IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IN AND FOR SAWGRASS HILLS COUNTY, FLORIDA

GENERAL CONTRACTOR SOLUTIONS, INC., a Foreign For-Profit Corporation, Plaintiff, v. SWIMMING POOL EXPERTS, LLC, a Florida Limited Liability Company, and EUGENE DUPREE, an individual, Defendants.	Case No. 19-CA-006751

VERIFIED COMPLAINT

Plaintiff, GENERAL CONTRACTOR SOLUTIONS, INC., by and through its undersigned counsel, hereby files this Verified Complaint and sues SWIMMING POOL EXPERTS, LLC and EUGENE DUPREE, and in support thereof states as follows:

PARTIES

1. Plaintiff, GENERAL CONTRACTOR SOLUTIONS, INC. ("General Contractor"), is a Delaware for-profit Corporation, with its principal place of business in Atlanta, Georgia. However, General Contractor is also authorized to, and routinely does, engage in business in and throughout the State of Florida, including in Sawgrass Hills County, Florida.

2. General Contractor's principal business is providing general contracting services for residential construction and renovations.

3. Defendant, SWIMMING POOL EXPERTS, LLC ("Defendant Subcontractor") is a duly authorized Florida limited liability company with its principal place of business in Florida.

4. Defendant Subcontractor is authorized to and does engage in business in and throughout the State of Florida.

5. Defendant, EUGENE DUPREE ("Defendant Dupree") is a resident of Sawgrass Hills County, Florida.

JURISDICTION AND VENUE

6. This is an action for damages which exceed $15,000.00, exclusive of interest, costs, and attorneys' fees.

7. This Court has subject matter and personal jurisdiction over Defendants.

8. Venue is proper in this forum because the events giving rise to the causes of action asserted herein occurred in the City of Sawgrass Hills, Florida, and the City of Sawgrass Hills is located within this judicial circuit.

9. All conditions necessary to bring this action have either been satisfied or waived by the Parties.

GENERAL ALLEGATIONS

10. According to the Florida Department of Business and Professional Regulations, Defendant Dupree received his certification as a swimming pool subcontractor in Florida prior to 2010 and has served as the primary qualifying agent for Defendant Subcontractor since at least 2010.

11. At all pertinent times hereto, Homer Owens has owned the residential real property located at 7777 Gulf Beach Boulevard, City of Sawgrass Hills, Florida (the "Property").

12. The Property contained an exterior Olympic-sized swimming pool (the "Pool").

13. On October 4, 2017, Homer Owens hired General Contractor to complete a large upscale renovation of the Property.

14. The renovation project included the renovation of the Pool.

15. In December of 2017, General Contractor hired Defendant Subcontractor to complete the Pool renovation.

16. General Contractor verbally agreed to pay Defendant Subcontractor $400,000.00 to complete the Pool renovation (the "Agreement").

17. In furtherance of the Agreement, General Contractor wired Defendant Subcontractor a $100,000.00 deposit for the Pool renovation.

18. Defendant Subcontractor accepted General Contractor's $100,000.00 deposit.

19. Upon information and belief, Defendant Subcontractor paid Defendant Dupree all of, or at least a portion of, the $100,000.00 deposit as Defendant Subcontractor's primary qualifying agent.

20. Defendant Dupree applied for the necessary building permits for the pool renovation with the City of Sawgrass Hills.

21. The permit application named Defendant Dupree as the Defendant Subcontractor's primary qualifying agent.

22. In early 2018, Defendant Dupree moved to England. Neither Defendant Subcontractor nor Defendant Dupree notified General Contractor or Mr. Owens that Defendant Dupree moved to England.

23. Defendant Dupree never removed himself as the point of contact for Defendant Subcontractor on the permitting paperwork filed with the City of Sawgrass Hills.

24. There was an error in the permit application submitted by Defendant Dupree. Defendant Dupree listed his Florida home address in the permitting application instead of Defendant Subcontractor's address. All attempts to notify Defendant Dupree of the error in the application went unreceived. The City of Sawgrass Hills ultimately denied the building permit as Defendant Dupree never corrected the error.

25. In February of 2018, Defendant Subcontractor brought materials to the Property and began performing the Pool renovation pursuant to the Agreement.

26. Defendant Subcontractor commenced performance without a valid building permit.

27. However, by late March of 2018, Defendant Subcontractor stopped showing up at the Property, and stopped communicating with General Contractor and Homer Owens.

28. Defendant Dupree left Defendant Subcontractor's Vice President, Victor Garcia ("Mr. Garcia"), in charge of the Pool renovation when Defendant Dupree moved to England. Defendant Dupree and Defendant Subcontractor did not notify General Contractor or Mr. Owens of this change.

29. Mr. Garcia never communicated with General Contractor or Mr. Owens.

30. Mr. Garcia is not a certified swimming pool subcontractor with the State of Florida or the City of Sawgrass Hills.

31. Defendant Dupree knew or should have known that Mr. Garcia was not a certified swimming pool subcontractor.

32. Once Defendant Dupree moved to England, he never communicated with anyone about the Pool renovation, and he ceased all involvement and participation in the Project's performance.

