property **unless** the amount in controversy exceeds the jurisdictional limits of the county court, in which case the circuit court has jurisdiction. § 34.011(2), Florida Statutes.

Florida Rule of Civil Procedure 1.170, which governs counterclaims and cross-claims, sets forth the procedure if "the demand of any counterclaim or crossclaim exceeds the jurisdiction of the court in which the action is pending". Fla. R. Civ. P. 1.170(j). In such circumstances, "the action ***shall be*** transferred forthwith to the court of the same county having jurisdiction of the demand in the counterclaim…". (*Id.*) (Emphasis added.)

Fla R. Civ. P. 1.170(j) goes on to provide that once the party asserting the demand exceeding the jurisdiction pays the court's service fee, the papers are transmitted to the proper court. *Id.* Thereafter the court to which the action is transferred "shall have full power and jurisdiction over the demands of all parties."

Id. If the court's service fee is not paid when the counterclaim "is filed, or within such further time as the court may allow," the claim for damages shall be reduced to an amount within the jurisdiction of the court where the action is pending. (*Id.*) (The timely deposit of this service fee is not jurisdictional. *Pearce v. Parsons*, 414 So.2d 296, 297 (Fla. 2d DCA 1982).)

In the instant case, Piekos' Counterclaim involved $300,000.00, which exceeded the jurisdictional limits of the County Court. The requirement that the entire action be transferred to the circuit court where there is a counterclaim exceeding the county court's jurisdiction is clear and perfunctory. *A-One Coin Laundry Equipment Co. v. Waterside Towers Condominium Ass'n, Inc.*, 561 So.2d 590, 591 (Fla. 3d DCA 1990). Although Witzer argued below that Piekos never requested a transfer (R.79), failing to move for a transfer does not confer subject matter jurisdiction where the same is lacking. In fact, Witzer moved to sever Piekos' Counterclaim (R.23-26), since the same is seeking an amount "far in excess of this Court's statutory and constitutional jurisdiction limits" (R. 24 ¶6.) The Motion to Sever was never scheduled for hearing.

Nonetheless, a transfer is mandatory where a counterclaim raises a demand that exceeds the subject matter jurisdiction of the court in which the main action is pending. *Hollywood Food Court, Inc. v. Hollowell*, 588 So.2d 243 (Fla. 4th DCA 1991). Accordingly, the County Court lacked subject matter jurisdiction over

Piekos' Counterclaim and the County Court's subject matter jurisdiction is nonwaivable. The Final Judgment, therefore, is void ab initio and must be vacated.

B. THE COURT EXCEEDED ITS JURISDICTION BY GRANTING RELIEF THAT WAS NOT PLEAD.

Even if the County Court had subject matter jurisdiction (which it did not) the Final Judgment is void because it granted relief that was not requested by the pleadings.

The County Court's ruling on October 23, 2014, awarding possession of the property to Witzer and entering final judgment against Piekos on his Counterclaim of $300,000.00, was based entirely on the terms of an Agreement entered into subsequent to the pleadings. (R.81.)

The Final Judgment references Piekos' alleged default under the terms of the Agreement only (R.62), and disposes of the Complaint and Counterclaim on a simple motion after a hearing held on three days' notice, in which no evidence, record or otherwise, was presented on the merits of Witzer's Complaint and Piekos' Counterclaim.

A trial court lacks jurisdiction to hear and to determine matters which are not the subject of proper pleading and notice, and to allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights. *Carroll & Assocs., P.A. v. Galindo*, 864 So.2d 24, 28–29 (Fla. 3d DCA 2003).

It is axiomatic that relief granted cannot be greater than the relief sought. (See Authors Comment to Florida Rule of Civil Procedure 1.110.) Courts are not authorized to award relief not requested in the pleadings and to grant unrequested relief is an abuse of discretion and reversible error. *Perez v. Fay*, --- So.3d ----, 2015 WL 292016 *3 (Fla. 2d DCA 2015) (citing to *Abbott v. Abbott*, 98 So.3d 616, 617–18 (Fla. 2d DCA 2012) (citations omitted) (internal quotation marks omitted)). A judgment which grants relief wholly outside the pleadings is void. *Bank of New York Mellon v. Reyes*, 126 So.3d 304, 309 (Fla. 3d DCA 2013) (citing to *Mullne v. Sea–Tech Constr., Inc.*, 84 So.3d 1247, 1249 (Fla. 4th DCA 2012), which held that a "judgment was void ... because the trial court was without jurisdiction to award relief that was not requested by the complaint.")).

