NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NORMAN GUNDEL; WILLIAM MANN; and BRENDA TAYLOR, individually and on behalf of all similarly situated persons,

Appellants/Cross-Appellees,

v.

AV HOMES, INC. and AVATAR PROPERTIES, INC.,

Appellees/Cross-Appellants.

Case No. 2D18-3199

Opinion filed February 21, 2020.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Polk County; Andrea Teves Smith, Judge.

Kristin A. Norse and Stuart C. Markman of Kynes, Markman & Felman, P.A., Tampa; Chris W. Altenbernd of Banker Lopez Gassler, P.A., Tampa; and Matthew A. Crist of Crist Legal, P.A., Tampa, for Appellants/Cross-Appellees.

Daniel J. Fleming, Ted C. Craig, and Christian M. Leger of Gray Robinson, P.A., Tampa (withdrew after briefing); Daniel J. Fleming and Daniel A. Hoffman of Johnson Pope Bokor Ruppel & Burns, LLP, Tampa (substituted as counsel of record), for Appellees/Cross-Appellants.

BLACK, Judge.

Norman Gundel, William Mann, and Brenda N. Taylor (the Residents) appeal from the nonfinal order granting in part their amended motion for class certification of the claims asserted in their twelve-count amended complaint against Avatar Properties, Inc., and its parent company, AV Homes, Inc. Of the twelve counts, the lower court certified the class as to four of them: counts II, V, VI (partially), and VIII. As to those four counts, the lower court limited the class to current homeowners in the Solivita community who have paid Club membership fees since April 26, 2013, four years before suit was filed, and ruled that the claims may proceed only as to Avatar Properties. The Residents assert that the class should have been certified as to counts I, II, III, V, VI (partially), VII, VIII, and XI and as against both Avatar Properties and AV Homes. They also argue that the class should not have been narrowed to include only current Solivita homeowners but should include both current and former Solivita homeowners who have paid Club membership fees since April 26, 2013. The Residents do not challenge the lower court's ruling that no class should be certified as to counts IV, IX, X, and XII. Avatar Properties and AV Homes cross-appeal, contending that the lower court erred in certifying the class as to counts II, VI, and VIII. They do not challenge the certification of the class as to count V. As to the appeal, because the lower court erred in narrowing the class to only current Solivita homeowners with respect to count VIII, we reverse in part. As to the cross-appeal, we affirm without comment.

I. Background

This court previously issued an opinion granting the Residents' petition for writ of certiorari in a related matter involving the same parties. See Gundel v. AV Homes, Inc., 264 So. 3d 304 (Fla. 2d DCA 2019). Much of the background information set forth in that opinion is relevant to this appeal:

> The Residents filed a class action complaint against AV Homes and Avatar Properties alleging violations of Florida's Homeowners' Association Act, §§ 720.301-720.407, and [the] Florida[] Deceptive and Unfair Trade Practices Act, §§ 501.201-501.213, Fla. Stat. (2017), seeking declaratory relief, injunctive relief, and damages.
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> Avatar Properties is the developer of Solivita, the [retirement] community in [Polk County in] which the Residents own homes. In their complaint, the Residents claimed that Avatar Properties and AV Homes violated the law when they created both the Solivita Community Association and the Club Plan, each of which require Solivita homeowners to pay fees.

Id. at 306. And as noted by this court,

> [m]embership in both the Solivita Community Association and the Club Plan are mandatory for Solivita homeowners. The association fee is an assessment. The Club Plan governs the "Club amenities" [(also referred to as "Club facilities")] and establishes the "Club dues" or Club fees, which include both expenses, similar to common-area upkeep expenses, and "Club membership fees." The Club amenities are exclusively owned by the "Club Owner," Avatar Properties, and as alleged by the Residents, the Club membership fees are collected "without deduction of expenses or charges in respect of the Club" as profit to Avatar Properties.

Id. at 306 n.1.