33. Unfortunately, right after Defendant Dupree moved to England, Mr. Garcia unexpectedly passed away.

34. Defendant Subcontractor failed to notify either General Contractor or Mr. Owens of Mr. Garcia's passing.

35. Defendant Subcontractor abandoned the Pool renovation after Mr. Garcia's death.

36. Defendant Subcontractor has not provided materials for or worked on the Pool renovation since March of 2018.

37. Due to Defendant Subcontractor's failure to complete the Pool renovation, , General Contractor was forced to hire another subcontractor, Aquatic Contracting Performance, LLC, to complete the Pool renovation at the cost of $500,000.00.

38. General Contractor was forced to pay Aquatic Contracting Performance, LLC $500,000.00 to complete the Pool renovation, rather than the $400,000.00 General Contractor originally agreed to pay Defendant Subcontractor.

39. Aquatic Contracting Performance, LLC realized there was not a valid permit for the Pool renovation and restarted the process to have a building permit issued. This delayed the Pool renovation by another six weeks. .

40. Defendant Subcontractor did not return the $100,000.00 deposit General Contractor paid in January of 2018.

41. Defendant Dupree never reimbursed or offered to pay General Contractor for the deposit.

42. General Contractor incurred legal fees in the amount of $15,000.00 to negotiate with Mr. Owens after Defendants abandoned the Project.

43. General Contractor retained the undersigned law firm to represent it in this action, and General Contractor has agreed to pay said firm a reasonable fee for its services.

COUNT I – CONVERSION

(Against both Defendants)

44. The allegations set forth in paragraphs 1 through 43, above, are hereby realleged and reincorporated herein.

45. By taking General Contractor's $100,000.00 deposit and not returning the funds after Defendant Subcontractor failed to successfully complete the Pool renovation, Defendant Subcontractor wrongfully converted General Contractor's assets into its own asset.

46. By agreeing to take all or a portion of General Contractor's $100,000.00 deposit, Defendant Dupree wrongfully converted General Contractor's assets into his own asset.

47. General Contractor repeatedly demanded that Defendants return the $100,000.00 deposit.

48. Despite General Contractor's repeated demands, Defendants failed to respond to the demands, and have not returned to General Contractor any of its deposit.

49. As a direct and proximate cause of Defendants' wrongful conversion of General Contractor's deposit, General Contractor has been damaged.

50. General Contractor reserves the right to subsequently amend this cause of action to include a claim for punitive damages against Defendants in the future.

WHEREFORE, Plaintiff demands a judgment against Defendants, jointly and severally, for damages, interest, costs, and for such other and further relief as this Court deems just and appropriate under the circumstances.

COUNT II – CIVIL THEFT

(As against both Defendants)

51. The allegations set forth in paragraphs 1 through 43, above, are hereby realleged and reincorporated herein.

52. Defendants committed civil theft when Defendants wrongfully and unlawfully retained General Contractor's $100,000.00 deposit even though they abandoned the Pool renovation.

53. On April 3, 2019, General Contractor sent, via Certified Mail, a civil theft letter to Defendants pursuant to Florida Statute 772.11 (the "April 3, 2019 Civil Theft Letter").

54. Defendants received the April 3, 2019 Civil Theft Letter on April 15, 2019.

55. Defendants never responded to the April 3, 2019 Civil Theft Letter.

56. After Defendants received the April 3, 2019 Civil Theft Letter, Defendants did not return the deposit to General Contractor.

57. After Defendants received the April 3, 2019 Civil Theft Letter, Defendants did not complete any of the required tasks within the April 3, 2019 Civil Theft Letter.

58. Pursuant to Florida Statute Section 772.11, should General Contractor prevail against Defendants, General Contractor is entitled to its reasonable attorneys' fees and costs, and treble damages in the amount of $300,000.00 from Defendants, jointly and severally.

59. General Contractor reserves the right to subsequently amend this cause of action to include a claim for punitive damages against Defendants in the future.

WHEREFORE, Plaintiff demands a judgment against Defendants, jointly and severally, for treble damages in the amount of $300,000.00, attorneys' fees and costs, interest, and for such other and further relief as this Court deems just and appropriate under the circumstances.

COUNT III – VIOLATIONS OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

(As against both Defendants)

60. The allegations set forth in paragraphs 1 through 43, above, are hereby realleged and reincorporated herein.

61. Defendants were engaged in a trade or business as a swimming pool subcontractor.

62. Defendants engaged in fraudulent, deceptive, and unfair trades and practices in their business as a swimming pool subcontractor when they:

a. Listed Defendant Dupree as the primary qualified agent in the permit application, even though they knew or should have known he would be moving to England when he filed the original permit application;

b. Failed to remove Defendant Dupree as the primary qualifying agent when he moved to England;

c. Failed to notify General Contractor or Homer Owens that Defendant Dupree moved to England, or that Mr. Garcia was the person primarily responsible for the Pool renovation;

d. Allowed Mr. Garcia to supervise and carry out the Pool renovation, even though Mr. Garcia was not a certified swimming pool contractor;

e. Abandoned the Pool renovation;

f. Ceased communicating with General Contractor and Homer Owens about the Pool Renovation; and

g. Refused to return General Contractor's deposit to General Contractor, despite repeated requests.

63. Pursuant to Florida Statute Section 501.2105, should General Contractor prevail against Defendants, General Contractor is entitled to its reasonable attorneys' fees and costs from Defendants.