When an order "is beyond the jurisdiction of the trial court as invoked by the facts alleged and relief sought in the pleadings in either of the pending cases [then] it is void, and therefore, its entry departs from the essential requirements of law." *Bartolucci v. McKay*, 428 So.2d 378, 379 (Fla. 5th DCA 1983).

In the instant case, the relief of possession in Witzer's Complaint was grounded in the alleged termination of Piekos' tenancy. The relief of return of the $300,000 in Piekos' Counterclaim was grounded in an alleged earlier lease option agreement. The County Court's ruling and Final Judgment was not based on the allegations in either of those pleadings but on a motion grounded in a subsequently

signed Agreement between the parties, which was outside the pleadings.[1] Accordingly, the Final Judgment is void for lack of jurisdiction.

Settlement agreements entered into by parties that dispose of all or some of a pending action are encouraged. See e.g. Fla. Sm. Cl. R. 7.130(b). Ordinarily, however, such settlement agreements are incorporated into a final judgment or approved by order that provides that jurisdiction is retained to enforce its terms. See e.g. *Zimmerman v. Olympus Fidelity Trust, LLC*, 847 So.2d 1101 (Fla. 4th DCA 2003). Under those circumstances, the Florida Supreme Court has held:

> when a court incorporates a settlement agreement into a final judgment or approves a settlement agreement by order and retains jurisdiction to enforce its terms, the court has the jurisdiction to enforce the terms of the settlement agreement **even if the terms are outside the scope of the remedy sought in the original pleadings.**

Paulucci v. General Dynamics Corp., 842 So.2d 797, 803 (Fla. 2003).

In the instant case, the Agreement was filed on the same day as the Final Judgment Motion and the County Court had not accepted or approved the Agreement. Indeed, no court has accepted or approved the Agreement. Yet, the entire action, the Complaint and Counterclaim, was resolved based on an alleged default under the terms of the Agreement presented by motion. This is reversible error.

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[1] Complaints, answers, and counterclaims are pleadings; a motion for final judgment is not. See *Green v. Sun Harbor Homeowners' Association, Inc.*, 730 So. 2d 1261, 1263 (Fla. 1998).

If a court renders a judgment in a case where it had jurisdiction of the parties, upon a matter entirely outside of the issues made, it would necessarily "be arbitrary and unjust as being outside the jurisdiction of the subject-matter of the particular case, and such judgment would be void and would not withstand a collateral attack, for upon such matter a presumption would arise that the parties had had no opportunity to be heard." *Lovett v. Lovett*, 93 Fla. 611, 112 So. 768, 775–76 (1927).

The rules of procedure governing summary judgment are illustrative. Florida's civil rules of procedure allow any party to move for final judgment, which must be based upon the pleadings, and may be supported by record evidence. Fla. R. Civ. P. 1.510(c). Notice and opportunity to be heard is carefully prescribed by the rules; to wit, the movant must serve its motion and all evidence upon which it relies to the non-moving party twenty days in advance of the hearing on the motion. Fla. R. Civ. P. 1.510(c). The summary judgment rule goes on to prohibit entry of a judgment if there is a genuine issue of material fact. (Id.)

In the instant case, Witzer's Final Judgment Motion –based not upon the pleadings but upon an Agreement– was filed almost before the ink was dry on the Agreement: one business day after Witzer fully executed the Agreement and before Piekos had fully executed the Agreement before two witnesses and a notary. The Final Judgment Motion was scheduled to be heard three days later, and the Final Judgment was granted based upon only the Agreement. Accordingly, the Final

Judgment determined matters that were not the subject of proper pleading and notice and granted relief on matters outside the pleadings. Since the Final Judgment is beyond the jurisdiction of the trial court as invoked by the facts alleged and relief sought in the pleadings in either of the pending cases, it is violative of Piekos' due process rights and is void, and therefore, its entry departs from the essential requirements of law. *Bartolucci v. McKay*, 428 So.2d 378, 379 (Fla. 5th DCA 1983); *Barreiro v. Barreiro*, 377 So.2d 999, 1000 (Fla. 3d DCA 1979).

C. THE COURT REACHED AN ERRONEOUS CONCLUSION OF LAW AND ITS DECISION WAS NOT BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

Even if, assuming *arguendo*, the County Court had subject matter jurisdiction (which it did not) and the County Court had accepted or approved the Agreement affording the County Court the jurisdiction to enforce the terms of the settlement agreement even if the terms are outside the scope of the original pleadings (which it did not), the County Court reached the wrong conclusion of law in its Final Judgment, which was not, in any event, based on substantial, competent evidence.