> The Residents claim that the imposition of both of these fees is not legal and that certain marketing for the community was deceptive. In creating Solivita, Avatar Properties also established two community development districts (CDDs) to fund infrastructure within the community through additional assessments on homeowners.

> The Residents' lawsuit arose after Avatar Properties proposed to sell the Club amenities, as established by the Club Plan, to the CDDs at a cost of $73.7 million. The purchase would be financed through the issuance of bonds, to be repaid by Solivita homeowners including the Residents. The Residents [became] concern[ed] about the proposed sale and . . . suggested purchase price . . . . [So] [t]he Residents obtained an appraisal setting the fair market value of the Club amenities at $19.25 million.

Id. at 307 (footnote omitted). The bond litigation remains pending but is not a part of this appeal.

The second amended class action complaint includes five counts for declaratory relief under Florida's Homeowners' Association Act (HOA Act), two counts for injunctive relief under the HOA Act and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and five counts for damages. The counts pertinent to the issues on appeal were summarized by the Residents as follows:

> Count [I] sought a declaration that (a) the HOA Act applies to the Club Plan; (b) the HOA Act applies to [Avatar Properties and AV Homes]; and (c) the liens the Club Plan purports to impose on Solivita homes [are] invalid.
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> Count [II] sought a declaration that the residents, as mandatory members in the Club, are entitled to voting rights in its operations.
>
> Count [III] sought a declaration that (a) the Club facilities are "common property" under the HOA Act that had to be delivered to the association upon the sale of 90% of the units; and (b) [Avatar Properties and AV Homes] w[ere] prohibited from unilaterally amending the governing documents to the prejudice of the residents' rights to use and enjoy them.
>
> Count [V] sought a declaration that the perpetual covenant purportedly imposed by the Club Plan is invalid and so the obligation to pay Club Dues is terminable at will.

> Count [VI] sought to enjoin [Avatar Properties and AV Homes] from profiting from the mandatory Club [m]embership [f]ees in violation of the HOA Act and [their] fiduciary duty.
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> Count [VII] sought to enjoin [Avatar Properties and AV Homes] from continuing to violate FDUTPA through [their] deceptive and unfair club fee scheme.
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> Count [VIII] sought damages and an accounting based on [Avatar Properties and AV Homes'] violation of section 720.308 of the HOA Act by collecting dues through a perpetual assessment that exceeded expenses.
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> Count [XI] sought damages for [Avatar Properties and AV Homes'] violations of FDUTPA for the amount Club [d]ues assessments exceeded expenses.

On October 5, 2017, Avatar Properties and AV Homes moved for final summary judgment. In that motion Avatar Properties and AV Homes asserted in part that the HOA Act does not apply to them, to the Club facilities, or to the Club Plan. A hearing was held on the motion on December 8, 2017. During that hearing, the Residents agreed to allow the lower court to rule on the legal issues regarding the applicability of the HOA Act, chapter 720, as framed by Avatar Properties and AV Homes in their motion. On January 23, 2018, the lower court issued an order granting in part and denying in part the motion for final summary judgment. In that order, the lower court determined that, as a developer, Avatar Properties is subject to the HOA Act but that AV Homes is not. See § 720.301(6), Fla. Stat. (2017). The lower court also concluded that the Club Plan, which is incorporated into the duly recorded Master Declaration, is a governing document subject to the HOA Act. See § 720.301(8)(a). Additionally, the lower court indicated that the HOA Act contemplates that homeowners may be obligated to pay mandatory fees for recreational facilities or other property not

constituting common areas that are owned by the developer or a third party, see § 720.3086, and that the Club Plan is enforceable through the Solivita Community Association By-Laws. With regard to the Club facilities, however, the lower court determined that they are not "common area[s]" but commercial property expressly excluded from the HOA Act. See §§ 720.301(2), .302(3)(b).