WHEREFORE, Plaintiff demands a judgment against Defendants, jointly and severally, for damages, attorneys' fees and costs, interest, and for such other and further relief as this Court deems just and appropriate under the circumstances.

TRIAL BY JURY ON ALL CLAIMS FOR RELIEF HEREBY DEMANDED.

Under penalties of perjury, I declare that I have read the foregoing Complaint and that the facts stated in it are true.

/s/ Gerry Cohn

President and Managing Member,

General Contractor Solutions, Inc.

Dated: June 7, 2019.

PALERMO & WEIRICH, PLLC

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IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IN AND FOR SAWGRASS HILLS COUNTY, FLORIDA

GENERAL CONTRACTOR SOLUTIONS, INC., Plaintiff, v. SWIMMING POOL EXPERTS, LLC, and EUGENE DUPREE, Defendants.	Case No. 19-CA-006751

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S VERIFIED COMPLAINT

Defendants, SWIMMING POOL EXPERTS, LLC ("Subcontractor"), and Eugene Dupree ("Mr. Dupree") (collectively referred to herein as the "Defendants"), hereby move this Honorable Court for an Order dismissing the Verified Complaint (the "Complaint") filed by the Plaintiff, GENERAL CONTRACTOR SERVICES, INC. ("Plaintiff"), on June 7, 2019, with prejudice, and in support thereof state as follows:

I. ARGUMENT

A. Plaintiff's claims against both Defendants must be dismissed with prejudice because the independent tort rule bars Plaintiff's tort claims.

According to the Complaint, Plaintiff entered into an Agreement to successfully complete the Pool renovation. [Complaint at ¶¶15-16]. As consideration for the Agreement, Plaintiff paid Subcontractor $100,000.00. [Complaint at ¶¶17-18]. After Defendants received the $100,000.00 deposit from Plaintiff, Defendants commenced performance by pulling the requisite permits to complete the Pool renovation and providing labor and materials. [Complaint at ¶¶20, 22]. Thus, Plaintiff's allegations in the Complaint show there is a contract between Plaintiff and Subcontractor. Plaintiff is dissatisfied with Defendants' performance under the contract.

All of the damages and causes of action asserted by Plaintiff in the Complaint directly and exclusively stem from Defendants' alleged failure to comply with the terms of the contract, not a tort action. This is a blatant attempt by Plaintiff to state causes of action where attorney's fees are

available to the prevailing party. Additionally, punitive damages are unlikely to be available in a breach of contract cause of action.

The Third District Court of Appeal in Peebles v. Puig stated, "It is a fundamental, long-standing common law principle that a plaintiff may not recover in tort for a contract dispute unless the tort is independent of any breach of contract." Island Travel & Tours, Ltd., Co. v. MYR Independent, Inc., 300 So. 3d 1236, 1239 (Fla. 3d DCA 2020) (citing Peebles v. Puig, 223 So. 3d 1065, 1068 (Fla. 3d DCA 2017)); see also LynkUs Communications, Inc. v. WebMD Corp., 965 So. 2d 1161, 1167 (Fla. 2d DCA 2007) (quoting HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996)) (holding that fraud in the performance of an agreement does not establish the independent basis for a fraudulent inducement cause of action).

In order for Plaintiff to successfully plead any tort claims against Defendants, Plaintiff must sufficiently plead that its tort damages were independent of, and unrelated to, Defendants' alleged breaches of the parties' contract. Here, Plaintiff failed to allege a tort or tort damages independent and distinct from Defendants' alleged breach(es) of the contract. This means the independent tort rule applies to the facts as alleged and bars the contractually-dependent tort claims against Defendants.

Because Plaintiff's tort claims are ultimately based upon the same underlying conduct which would form the basis for a breach of contract claim (i.e. Defendants' alleged failures to successfully complete the Project), Plaintiff is, as a matter of law, unable to independently establish a basis for its three tort claims aside from the allegedly inadequate performance of the contract, and therefore the tort claims must be dismissed with prejudice as a matter of law.

B. Plaintiff's FDUTPA claims against Defendants must be dismissed as a matter of law because Plaintiff does not have standing.

Alternatively, even if the independent tort doctrine does not bar the FDUTPA claims against Defendants, the FDUPTA claim still legally fails against both Defendants as Plaintiff lacks standing to bring a FDUPTA claim.

First, Plaintiff is not a consumer. Only consumers may sue for damages under FDUTPA. See, e.g., Kertesz v. Net Transactions, Ltd., 635 F.Supp.2d 1339, 1349–50 (S.D.Fla.2009) (holding that plaintiff, as a non-consumer, was not entitled to bring a claim for monetary damages under FDUTPA); Cannova v. Breckenridge Pharm., Inc., No. 08–81145–CIV, 2009 WL 64337, at *3 (S.D. Fla. Jan. 9, 2009) (dismissing FDUTPA claim because plaintiff failed to allege he acted as a consumer in the conduct of trade or commerce); Goodbys Creek, LLC v. Arch Ins. Co., No. 307–cv947–J–33HTS, 2008 WL 2950112, at *8–9 (M.D. Fla. July 31, 2008) ("Only consumers may bring private suit under FDUTPA.").