The Final Judgment Motion was based on an alleged default by Piekos of the payment under the Agreement of $52,500.00.

The Agreement provides that Piekos "shall pay the initial payment of $52,500.00, by wire transfer and all additional payments as referenced in the Lease/Option Agreement…". (R.41 ¶2.)

The Lease/Option Agreement provides as follows:

> In consideration of promises, mutual covenants, and agreements herein contained and the sum of Fifty-Two Thousand Five Hundred ($52,500.00) dollars and other valuable consideration paid this day by Tenant to Owner, receipt of which is hereby acknowledged upon full execution of these presents...

(R.45.)

At the hearing on the Final Judgment Motion, the parties both agreed that no specific date for full payment was set forth in either agreement. (R.80.) Nonetheless, Witzer acknowledged receipt of $20,000.00 on October 15, 2014. (R.56 ¶5.) Witzer also acknowledged receipt of the $32,500.00 but insisted the same was not timely. (R.79.) Piekos proffered bank documents showing, among other things, Bank Polski's foreign transfer details showing a wire transfer in the amount of $32,500.00 initiated on October 21, 2014. (R.73.)

Piekos argued that he was in substantial compliance with the Agreement and a contrary finding would result in the inequitable forfeiture of Piekos' $300,000 down payment acknowledged in the Lease/Option Agreement. (R.80.) Piekos also argued below that Piekos attempted to wire the $32,500 remaining balance but his bank in Poland (Bank Polski) was unable to complete the transaction due to incomplete information on Witzer's counsel's Wire Instructions. (R.80.) By giving Piekos Wire Instructions that were incomplete, Witzer made it impossible for Piekos to perform his obligations under the Agreement, inducing Piekos' default and

thereby allowing Witzer to retain Piekos' $300,000 down payment with no further ado.[2]

Moreover, Witzer should have been estopped from claiming Piekos defaulted when Witzer induced Piekos' reliance on Witzer's Wire Instructions that did not contain the necessary information to allow Piekos to transfer the money in a timely fashion. Allowing Witzer to take possession of the property and retain Piekos' $300,000 after essentially inducing Piekos' default is inequitable. Nonetheless, the County Court rejected Piekos' substantial performance and impossibility of performance arguments, and took no evidence before reaching erroneous conclusions of law.

1. Piekos Substantially Performed His Obligations Under the Agreement and Awarding Witzer Piekos' $300,000 Constitutes Unjust Enrichment.

Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's

[2] Notably, section 83.56(5) of the Florida Residential Landlord and Tenant Act provides that if a Landlord accepts rent "actual knowledge of a noncompliance by the tenant", the Landlord waives his right to terminate the rental agreement or to bring a civil action for that noncompliance. On October 15, 2014, Witzer accepted Piekos' $20,000, which included rental payments, and retained the same through the filing of the Final Judgment Motion and hearing thereon, only returning the same by order of this court, along with the $32,500 tendered by Piekos, in violation of § 83.56(5), Florida Statutes.

right to recover whatever damages have been occasioned him by the promisee's failure to render full performance. *J.M. Beeson Co. v. Sartori*, 553 So.2d 180, 182 (Fla. 4th DCA 1989) (citing to *Ocean Ridge Development Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971) (citing to 3A CORBIN ON CONTRACTS, Section 702 et sequi.) The contractual definition of substantial completion in this case is similar to the well-established doctrine of substantial performance, and the terms are interchangeable. *Id.*

The *J.M. Beeson Co. v. Sartori* Court goes on to explain that in defining substantial performance, one of the tests as enunciated by Corbin is the "degree of frustration of purpose":

> Extremely important factors in solving the present problem [of what is substantial performance] are the character of the performance that the plaintiff promised to render, the purposes and end that it was expected to serve in behalf of the defendant, and the extent to which the nonperformance by the plaintiff has defeated those purposes and ends, or would defeat them if the errors and omissions are corrected.

Id. Generally speaking, substantial performance does not apply to the payment of money, especially where time is of the essence. *Hufcor/Gulfstream, Inc. v. Homestead Concrete & Drainage, Inc.*, 831 So.2d 767, 769 (Fla. 4th DCA 2002).

In the instant case, however, Witzer admitted receiving the $52,500.00 due under the Agreement. As recognized by the interlineation to the first paragraph of the Final Judgment, the default was not Piekos' failure to pay, but rather Piekos' alleged failure to ***timely*** pay (R. 62), even though the parties acknowledged no

specific date for full payment was set forth in either agreement. (R.80.) Notably, the Agreement did ***not*** state that time is of the essence.

