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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DEER BROOKE SOUTH HOMEOWNERS ASSOCIATION OF POLK COUNTY, INC., a Florida nonprofit Corporation,

Appellant,

v.

CARLOS M. BATTLES and LANITA BATTLES,

Appellees.

Case No. 2D19-1988

Opinion filed August 7, 2020.

Appeal from the Circuit Court for Polk County; Michael E. Raiden and John Radabaugh, Judges.

David N. Glassman of David N. Glassman, P.A., Orlando, for Appellant.

Daniel F. Pilka of Pilka & Associates, P.A., Brandon, for Appellees.

SMITH, Judge.

Deer Brooke South Homeowners Association of Polk County, Inc. (Deer Brooke), appeals the final summary judgment entered in favor of homeowners Carlos and Lanita Battles (the Battles), wherein the trial court found Deer Brooke's claim of lien for unpaid homeowners' association assessments invalid and unenforceable because the claim of lien includes, in part, amounts allegedly barred by the statute of limitations.

Because the Battles first raised the statute of limitations defense in their motion for summary judgment, and not in their pleadings, summary judgment on this ground was error. Accordingly, we reverse and remand for further proceedings.[1]

In April of 2017, Deer Brooke filed a one-count complaint against the homeowners, the Battles, for the purpose of foreclosing a claim of lien for unpaid assessments due to the homeowners' association arising out of Deer Brooke's Declaration of Covenant, Conditions, and Restrictions (Declarations).[2] In support of its complaint, Deer Brooke attached copies of the Claim of Lien and Notice of Intent to Record a Claim of Lien, which were sent to the Battles pursuant to section 720.3085(4)(a), Florida Statutes (2016).

The Battles responded to the complaint but did not include in their response an affirmative defense based upon section 95.11(2)(b), Florida Statutes (2016)—which provides a five-year statute of limitations period for written contracts. To be sure, the Battles raised only one affirmative defense:

> The charges imposed against the [Battles] by [Deer Brooke] violate the terms and conditions of [Deer Brooke's] governing documents as well as Florida Statute § 720.3085, and as such, to the extent such charges are not permitted by the

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[1]Because we find the failure to plead the statute of limitations is dispositive, we do not address the remaining issues on appeal. Deer Brooke also requests in this appeal that we direct the trial court to enter summary judgment in its favor. We decline to do so, inasmuch as the motion for summary judgment filed by Deer Brooke was not set for hearing below, nor did the trial court consider the issues raised in Deer Brooke's motion at the time it ruled on the Battles' motion for summary judgment. See State v. Barber, 301 So. 2d 7, 9 (Fla. 1974) ("An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.").

[2]The original amount specified in the claim of lien was $1464.84. However, at the time of the filing of the complaint, the Battles owed assessments, interest, late fees, and collection fees, totaling $5751.19, through April 18, 2017, plus reasonable attorneys' fees and costs.

> governing documents or Florida Statutes, the [Battles] cannot be held liable for such charges.

Thereafter, the Battles served Deer Brooke with requests for admissions, which included that Deer Brooke admit the annual assessments for the association have been $135 since January 1, 2011. Deer Brooke chose not to respond to the request for admissions and was deemed to have admitted that the annual assessments for the association were $135 since January 1, 2011.[3] The Battles then moved for summary judgment, relying upon the admitted requests for admissions, and argued for the first time that the Notice of Intent and Claim of Lien, in their entirety, were invalid and unenforceable because they sought assessments outside the five-year statute of limitations period. See § 95.11(2)(b). Specifically, the Battles argued there were no issues of material fact where Deer Brooke admitted, by its lack of response to the request for admissions, the annual assessment was $135. Therefore, the most Deer Brooke was entitled to was $675—or five years' worth of annual assessments—as opposed to the $1464.84 sought in the complaint, which, when divided by $135, amounted to more than ten years of unpaid assessments. In its response to the motion for summary judgment, Deer Brooke argued the Battles waived the defense of statute of limitations by failing to include it in their answer, and thus, they were precluded from raising this issue for the first time in their motion for summary judgment.