On March 21, 2018, the Residents filed their amended motion for class certification. A hearing was held on April 6, 2018, and the lower court entered the order granting the motion in part on June 29, 2018. The lower court certified the narrowed class defined as all persons who currently own a home in Solivita and who have paid a Club membership fee under the Club Plan on or after April 26, 2013, for counts II, V, VI (as to alleged direct violation of section 720.308), and VIII of the second amended class action complaint against Avatar Properties.[1] In determining that class certification for counts I and III was not warranted and that no class should be certified as to the claims against AV Homes, the lower court relied upon the legal determinations made in the order on the motion for final summary judgment regarding the applicability of the HOA Act and concluded that those counts had been resolved, leaving no controversy between the parties as to the claims alleged therein. Moreover, the court indicated that it was acting within its discretion to narrow the class to current homeowners to allow for better utilization of the class action. And as to counts VII and XI, the lower court determined that given the number of potential class members and the almost two dozen

[1]The Residents do not challenge the lower court's determination that class certification is not warranted for count VI to the extent that it seeks injunctive relief for violating a fiduciary duty.

separately alleged violations of the FDUTPA set forth in the complaint, there are "enumerable possibilities of one or more combination[s] of deceptive acts or unfair practices that may have cause[d] damage to any particular member of the class." The court therefore concluded that "[t]he necessity for individual inquiry and determination to prove causation per each class member's individual FDUTPA claim defeats [the Residents'] ability as class representatives to possess the same legal interest and endure the same legal injury as all the class members."

II. Analysis

"An appellate court 'reviews a trial court's order on class certification for an abuse of discretion, examines a trial court's factual findings for competent, substantial evidence, and reviews conclusions of law de novo.' " Waste Pro USA v. Vision Constr. ENT, Inc., 282 So. 3d 911, 916 (Fla. 1st DCA 2019) (quoting Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 105 (Fla. 2011)).

> Before a class action can be certified, the trial court must conduct a rigorous analysis to determine that the elements of [Florida Rule of Civil Procedure] 1.220, the class action rule, have been met. See Ortiz v. Ford Motor Co., 909 So. 2d 479, 480 (Fla. 3d DCA 2005). First, the trial court must conclude that a plaintiff has established the prerequisites to class representation described in rule 1.220(a). Under rule 1.220(a), the threshold requirements for class action representation are that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim raises questions of law or fact common to each member of the class, (3) the claim of the representative party is typical of the claim of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of other members of the class. Id. "These requirements are commonly referred to as the numerosity, commonality, typicality, and adequacy of representation elements of class certification." Marco Island Civic Ass'n v. Mazzini, 805 So. 2d 928, 930 (Fla. 2d DCA 2001).

> In addition to satisfying rule 1.220(a), a plaintiff must also satisfy one of the three subdivisions of rule 1.220(b). . . . Rule 1.220(b)(2) requires that the party opposing the class has acted or refused to act on grounds applicable to all class members, thereby making final injunctive or declaratory relief appropriate. Rule 1.220(b)(3) requires that common questions of law or fact predominate over any individual questions of the separate members and the class action must be superior to other available methods for a fair and efficient adjudication of the controversy. The rule 1.220(b)(3) requirement parallels the commonality requirement under rule 1.220(a) because both require that common questions exist, but the predominance requirement in subsection (b)(3) "is more stringent since common questions must pervade." Wyeth, Inc. v. Gottlieb, 930 So. 2d 635, 639 (Fla. 3d DCA 2006).

Rollins, Inc. v. Butland, 951 So. 2d 860, 867-68 (Fla. 2d DCA 2006). The lower court determined that counts II, V, VI (as to alleged violation of section 720.308), and VIII satisfy the requirements for class certification set forth in Florida Rule of Civil Procedure 1.220. In addition to satisfying the requirements of rule 1.220(a), the lower court found that counts II, V, and VI (as to alleged violation of section 720.308) satisfy the requirements of rule 1.220(b)(2) and that count VIII satisfies the requirements of rule 1.220(b)(3).