As a general rule, time is considered to be of the essence where an agreement specifies, or where such may be determined from the nature of the subject matter of the contract, or where treating time as non-essential would produce a hardship, or where notice has been given to the defaulting party requiring that the contract be performed within a stated time, which must be a reasonable time according to the circumstances. *Moss v. Moss*, 959 So.2d 375, 377 (Fla. 3d DCA 2007) (quoting *Sublime, Inc. v. Boardman's Inc.*, 849 So.2d 470, 471 (Fla. 4th DCA 2003). The *Moss* court goes on to explain that:

> As observed in *Rose v. Ditto*, 804 So.2d 351, 352 (Fla. 4th DCA 2001), quoting *National Exhibition Co. v. Ball*, 139 So.2d 489 (Fla. 2d DCA 1962), "[t]he modern trend of decisions concerning brief delays by one party in performance of a contract or conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is not to treat such delays as a failure of a constructive condition discharging the other party unless performance on time was clearly an essential and vital part of the bargain." In *Rose*, the Fourth District concluded that a two day delay by a former husband in making the first installment payment due on a settlement agreement of a child support arrearage was not a material breach.

Id.

In the instant case, not only was no date specified in the Agreement for time of payment but also neither the Stipulated Settlement Agreement nor the Lease/Option agreement provided that time was of the essence. Additionally, no

hardship would have resulted (or indeed, did result) from treating time as non-essential.

Significantly, since both parties admitted that the Agreement contained no specific date for full payment of the $52,500.00 (R.80), the Agreement was ambiguous as to when such payment must be made. When an instrument contains a latent ambiguity, parole evidence is admissible to determine the parties' intent. *Berry v. Teves*, 752 So.2d 112, 114 (Fla. 2d DCA 2000). Nevertheless, even though parties had no meeting of the minds with respect to a certain date for payment upon pain of default, the County Court based Piekos' default on the failure to pay timely and, based on that default, entered a final judgment which, among other things, allowed Witzer's retention of Piekos' $300,000, which was inequitable under the circumstances (in addition to outside of the pleadings and beyond the County Court's subject matter jurisdiction).

Moreover, if notice has been given to the defaulting party requiring that the contract be performed within a stated time, that time must be reasonable according to the circumstances. *Moss, supra*, at 377. In the instant case, Witzer's counsel sent Witzer's executed agreement on October 17, 2014 at 3:04 pm and demanded payment by 6:00 pm and stated, in that email, for the first time, that time was of the essence. (R.60.) A three-hour time-frame within which to transfer funds from a bank in Poland that would have been closed for the weekend in any event cannot be

considered "a reasonable time according to the circumstances." *Id.* Additionally, although Witzer and/or Witzer's counsel might have known, there was no way for Piekos or Piekos' counsel to know that the Wire Instructions Witzer's counsel gave Piekos' counsel contained insufficient information to allow a wire transfer.

Piekos scrambled to overcome Witzer's incorrect Wire Instructions and succeeded in initiating a transfer of the entire remaining balance of $32,500.00 to Witzer on October 21, 2014. Based on the doctrine of substantial performance, perhaps Witzer could have claimed damages for four days of interest, but the damages awarded to Witzer were in the amount of $300,000.00. Under these circumstances, Witzer was unjustly enriched since Piekos conferred a benefit of $300,000 upon Witzer, Witzer was aware of the benefit, and Witzer accepted and retained the benefit under circumstances that make it inequitable for him to retain the same without paying value for it. See *AMP Services Ltd. v. Walanpatrias Foundation,* 73 So.3d 346, 350 (Fla. 4th DCA 2011) (quoting *Fla. Power Corp. v. City of Winter Park,* 887 So.2d 1237, 1241 n. 4 (Fla. 2004).)

Accordingly, since no time was specified in the Agreement for payment, and since time was not of the essence in the Agreement, and since Piekos transferred nearly half of the funds due under the Agreement before the time due, and transferred the balance within a few business days of the demand, Piekos substantially performed under the Agreement. The Final Judgment, which reflects no

consideration of this defense, and reached the conclusion of default based on no evidence, let alone competent, substantial evidence, should be reversed.

2. Piekos' Obligations Under the Agreement Were Impossible to Perform and Witzer Should Have Been Estopped From Claiming a Default He Induced.