While the FDUTPA statute was amended in 2001 replacing the word "consumer" with "person", Plaintiff is still required to demonstrate that consumers will be harmed by the deceptive or unfair trade practice. Caribbean Cruise Line, Inc. v. Better Business Bureau of Palm Beach County, Inc., 169 So.3d 164, 169 (Fla. 4th DCA 2015) (citing PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So.2d 773, 777 (Fla. 2003)).

Here, Plaintiff does not sufficiently allege that consumers will be harmed by the Defendants' alleged deceptive or unfair trade practices. According to the Complaint, the only possible "consumer" who may have been impacted by Defendants' actions is the homeowner, Homer Owens. However, Plaintiff admits that Mr. Owens was not affected because Plaintiff paid the difference in contract price between the two subcontractors.

Second, even if Plaintiff qualified as a consumer, Plaintiff was not Mr. Dupree's consumer. Plaintiff lacks standing to bring a FDUTPA claim against Mr. Dupree as Plaintiff did not consume anything from Mr. Dupree. Plaintiff had a verbal contract with Subcontractor, not with Mr. Dupree in his individual capacity. There is no allegation that Plaintiff "consumed" a service or material provided by Mr. Dupree in his individual capacity.

Third, Plaintiff also lacks standing to bring its FDUTPA claim against both Defendants because FDUPTA does not apply to non-residents. While Defendants concede that personal jurisdiction and venue are appropriate as stated in the Complaint, FDUTPA violations can only be alleged by

Florida residents. E.g., W.W. Sports Importadora Exportadora E Comercial LTDA v. BPI Sports, LLC, Case No. 0:16-cv-60147-WPD, 2016 WL 9375202, 2016 U.S. Dist. LEXIS 192427 at *18 (S.D. Fla. Aug. 10, 2016); Hutson v. Rexall Sundown, Inc., 837 So.2d 1090, 1093-1095 (Fla. 4th DCA 2003); OCE Printing Sys. USA, Inc. v. Mailers Data Servs., Inc., 760 So.2d 1037, 1043 (Fla. 2d DCA 2000); Coastal Physician Servs., Inc. v. Ortiz, 764 So.2d 7, 8 (Fla. 4th DCA 1999). Plaintiff is a Delaware corporation, with its principal place of business in Atlanta Georgia. [Complaint at ¶1]. Accordingly, Plaintiff is a non-resident and thus cannot sue under Florida's FDUTPA statute.

Consequently, because Plaintiff lacks standing to bring its FDUTPA claim against both Defendants, the FDUTPA claim against both Defendants must be dismissed with prejudice as a matter of law.

C. Plaintiff's FDUTPA claim must be dismissed against Defendant Dupree because it inappropriately attempts to assert a private civil cause of action against a qualifying agent.

Florida Statutes Chapter 489 sets out the responsibilities for primary qualifying agents. A homeowner "may recover from a negligent qualifying agent, but only under a common law theory of negligence or through the administrative remedies available pursuant to chapter 489." Murthy v. N. Sinha Corp., 644 So.2d 983, 986-87 (Fla. 1994). Here, the Complaint alleges Mr. Dupree is liable because he failed to adequately supervise the Pool renovation as the Subcontractor's qualifying agent. However, a qualifying agent cannot be sued, in his personal capacity, for negligently supervising a construction project solely based upon his relationship with the entity as its qualifying agent. Id. Not only would this be an inappropriate piercing of the corporate veil, but as Murthy demonstrates, no such private cause of action exists.

Furthermore, the homeowner, Homer Owens, is the only entity entitled to bring such a cause of action under the Statute, not Plaintiff.

D. Plaintiff's claims must be dismissed with prejudice.

The Court must allow the Plaintiff to amend its Complaint unless the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile. E.g., Bryant v. State, 901 So. 2d 810, 818 (Fla. 2005) (quoting Sonny Boy, L.L.C. v. Asnani, 879 So. 2d 25, 28-29 (Fla. 5th DCA 2004)) (emphasis in original). As of now, Defendants concede this is not a case where an amended Complaint would unduly prejudice Defendants, or where Plaintiff has abused its privilege to amend. Instead, however, any amendment involving any of the three claims would always be legally insufficient, because Plaintiff's allegations in the Verified Complaint have been cemented into place by its own verification. Therefore, further amendment is futile and the Complaint must therefore be dismissed with prejudice.

II. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Defendants, Swimming Pool Experts, LLC and Eugene Dupree, respectfully request this Honorable Court enter an order:

A. Granting this Motion;

B. Dismissing the Verified Complaint with prejudice; and

C. Granting such other and further relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted, June 28, 2019.

SCHWARTZ, WEINSTEIN, ADAMS & PRICE, P.A.

By: ***/s/ Adam Weinstein***
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 28, 2019, I electronically transmitted the attached document to the Clerk of Court using the Florida Courts E-Filing Portal ("FCEP") for filing and transmittal of electronic mailing to the FCEP registrant(s) listed therein.

SCHWARTZ, WEINSTEIN, ADAMS & PRICE, P.A.

