IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CORNERSTONE 417, LLC, A FLORIDA
LIMITED LIABILITY COMPANY,

Appellant,

v. Case No. 5D19-1621

CORNERSTONE CONDOMINIUM ASSOCIATION, INC.,
A FLORIDA NOT FOR PROFIT CORPORATION
AS TERMINATION TRUSTEE AND LSREF2 OREO
(DIRECT), LLC, A DELAWARE LIMITED LIABILITY COMPANY,

Appellees.

________________________________/

Opinion filed July 24, 2020

Appeal from the Circuit Court for
Orange County,
Luis Fernando Calderon, Judge.

Stuart J. Barks, of Barks Law Firm,
Sanford, for Appellant.

Christopher D. Donovan, of Roetzel &
Andress, LPA, Naples, for Appellees.

PER CURIAM.

Cornerstone 417, LLC ("Cornerstone"), appeals the trial court's final judgment dismissing, with prejudice, its complaint against Cornerstone Condominium Association, Inc., a Florida Not for Profit Corporation as Termination Trustee ("Association"), and LSREF2 OREO (DIRECT), LLC, a Delaware Limited Liability Company ("Oreo") (collectively, "Appellees"), for failure to exhaust its administrative remedies. On appeal,

Cornerstone argues that the trial court erred in dismissing the complaint based on its conclusion that Cornerstone was required, pursuant to section 718.117(16), Florida Statutes (2019), to timely file a petition for mandatory nonbinding arbitration with the Department of Business and Professional Regulations ("DBPR") prior to filing its claim in the circuit court.[1] We affirm.

Cornerstone owned a unit in the Cornerstone Commercial Condominium ("Building"). Oreo acquired ownership of 91% of the units and thereafter, elected a board of directors that approved a plan to terminate the condominium ("Termination Plan"). The Termination Plan provided that Cornerstone would be provided the fair market value for its condominium, according to Association's fair market value determination. The termination was carried out, and Cornerstone was compensated for its unit. Cornerstone subsequently filed a complaint against Appellees alleging that Appellees were unjustly enriched because Cornerstone surrendered its unit for less than the market value and

[1] Although Cornerstone did not provide this Court with a transcript of the hearing on Appellees' motion to dismiss, we are nevertheless able to resolve the issues raised by Cornerstone because it alleges reversible error apparent on the face of the judgment. See In re D.P., III, 228 So. 3d 718, 723 (Fla. 2d DCA 2017) ("There is no hearing transcript in the record. Because the error for which we reverse is apparent on the face of the record, this circumstance does not affect our disposition of the appeal."). However, Cornerstone did not provide this Court with its response to Appellees' motion to dismiss, if any. Additionally, the trial court's order granting dismissal does not indicate any specific arguments that Cornerstone made at the hearing; it merely provides that "the Plaintiff only contends that the Defendants unfairly valued the Plaintiff's unit." (emphasis added). Thus, this Court has no way of knowing whether Cornerstone made the same arguments below that it has raised on appeal. The appellant bears the burden to demonstrate that its argument is preserved for appellate review. See Black Point Assets, Inc. v. Fed. Nat'l Mortg. Ass'n ("Fannie Mae"), 220 So. 3d 566, 568–69 (Fla. 5th DCA 2017) (explaining that although court could determine whether summary judgment was proper without transcript of hearing, appellant failed to demonstrate that issue was preserved for appeal because issue was not presented to trial court through motion or other paper). Accordingly, Cornerstone's argument is not preserved for appeal.

that Association breached its fiduciary duty to Cornerstone by undervaluing its unit by $150,000, failing to account for its high-end build out, and using inappropriate comparable sales. Additionally, Cornerstone sought a declaratory judgment as to the value of its unit.

Appellees moved to dismiss Cornerstone's complaint, arguing that pursuant to section 718.117(16), Florida Statutes, a unit owner who intends to contest a condominium termination plan must file a petition for mandatory nonbinding arbitration pursuant to section 718.1255, Florida Statutes (2019), within ninety days after the date that the termination plan is recorded; otherwise, the owner is barred from prosecuting their claim in the circuit court. The record reflects that Cornerstone had petitioned for mandatory nonbinding arbitration but that the DBPR dismissed Cornerstone's petition as untimely and procedurally flawed. The trial court dismissed Cornerstone's complaint.

Cornerstone's first argument on appeal is that it was not required to initiate mandatory nonbinding arbitration prior to filing its complaint in the circuit court because the DBPR lacked jurisdiction to hear the issues it raised in its complaint.

Section 718.117, Florida Statutes, governs condominium terminations. "The condominium form of ownership may be terminated for all or a portion of the condominium property pursuant to a plan of termination meeting the requirements of this section and approved by the division." § 718.117(3), Fla. Stat. "Before a residential association submits a plan to the division, the plan must be approved by at least 80 percent of the total voting interests of the condominium." Id. "The plan of termination must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee." § 718.117(9), Fla. Stat. A plan of termination must specify, among other things, "[t]he

interests of the respective unit owners in any proceeds from the sale of the condominium property." § 718.117(10)(d), Fla. Stat.

> A unit owner or lienor may contest a plan of termination by initiating a petition for mandatory nonbinding arbitration pursuant to s. 718.1255 within 90 days after the date the plan is recorded. A unit owner or lienor may only contest the fairness and reasonableness of the apportionment of the proceeds from the sale among the unit owners, that the liens of the first mortgages of unit owners other than the bulk owner have not or will not be satisfied to the extent required by subsection (3), or that the required vote to approve the plan was not obtained. A unit owner or lienor who does not contest the plan within the 90-day period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property. In an action contesting a plan of termination, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable or that the required vote was not obtained.