In Florida, impossibility of performance is a well-recognized defense to nonperformance of a contract. *Mailloux v. Briella Townhomes, LLC*, 3 So.3d 394, 395 (Fla. 4th DCA 2009). Impossibility of performance "is a defense to nonperformance and refers to situations where the purpose for which the contract was made has become impossible to perform." *Zephyr Haven Health & Rehab Center, Inc. v. Hardin ex rel. Hardin*, 122 So.3d 916, 920 (Fla. 2d DCA 2013) (citing to *Spring Lake NC, LLC v. Figueroa*, 104 So.3d 1211, 1216 (Fla. 2d DCA 2012). When determining impossibility, courts focus on "whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." *Ferguson v. Ferguson*, 54 So.3d 553, 556 (Fla. 3d DCA 2011) (quoting 6 WILLISTON, CONTRACTS (Rev. ed.) § 1931 (1938)).

In the instant case, the Wire Instructions given by Witzer to Piekos omitted necessary information, which Piekos could not have known until after he initiated the transfer of funds. The County Court concluded that Piekos had a duty to inquire whether the funds were transferred and failed in that duty. (R. 80, 81.) However, the

County Court took no evidence on the necessity of the wiring information omitted from the Wire Instructions and took no evidence about Piekos' good faith efforts to transfer the funds despite the missing information on the Wire Instructions.

Moreover, the emails from Piekos' counsel attached to Witzer's counsel's Affidavit in support of the Final Judgment Motion, indicate that Piekos had, in fact, inquired about that transfer of the funds and had, in fact, followed up on the same. (R. 60, 61.) Accordingly, even if the County Court found that the funds in the amount of $32,500.00 were not timely paid, the County Court should have considered Piekos' defenses in order to avoid an inequitable result. The County Court, which had no jurisdiction to entertain Piekos' Counterclaim and had no authority to enter a judgment based on a motion involving issues not framed by the pleadings, reached an incorrect conclusion of law which was not based on substantial, competent evidence, and the same should be reversed.

Moreover, Witzer should have been estopped from claiming Piekos defaulted when Witzer induced Piekos' reliance on Witzer's Wire Instructions that did not contain the necessary information to allow Piekos to transfer money. The elements of equitable estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the

representation and reliance thereon. *Progressive Exp. Ins. Co. v. Camillo,* 80 So. 3d 394, 401-02 (Fla. 4th DCA 2012).

Witzer provided Wire Instructions on which Piekos reasonably relied. The Wire Instructions were missing information necessary for Piekos' Polish bank to complete the transaction. With full knowledge that Piekos was relying on incomplete Wire Instructions and with full knowledge that the transfer was from a bank in Eastern Europe, Witzer, at 3:04 pm on a Friday, demanded that Piekos transfer payment by 6:00 pm that Friday or he would consider Piekos to be in default of the Agreement. Allowing Witzer to take possession of the property and retain Piekos' $300,000 after essentially inducing Piekos' default is inequitable, constitutes unjust enrichment, and Witzer should be estopped from retaining the $300,000.00.

VI. CONCLUSION

The record on appeal demonstrates that the County Court's Final Judgment is void for lack of subject-matter jurisdiction and that alone is reason to vacate the same. Even if the County Court had subject-matter jurisdiction, the County Court entered a judgment on issues outside of the pleadings, which a court is without authority to do. Moreover, the County Court, which failed to take competent, substantial evidence, reached the wrong conclusions of law. Witzer's claim is barred by the doctrines of substantial performance, impossibility of performance, equitable estoppel and unjust enrichment. Accordingly, the County Court's Final Judgment

should be reversed, and the case should be transferred to the circuit court for further proceedings consistent herewith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 9, 2015, a true and correct copy of the foregoing was electronically filed with the Clerk of the Circuit Court of Sarasota County, Florida using the Florida Courts E-Filing Portal, and furnished via electronic mail to Andrew W. Rosin, Esq., arosin@rosinlawfirm.com, Law Offices of Andrew W. Rosin, P.A., 1966 Hillview Street, Sarasota, FL 34239, counsel for Appellee, Stephen A. Witzer.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2).

LAW FIRM OF JAMES L. ESSENSON

James L. Essenson (FBN 0359033)
Barbara J. Welch (FBN 0624683)
Matthew J. Kelly (FBN 0112572)
2071 Main Street
Sarasota, Florida 34237
Telephone: (941) 954-0303
Facsimile: (941) 951-7739
Primary: essenson@essensonlaw.com
Secondary: bwelch@essensonlaw.com
Counsel for Marek W. Piekos