By: ***/s/ Adam Weinstein***

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IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IN AND FOR SAWGRASS HILLS COUNTY, FLORIDA

GENERAL CONTRACTOR SOLUTIONS, INC., Plaintiff, v. SWIMMING POOL EXPERTS, LLC, and EUGENE DUPREE, Defendants.	Case No. 19-CA-006751

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S VERIFIED COMPLAINT

Plaintiff, GENERAL CONTRACTOR SERVICES, INC. ("Plaintiff"), by and through its undersigned counsel, hereby files this Response in Opposition to the Motion to Dismiss (the "Motion") filed by the Defendants, SWIMMING POOL EXPERTS, LLC ("Defendant Subcontractor"), and Eugene Dupree ("Defendant Dupree") (collectively referred to herein as the "Defendants"), and states the following:

I. ARGUMENT

A. The independent tort rule does not bar Plaintiff's claims.

The independent tort rule is also known as the "Economic Loss Doctrine." In Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc., 110 So. 3d 399 (Fla. 2013), the Florida Supreme Court effectively ruled the economic loss doctrine should only apply to products liability cases. This is not a products liability case. Therefore, the doctrine does not apply.

Alternatively, even if the independent tort rule is somehow different from the economic loss rule, it does not and should not apply based upon the Plaintiff's allegations made within its Complaint.

B. Plaintiff has standing to bring its FDUTPA claims.

Plaintiff has standing to bring its FDUTPA claims. First, Plaintiff does not need to be a consumer to bring claims under FDUTPA. The FDUTPA statute was amended in 2001 when it replaced "consumer" with "person". The cases interpreting the statutory change are clear that the FDUTPA statute, as amended in 2001, allows non-consumers to sue under FDUTPA.

Second, non-Florida residents can and have sued under FDUTPA. Accordingly, Plaintiff has standing to pursue its FDUTPA claims against both Defendants.

C. Plaintiff's FDUTPA claim against Defendant Dupree must be allowed to proceed.

Defendants cite to Murthy v. N. Sinha Corp., 644 So.2d 983 (Fla. 1994), in support of their argument that the FDUTPA claim against Defendant Dupree must fail. However, Murthy does not apply to FDUTPA claims. Even if it did, the allegations in Murthy are inapposite to the allegations made in this case, and therefore Murthy does not apply to a case like this.

D. Plaintiff's claims must not be dismissed with prejudice.

All of Plaintiff's claims are sufficiently pled as alleged in the Complaint; however, if the Court grants Defendants' Motion to Dismiss the Complaint, the Court should provide Plaintiff leave to amend the Complaint as an amendment is not futile, and amendment should be granted freely and liberally, as justice so requires.

Respectfully submitted, November 28, 2019.

PALERMO & WEIRICH, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 2019, I electronically transmitted the attached document to the Clerk of Court using the Florida Courts E-Filing Portal ("FCEP") for filing and transmittal of electronic mailing to the FCEP registrant(s) listed therein.

PALERMO & WEIRICH, PLLC

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IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IN AND FOR SAWGRASS HILLS COUNTY, FLORIDA

GENERAL CONTRACTOR SOLUTIONS, INC., Plaintiff, v. SWIMMING POOL EXPERTS, LLC, and EUGENE DUPREE, Defendants.	Case No. 19-CA-006751

ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S VERIFIED COMPLAINT WITH PREJUDICE

THIS CAUSE, having come before this Honorable Court at a hearing on November 29, 2019, and this Court, having considered the arguments of counsel, having reviewed the case file including the Verified Complaint, the Motion to Dismiss, and the Response to the Motion to Dismiss, and being otherwise duly advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The Motion to Dismiss is GRANTED;
2. The three counts asserted against both Defendants are DISMISSED WITH PREJUDICE;
3. Notwithstanding the dismissal with prejudice, to the extent Plaintiff wishes to assert or allege any separate causes of action against Defendants, Plaintiff shall have leave to amend its Complaint if it so chooses.

DONE AND ORDERED this 13th day of December, 2019.

/s/ Carl Fuller
Hon. Carl S. Fuller
Circuit Court Judge

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IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IN AND FOR SAWGRASS HILLS COUNTY, FLORIDA

GENERAL CONTRACTOR SOLUTIONS, INC., a Foreign For-Profit Corporation, Plaintiff/Appellant, v. SWIMMING POOL EXPERTS, LLC, a Florida Limited Liability Company, and EUGENE DUPREE, Defendants/Appellees.	Sixth DCA Case No.: _____ Lower Tribunal Case No. 2019-CA-006751

PLAINTIFF'S/APPELLANT'S NOTICE OF APPEAL OF FINAL ORDER

NOTICE IS HEREBY GIVEN that Plaintiff/Appellant, GENERAL CONTRACTOR SOLUTIONS, INC., appeals to the Sixth District Court of Appeal the Order of this Court rendered December 13, 2019. The nature of the order is a final order denying, with prejudice, claims made by Plaintiff/Appellant in Plaintiff's/Appellant's Verified Complaint in the instant matter. A true and accurate copy of the December 13, 2019 Order is attached hereto and incorporated herein as **Exhibit "1"**.

Respectfully submitted December 30, 2019.