The Residents first argue that the lower court erred in declining to certify the class as to counts I and III against Avatar Properties and counts I, II, III, V, VI, and VIII against AV Homes because in doing so the court relied on the merits determinations it made at the summary judgment stage regarding the applicability of the HOA Act. The Residents rely on Sosa for the proposition that a court's consideration of a motion for class certification is restricted to an "examination [of] the substance of the motion and not the merits of the cause of action or questions of fact for the jury." 73 So.

3d at 104-05. We need not entertain whether the court erred in considering the merits of these counts, however, because the Residents expressly stipulated to allowing the lower court to do just that. See Tate v. Tate, 91 So. 3d 199, 204 (Fla. 2d DCA 2012) (explaining that a party cannot complain on appeal about a ruling that he or she "invited the trial court to make"). With the express agreement of the Residents, the lower court made various legal determinations regarding the applicability of the HOA Act and those legal determinations completely resolved counts I and III as well as all counts against AV Homes.[2]

The Residents next contend that the lower court erred by narrowing the class to include only current homeowners when both current and former homeowners had been required to pay the Club membership fees during the four years preceding the filing of the class action. The lower court determined that since monetary damages "do not predominate and are incidental to the declaratory relief sought" in the counts amenable to certification the argument advanced by Avatar Properties and AV Homes that former homeowners who no longer pay Club membership fees have no need for the declaratory relief sought and should therefore be excluded from the class was "well taken." Though the court acknowledged that if the Residents were to prevail they would be entitled to monetary damages as a result of their payment of the Club membership fees, the court concluded that it was within its discretion to limit the class to only current homeowners. See Canal Ins. Co. v. Gibraltar Budget Plan, Inc., 41 So. 3d 375, 377 (Fla. 4th DCA 2010).

[2]We express no opinion regarding the merits of the legal determinations made by the lower court as those rulings are not before this court on review.

It was appropriate for the lower court to limit the class to current homeowners with respect to count II (seeking declaratory relief regarding voting rights), count V (seeking declaratory relief regarding whether the perpetual covenant imposed by the Club Plan is invalid making the Club dues terminable at will), and count VI (seeking to enjoin Avatar Properties from further profiting from the Club membership fees), as the former homeowners have no interest in the relief sought. Cf. Breen v. Arbomar Condo. Ass'n, 501 So. 2d 697, 697-98 (Fla. 2d DCA 1987).[3] However, count VIII seeks damages from Avatar Properties as a result of its collection of Club membership fees in violation of section 720.308 of the HOA Act dating back to April 26, 2013, a time period during which both current and former homeowners would have been impacted by the payment of fees. When considering whether former homeowners should be included in the class certification for count VIII, the court did not expressly address any of the factors set forth in rule 1.220(a) or whether common questions predominate as required by rule 1.220(b)(3).[4] However, it did determine in conducting the superiority analysis as required by rule 1.220(b)(3) that the class action is the "only economically viable remedy" and that since the class has been narrowed it is now "manageable." See Sosa, 73 So. 3d at 116 ("Three factors for courts to consider when deciding whether a class action is the superior method of adjudicating a controversy are

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[3]Though these claims were raised against Avatar Properties and AV Homes, for ease of reference and since we have determined that the lower court did not err in declining to certify the class against AV Homes, going forward we will only address these counts in reference to Avatar Properties.

[4]And we see no basis for the court to have determined that former homeowners do not satisfy the requirements of rule 1.220(a) and rule 1.220(b)(3). Cf. Discount Sleep of Ocala, LLC v. City of Ocala, 245 So. 3d 842, 856 (Fla. 5th DCA 2018).

(1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable."). Though including former homeowners in the class with respect to count VIII will certainly increase its size, it will not make it unmanageable. Rather, including former homeowners in the class "would be a more manageable and more efficient use of judicial resources" than requiring them to file individual claims. See Discount Sleep of Ocala, LLC v. City of Ocala, 245 So. 3d 842, 856 (Fla. 5th DCA 2018). Furthermore, because the other findings made by the lower court with respect to count VIII do not support excluding former homeowners, it was error for the lower court to narrow the class as it did with respect to that count. Cf. Cole v. Echevarria, McCalla, Barrett & Frappier, 965 So. 2d 1228, 1231 (Fla. 1st DCA 2007) ("The class certification order does not state a reason for limiting the class to those who reinstated their mortgages. To the contrary, the findings in the order support the view that the class should not be limited in that way.").