Despite recognizing the technical argument barring the belated statute of limitations defense, the trial court capitulated and granted summary judgment,

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[3]If a party does not serve a written answer or objection to a request for admissions sent by an opposing party within thirty days after service of the request for admissions, the matter is deemed admitted and any matter admitted is deemed conclusively established for purposes of the pending action. Fla. R. Civ. P. 1.370(a), (b).

reasoning amendments to pleadings are typically liberally granted and finding no prejudice to Deer Brooke because the Battles notified Deer Brooke of the defense in advance of the hearing on the motion for summary judgment.[4] And while the trial court also recognized that Deer Brooke could validly claim $675—representing five years of $135 annual assessments—it invalidated the entire Claim of Lien finding it unenforceable because it included amounts barred by the statute of limitations. On that basis, final summary judgment was entered in favor of the Battles, and this appeal followed.

We review the order granting final summary judgment de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). We first dispense with the Battles' contention that they timely pleaded a statute of limitations defense. The Battles persist in arguing that the statute of limitations defense is embodied in their sole affirmative defense. The trial court did not agree, and we are equally unpersuaded.

The defense of "statute of limitations" is one of the enumerated affirmative defenses under Florida Rule of Civil Procedure 1.110(d), which must be affirmatively set forth in a pleading or it is deemed waived. Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc., 915 So. 2d 220, 223 (Fla. 4th DCA 2005) (holding that under rule 1.110(d), waiver and estoppel are affirmative defenses that are waived unless they are included in the pleadings). The affirmative defense asserted by the Battles fails to refer, even generally, to the statute of limitations, and it certainly does not cite to the applicable five-

[4]We note, however, that the Battles neither filed a motion for leave to amend their pleadings to include the statute of limitations affirmative defense prior to the hearing nor sought to amend their pleadings at the hearing on the motion for summary judgment. Our opinion here does not reach whether such motion for leave to amend, if filed, should or should not have been granted.

year statute of limitations statute under section 95.11(2)(b). Instead, the affirmative defense cites to the Declarations and section 720.3085, which governs the payment of assessments and claims of liens. Both the Declaration and section 720.3085 are silent as to any statute of limitations period. Thus, we cannot say the Battles affirmatively raised the defense of statute of limitations in their pleadings as required by rule 1.110(d).

It follows that because the statute of limitations defense was not timely raised in the Battles' pleadings, the defense was waived. "It is well-settled law in Florida that affirmative defenses not raised are waived." Heartwood 2, LLC v. Dori, 208 So. 3d 817, 821 (Fla. 3d DCA 2017) (citing Fla. R. Civ. P. 1.140(b)). Absent leave of court to amend the pleadings, the only recognized exception to this rule is when the issue is tried by consent. Paul Gottlieb & Co. v. Alps S. Corp., 985 So. 2d 1, 5 (Fla. 2d DCA 2007). In the proceedings below, however, there was no such consent. To the contrary, Deer Brooke objected to the belated statute of limitations defense, arguing the Battles waived the statute of limitations defense by failing to include the same in their pleadings.

Therefore, the trial court erred in granting final summary judgment based upon the unpleaded and waived affirmative defense of statute of limitations. Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 923 (Fla. 2d DCA 2000) (holding defendant who did not plead the affirmative defense of accord and satisfaction waived the defense; thus "it should not have been considered by the trial court, much less used as the basis for granting summary judgment"); Lobrillo v. Brokken, 837 So. 2d 1059, 1061 (Fla. 3d DCA 2002) (reversing summary judgment in favor of defendants where defendants failed to plead the affirmative defense of statute of limitations in their

answer, which precluded the trial court from considering the statute of limitations defense and granting final summary judgment on that ground).

Accordingly, we reverse the final summary judgment in favor of the Battles and remand for further proceedings.

Reversed and remanded.

KHOUZAM, C.J., and VILLANTI, J., Concur.