PALERMO & WEIRICH, PLLC

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IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IN AND FOR SAWGRASS HILLS COUNTY, FLORIDA

GENERAL CONTRACTOR SOLUTIONS, INC., Plaintiff, v. SWIMMING POOL EXPERTS, LLC, and EUGENE DUPREE, Defendants.	Case No. 19-CA-006751

ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S VERIFIED COMPLAINT WITH PREJUDICE

THIS CAUSE, having come before this Honorable Court at a hearing on November 29, 2019, and this Court, having considered the arguments of counsel, having reviewed the case file including the Verified Complaint, the Motion to Dismiss, and the Response to the Motion to Dismiss, and being otherwise duly advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The Motion to Dismiss is GRANTED;
2. The three counts asserted against both Defendants are DISMISSED WITH PREJUDICE;
3. Notwithstanding the dismissal with prejudice, to the extent Plaintiff wishes to assert or allege any separate causes of action against Defendants, Plaintiff shall have leave to amend its Complaint if it so chooses.

DONE AND ORDERED this 13th day of December, 2019.

/s/ Carl Fuller
Hon. Carl S. Fuller
Circuit Court Judge

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EXHIBIT "1"

DISTRICT COURT OF APPEAL OF FLORIDA
SIXTH DISTRICT

GENERAL CONTRACTOR SOLUTIONS, INC.

Appellant,

v.

SWIMMING POOL EXPERTS, LLC, and
EUGENE DUPREE,

Appellees.

No. 6D19-2022

December 20, 2021

Appeal from the Circuit Court for Sawgrass Hills County; Carl S. Fuller, Judge.

Jason Palermo of Palermo & Weirich, PLLC, for Appellant.

Adam Weinstein of Schwartz, Weinstein, Adams & Price, P.A., for Appellees.

BUTLER, Judge.

Appellant, General Contractor Solutions, Inc., appeals a final order dismissing with prejudice the three counts Appellant asserted against the two Appellees, Swimming Pool Experts, LLC and Eugene Dupree. We affirm in part and reverse in part.

I. Background

Appellant hired Appellee, Swimming Pool Experts, LLC, as a subcontractor to handle a pool renovation. Swimming Pool Experts, LLC's primary qualifying agent at the time was Eugene Dupree, a Florida certified swimming pool contractor.

After Appellant tendered payment in the form of a $100,000.00 deposit to Swimming Pool Experts, LLC, Eugene Dupree applied to the City of Sawgrass Hills for a permit to begin the pool renovation. Eugene Dupree then moved to England without notifying Appellant or the homeowner, Homer Owens. Mr. Dupree left Swimming Pool Experts, LLC's vice president, Victor Garcia, in charge of the pool renovation project. Mr. Garcia was not a certified swimming pool contractor, in any state.

After Mr. Dupree moved to England, Mr. Garcia unexpectedly died. After Mr. Garcia's death, Swimming Pool Experts, LLC abandoned the pool renovation. Appellant hired another subcontractor to replace Swimming Pool Experts, LLC. Appellant paid the difference in contract prices between the two subcontractors, which was an additional $100,000.00. Furthermore, Appellant hired legal counsel to negotiate with the homeowner after Swimming Pool Experts, LLC, abandoned the pool renovation, costing Appellant $15,000.00 in legal fees.

Appellant sued Swimming Pool Experts, LLC and Eugene Dupree for conversion, civil theft, and violations of the Florida Deceptive and Unfair Trade

Practices Act ("FDUTPA"). Appellees Swimming Pool Experts, LLC and Eugene Dupree moved to dismiss Appellant's Verified Complaint with prejudice. The trial court granted Appellees' Motion to Dismiss with prejudice.

We review a trial court's ruling on a motion to dismiss for an abuse of discretion. Friedel v. Edwards, Case No. 2D20-2233, 2021 WL 4447041, at *1 (Fla. 2d DCA Sept. 29, 2021) ("Whether a proposed amended complaint should be permitted…is reviewed for an abuse of discretion.").

II. Analysis

A trial court must allow a plaintiff the opportunity to amend its pleading "unless it is clear that…'the amendment would be futile.'" Friedel v. Edwards, Case No. 2D20-2233, 2021 WL 4447041, at *3 (Fla. 2d DCA Sept. 29, 2021) (quoting Sorenson v. Bank of New York Mello as Trustee for Certificate Holders CWALT, Inc., 261 So.3d 660, 663 (Fla. 2d DCA 2018)).

A. Conversion and Civil Theft

The Complaint alleges Appellant agreed to pay Swimming Pool Experts, LLC $400,000.00 to complete the pool renovation. Further, the Complaint alleges Swimming Pool Experts, LLC agreed to perform the pool renovation and accepted a $100,000.00 deposit from Appellant. Afterwards, in furtherance of the pool renovation , Swimming Pool Experts, LLC applied for a permit to complete the renovation. Swimming Pool Experts, LLC provided materials and labor but abruptly

abandoned the pool renovation without contacting Appellant or the homeowner. The verbal Agreement referred to by Appellant in its pleading is a verbal contract between Appellant and Swimming Pool Experts, LLC. Marin v. Infinity Auto Insurance Company, 239 So.3d 751, 754 (Fla. 3d DCA 2018) (quoting Mercury Ins. Co. of Fla. v. Fonseca, 3 So.3d 415, 417 (Fla. 3d DCA 2009)) ("To form a binding contract there must be an offer and acceptance.").