§ 718.117(16), Fla. Stat.

Cornerstone acknowledges that a plaintiff must exhaust its administrative remedies before filing a complaint in a court of general jurisdiction but asserts that if a plaintiff raises an issue that is outside of the respective administrative agency's jurisdiction, then the circuit court is the proper forum for the claim. Butler v. Dep't of Ins., 680 So. 2d 1103, 1106–07 (Fla. 1st DCA 1996). It contends that its claims for unjust enrichment, breach of fiduciary duty, and declaratory judgment were outside the DBPR's jurisdiction because section 718.117(16) narrowly confines the DBPR's jurisdiction in condominium termination cases to determining the rights and interests of the parties in the apportionment of the sale proceeds from the termination.

As stated, the plain language of section 718.117(16) provides that "[a] unit owner or lienor may contest a plan of termination by initiating a petition for mandatory nonbinding

arbitration pursuant to s. 718.1255, Florida Statutes, within ninety days after the date the plan is recorded.” The language of section 718.117(16) must be read in conjunction with section 718.1255, which provides that “[p]rior to the institution of court litigation, a party to a dispute shall petition the division for nonbinding arbitration,” and that a “dispute” is any disagreement between two or more parties that involves a plan of termination. § 718.1255(1)(c), (4)(a), Fla. Stat.

Although Cornerstone is correct that section 718.1255, Florida Statutes (2019), provides that a “dispute” does not include a claim alleging “breach of fiduciary duty by one or more directors,” § 718.1255(1)(c), in determining whether a plaintiff’s claim is subject to mandatory nonbinding arbitration, we look not to how the plaintiff frames the claim, but rather, at the gravamen of the claim and the relief sought. Villorin v. Vill. of Kings Creek Condo. Ass’n, 789 So. 2d 1157, 1159 (Fla. 3d DCA 2001) (reversing order of dismissal based on plaintiff’s failure to exhaust administrative remedies; gravamen of complaint concerned validity of special assessment, which was exempt from presuit requirement of section 718.1255 and, although plaintiff alleged facts contesting assessment and questioning association’s authority, “[c]learly, if there had been no special assessment plaintiffs would not have brought this action”); Blum v. Tamarac Fairways Ass’n, 684 So. 2d 826, 828 (Fla. 4th DCA 1996) (holding dispute was within ambit of section 718.1255 presuit requirements despite plaintiff’s attempt to plead around requirement; dispute was not disagreement about title, which was exempt from section 718.1255, but rather, related to lease of the unit, subject to statute), receded from on other grounds, Neate v. Cypress Club Condo., Inc., 718 So. 2d 390 (Fla. 4th DCA 1998).

Here, it is clear that in each of its three claims, however labelled, Cornerstone alleges that in creating and executing the Termination Plan, Appellees significantly undervalued Cornerstone's condominium. Thus, Cornerstone disputes "the fairness and reasonableness of the apportionment of the proceeds." § 718.117(16), Fla. Stat. Accordingly, the DBPR had authority to hear Cornerstone's claims, and therefore, Cornerstone was required to submit to mandatory nonbinding arbitration prior to filing its claim in the circuit court. To allow Cornerstone to bring its claims and avoid mandatory nonbinding arbitration would render section 718.117(16) meaningless; a plaintiff who did not request arbitration or who failed to timely do so could avoid the requirement by labelling its claims as other types of disputes, such as unjust enrichment or breach of fiduciary duty. It is clear that Cornerstone attempted to do just that.[2]

Second, Cornerstone argues that the trial court erred in dismissing its complaint because the DBPR lacked jurisdiction to award the remedies it sought. It asserts that if an agency lacks jurisdiction to award the remedy sought by the plaintiff, then the plaintiff is not required to exhaust its administrative remedies prior to filing in the circuit court, even if a different administrative remedy is available. We agree with Cornerstone that the doctrine of exhaustion of remedies does not apply where a plaintiff seeks money damages, but the administrative agency is not permitted to award such damages; in those cases, the administrative remedy is inadequate. S. Bell Tel. & Tel. Co. v. Mobile Am. Corp., 291 So. 2d 199, 201–02 (Fla. 1974) (holding that petitioner was not required to file claim seeking money damages with Public Service Commission before filing in circuit

[2] Furthermore, Cornerstone's assertion that its claims were not subject to mandatory nonbinding arbitration is belied by the fact that Cornerstone actually petitioned for mandatory nonbinding arbitration, although its petition was untimely.

court because commission could not award damages). However, we disagree that the DBPR lacked authority to grant the relief Cornerstone sought.

Section 718.117(16) specifically provides that "[i]f the arbitrator determines that the apportionment of sales proceeds is not fair and reasonable, the arbitrator may void the plan <u>or may modify the plan to apportion the proceeds in a fair and reasonable manner</u> pursuant to this section based upon the proceedings and order the modified plan of termination to be implemented." (emphasis added). Thus, had Cornerstone participated in mandatory nonbinding arbitration and been successful in its claim that the proceeds were not fair and reasonable, then the arbitrator would have been able to grant Cornerstone the exact relief that it now seeks—more compensation for its unit. Accordingly, the DBPR had authority to grant the relief Cornerstone sought. Now, because the Termination Plan was uncontested and carried out, Cornerstone seeks "damages," rather than a greater apportionment of proceeds, but it is nevertheless seeking the money it claims that it was owed as compensation for its unit.

Accordingly, Cornerstone was required to submit to mandatory nonbinding arbitration prior to initiating its claims in the circuit court; because it failed to timely do so, its claim is barred. The trial court did not err in dismissing Cornerstone's complaint with prejudice.

AFFIRMED.

EVANDER, C.J., COHEN and SASSO, JJ., concur.