The lower court did not cite any authority in support of what appears to be its primary basis for determining that it was appropriate to narrow the class to include only current homeowners: namely, that claims for prospective monetary damages do not predominate but are incidental to claims for declaratory relief. The lower court, however, misapplied that principle. Though we do not believe that the court erred in narrowing the class with respect to counts II, V, and VI as explained above, it was not appropriate for the court to do so on the basis that monetary relief does not predominate. Assessing whether monetary damages predominate is only necessary

when considering claims amenable to class certification under rule 1.220(b)(2), not rule 1.220(b)(3). See Rollins, 951 So. 2d at 881-82; Freedom Life Ins. Co. of Am. v. Wallant, 891 So. 2d 1109, 1117-18 (Fla. 4th DCA 2004). Thus, this was not an appropriate consideration with respect to count VIII because that count sought only money damages and was therefore only amenable to class certification under rule 1.220(b)(3). See Rollins, 951 So. 2d 868 (explaining that claims seeking monetary damages "should be evaluated for certification under rule 1.220(b)(3)").

Finally, with regard to counts VII and XI, the FDUTPA counts, given the nature of the Residents' claims as they were presented to the lower court in the second amended complaint, the amended motion for certification, and at the certification hearing, we do not believe that the court erred in determining that they are not amenable to class certification. See Rollins, 951 So. 2d at 869-76; Black Diamond Props., Inc. v. Haines, 940 So. 2d 1176, 1177-79 (Fla. 5th DCA 2006); Philip Morris USA Inc. v. Hines, 883 So. 2d 292, 292-95 (Fla. 4th DCA 2003); Hutson v. Rexall Sundown, Inc., 837 So. 2d 1090, 1090-93 (Fla. 4th DCA 2003).[5]

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[5]In reaching its conclusion that claims VII and XI are not amenable to class certification, the lower court indicated that it was applying the "actual reliance" standard set forth in Rollins. However, this court in Rollins did not apply an actual reliance standard in analyzing the FDUTPA claims at issue in that case, see 951 So. 2d at 869-76, but instead stated that proof of individual reliance was necessary with regard to the fraud claims at issue since reliance was an element of those claims, see id. at 877-79. Reliance is not an element of a claim for damages under the FDUTPA. See id. at 869 ("[A] claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."); see also Waste Pro USA, 282 So. 3d at 917 ("[A] party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." (quoting Carriuolo v. Gen. Motors, 823 F.3d 977, 984 (11th Cir. 2016))); Turner Greenberg Assocs. v. Pathman, 885 So. 2d 1004, 1009 (Fla. 4th DCA 2004) ("[A] demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA."); State, Office of Attorney Gen., Dep't of Legal Affairs v. Wyndam Int'l, Inc., 869 So. 2d 592, 598 (Fla. 1st

III. Conclusion

For the reasons set forth herein, the order on the amended motion for class certification is reversed to the extent that former homeowners were excluded from the class with respect to count VIII. The class, certified only against Avatar Properties and not AV Homes, should include current homeowners in the Solivita community who paid Club membership fees pursuant to the Club Plan on or after April 26, 2013, for counts II, V, and VI (as to the alleged direct violation of section 720.308) and current and former homeowners in the Solivita community who paid Club membership fees pursuant to the Club Plan on or after April 26, 2013, for count VIII. The order is otherwise affirmed in all respects.

Affirmed in part; reversed in part; remanded.

ROTHSTEIN-YOUAKIM and ATKINSON, JJ., Concur.

DCA 2004) ("A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue."). Nonetheless, the lower court reached the correct result with regard to counts VI and XI.