While this Court does not rule on whether the Complaint sets forth a valid cause of action on a breach of contract claim, this Court notes that "[i]t is a fundamental, long-standing common law principle that a plaintiff may not recover in tort for a contract dispute unless the tort is independent of any breach of contract." E.g., Island Travel & Tours, Ltd., Co. v. MYR Independent, Inc., 300 So. 3d 1236, 1239 (Fla. 3d DCA 2020) (citing Peebles v. Puig, 223 So. 3d 1065, 1068 (Fla. 3d DCA 2017)); see also LynkUs Communications, Inc. v. WebMD Corp., 965 So. 2d 1161, 1167 (Fla. 2d DCA 2007) (quoting HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996)) (holding that fraud in the performance of an agreement does not establish the independent basis for a fraudulent inducement cause of action).

Swimming Pool Experts, LLC purportedly breached its verbal contract with Appellant when it abandoned the pool renovation. Appellant's alleged damages consist of the difference in contract prices between the original subcontractor and

the replacement subcontract, the loss of the $100,000.00 deposit, and additional legal fees. The facts alleged Appellant's Complaint all appear to stem from Swimming Pool Experts, LLC breaching the contract. If Swimming Pool Experts, LLC completed the pool renovation per the terms of the agreement, then Appellant would have suffered no damage. The independent tort doctrine precludes Appellant's civil theft and conversion claims against both Appellees.

We view rulings to dismiss a complaint with prejudice, without affording the plaintiff at least one opportunity to amend, with the strongest disfavor, and we find the defendant carries a strong burden to demonstrate the futility necessary to dismiss a complaint with prejudice at a case's inception. Nevertheless, in this case, there is no conceivable universe of possible facts which allows Appellant to plead its conversion or civil theft claims without invoking the preclusive effect of the independent tort rule. Consequently, we must affirm the trial court's ruling dismissing the counts for conversion and civil theft with prejudice.

B. FDUTPA

We need not address the merits on Appellant's FDUTPA claim against either Appellee, but instead review whether the trial court erred in dismissing Appellant's FDUTPA claim with prejudice. We find the trial court erred in dismissing the complaint with prejudice as Appellant's claim is not so futile as to be unable to state a cause of action.

Regardless of whether Appellant sufficiently alleged a FDUTPA claim against either Appellee in its original pleading, there is a possibility that Appellant can plead facts sufficient to support a FDUTPA claim. A pleading is not futile unless the movant can establish "beyond any doubt that the claimant could prove no set of facts what[so]ever in support of his claim." Ingalsbe v. Stewart Agency, Inc., 869 So.2d 30, 35 (Fla. 4th DCA 2004). As the moving parties on the Motion to Dismiss, Appellees failed to establish, beyond any doubt, that Appellant could not allege sufficient facts which would entitle it to the relief it sought under Chapter 501, Florida Statutes. Accordingly, the trial court abused its discretion and thus reversibly erred when it denied the FDUTPA claim against both Appellees with prejudice.

This Court believes this case deals with two issues with potentially wide-ranging effect, and therefore we certify the following questions as ones of great public importance:

> Whether the independent tort rule applies to non-products liability cases after the Florida Supreme Court's decision in Tiara, and, if so, whether the application of the independent tort rule necessitated the dismissal of Plaintiff's civil theft and conversion claims with prejudice?
>
> Whether a party, who is not a resident of Florida and not a consumer, can have standing and can sue for relief under the Florida Deceptive and Unfair Trade Practices Act, and, if so, whether the Florida Supreme Court's ruling in Murthy necessitated the dismissal of Plaintiff's Florida Deceptive and Unfair Trade Practices Act claim against the qualifying agent with prejudice.

Affirmed in part, reversed in part; questions certified.

CARLISLE, A., concurring in part and dissenting in part.

I concur with the majority's opinion that the trial court abused its discretion when it dismissed the FDUTPA claim against both Appellees with prejudice, and I also concur with the decision to certify those two questions to the Florida Supreme Court, especially after reading the majority's opinion. Furthermore, I find that the FDUTPA claims were sufficiently alleged against both Appellees in the Complaint.

However, I disagree with the majority's application of the independent tort doctrine. First, this idea that the independent tort rule survived the Florida Supreme Court's opinion in Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc., 110 So. 3d 399 (Fla. 2013), is unpersuasive. The Tiara opinion effectively curtained the judicial expansion of the economic loss rule and repositioned the economic loss rule to exclusively apply to products liability cases. Justice Pariente, in a concurring opinion, expressed reluctance that the opinion reflected a "dramatic unsettling of Florida law" as expressed by her colleague, Justice Canady, in his dissenting opinion. Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc., 110 So. 3d 399, 408 (Fla. 2013) (J., Pariente, concurring). In so doing, Justice Pariente attempted to draw a contrast between the economic loss rule and the independent tort doctrine.

It is important to recognize that the Florida Supreme Court "has not adopted Justice Pariente's concurrence as controlling law." Carl's Furniture, Inc. v. APJL Consulting, LLC, Case No. 15-60023-CIV, 2015 WL 1467726 at *4 (S.D. Fla. March 30, 2015). Therefore, the judicial application of the independent tort doctrine has never been approved by the Florida Supreme Court after its ruling in Tiara.

Additionally, this contrast is a legal fiction. Importantly, Tiara's majority opinion (which Justice Pariente said did not affect the independent tort rule in her concurring opinion) effectively overruled cases where the independent tort doctrine, and not the economic loss rule, applied, including Ginsberg v. Lennar Fla. Holdings, Inc., 645 So.2d 490 (Fla. 3d DCA 1994). Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc., 110 So. 3d 399, 402 (Fla. 2013).

Despite much ado, and much consternation caused to litigants by our sister courts, the economic loss doctrine and the independent tort rule are effectively the same legal concept, despite different names. E.g., Negron v. CitiMortgage, Inc., Case No. 16-CIV-61776-BLOOM/VALLE, 2016 WL 10953267 at *9 (S.D. Fla. Oct. 19, 2016) (quoting De Sterling v. Bank of America, N.A., 2009 WL 3756335, at *3 (S.D. Fla. Nov. 6, 2009) ("The independent tort doctrine (also known as the economic loss doctrine) 'bars a contracting party from recovery in tort where the act complained of relates to the performance of the contract.'")); Moecker v. Bank of

America, N.A., Case No. 8:13-CV-01095-SCB-EAJ, 2013 WL 12159056 at *10 (M.D. Fla. Oct. 21, 2013) (citation omitted).

Second, I believe the independent tort doctrine, if legitimate, is inapplicable in cases where a breach of contract cause of action is not pled by the plaintiff. Here, Appellant chose not to allege a breach of contract claim against Appellees. That was the Appellant's choice. We must honor the litigant's strategic pleading decisions. Forcing a plaintiff to rewrite its pleading and add particular causes of action deprives our citizens of their constitutional right to access the courts, articulated in Article 1, Section 21 of the Florida Constitution.

Third, I believe the majority incorrectly prevented Appellant from trying to re-allege the conversion and civil theft claims against both Appellees at least once. While there is no "magic number" of amendments the trial court must first allow before it can deny an amendment without abusing its discretion, trial courts usually abuse their discretion if they do not allow the plaintiff to amend their complaint at least once. E.g., Bryant v. State, 901 So.2d 810, 818 (Fla. 2005); Acquisition Trust Company, LLC v. Laurel Pinebrook, LLC, 226 So.3d 325, 326 (Fla. 2d DCA 2017) (citation omitted) ("Appellees concede that the circuit court's dismissals with prejudice was improper since Acquisition Trust had never been afforded an opportunity to amend its complaint. We agree."); accord Chakra 5, Inc. v. City of Miami Beach, 254 So.3d 1056, 1070 fn. 10 (Fla. 3d DCA 2018) (quoting Annex

Indus. Park, LLC v. City of Hialeah, 218 So.3d 452, 453 (Fla. 3d DCA 2017) ("While our courts have recognized that there is no 'magic number' as to the number of amendments that should be allowed, under the facts of this case, the trial court should have afforded Annex the opportunity to amend its first amended complaint, particularly in light of the fact that the complaint had been amended only once.")); If Six Were Nine, LLC v. Lincoln Road III, LLC, 242 So.3d 1187, 1188 (Fla. 3d DCA 2018) (citing Hawkins v. Crosby, 910 So.2d 424, 425 (Fla. 4th DCA 2005)).

The majority seems to suggest that the mere existence of a verbal contract between the subcontractor and the general contractor precluded Appellant from bringing a conversion or civil theft claim against either Appellee. However, it is entirely possible to allege both a civil theft and a conversion claim and not trip over the so-called "independent tort rule." While the majority correctly adjudges there is a universe of potential facts which would entitle Appellant to successfully allege a FDUTPA claim against both Appellees, these same potential facts would also prevent the "independent tort rule" from precluding Appellant's civil theft and conversion claims. Instead, the majority inconsistently engages in this analysis and thereby incorrectly treats Appellant's claims differently when it discusses the conversion and civil theft claims.

Although the independent tort rule should be relegated to products liability cases based on the Florida Supreme Court's majority opinion in Tiara, and although

the independent tort rule (if legitimate) is not even likely applicable based upon the allegations made by Appellant in its Complaint, Appellant should be afforded at least one more opportunity to allege its conversion and civil theft claims against both Appellees.

Accordingly, I respectfully concur in part and dissent in part.

Supreme Court of Florida

THURSDAY, JANUARY 30, 2020

CASE NO.: SC20-202222
Lower Tribunal No(s).:
6D19-2022;
2019CA006751

General Contractor Solutions, Inc.,	vs.	SWIMMING POOL EXPERTS, LLC, and EUGENE DUPREE
Petitioner		Respondents

The Court accepts jurisdiction of this case certifying the following two questions as being of great public importance:

I. Whether the independent tort doctrine applies to non-products liability cases after this Court's decision in Tiara, and, if so, whether the application of the independent tort doctrine necessitated the dismissal of Plaintiff's civil theft and conversion claims with prejudice?

II. Whether a party, who is not a resident of Florida and not a consumer, can have standing to sue for relief under the Florida Deceptive and Unfair Trade Practices Act, and if so, whether the Court's ruling in Murthy necessitated the dismissal of Plaintiff's Florida Deceptive and Unfair Trade Practices Act claim against the qualifying agent with prejudice?

The briefing schedule and date of oral argument will be set by separate order.

DORN, C.J., and METZ, PATEL, LEVINE, and COLEMAN, JJ. concur.

/s/Nancy L. Arsenault
Clerk, Supreme Court

Served on all parties of record