IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CALVIN W. CALHOUN, SR.,

CASE NO.: 2014-CV-000035-A-O
Lower Case No.: 2011-CC-003384-O

Appellant,

v.

CENTRAL FLORIDA INVESTMENTS, INC., a Florida corporation; WESTGATE VACATION VILLAS LLC, a Florida limited liability company; and WESTGATE RESORTS, INC., a Florida corporation,

Appellees.

_____/

Appeal from the County Court,
for Orange County, Florida,
A. James Craner, County Court Judge.

Michael R. D'Lugo, Esq.,
for Appellant.

Victor Kline, Esq. and Edmund O. Loos III, Esq.,
for Appellee.

Before MUNYON, EGAN, and H. RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant, Calvin W. Calhoun, Sr. ("Appellant"), timely appeals the trial court's Order Granting Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint and Motion to Strike Demand for Jury Trial with Prejudice entered on April 29, 2014. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Procedural History

As gathered from the lower court's findings of fact, this case is the result of a Contract for Purchase and Sale entered into by Appellant and Westgate Vacation Villas, LLC ("Appellee") on November 22, 2008. Appellant brought suit based on Count I for breach of contract for failure to comply or violation of Florida Statutes, Count II for fraudulent misrepresentation, and Count III for violation of Florida Deceptive and Unfair Trade Practices Act (DUTPA).

Appellant relied on allegations that he was unable to read the contract due to the size of the font, claiming that it was too small and inconspicuous; he was not provided with a title insurance policy; the time in which he would receive said policy was fraudulently misrepresented to him, and he made a timely attempt to cancel the contract. He filed a Complaint on February 28, 2011. He announced a voluntary dismissal in open court on October 6, 2011 and was given 10 days to amend his complaint. He then filed his First Amended Complaint on October 26, 2011. Appellees filed a Motion to Dismiss stating that the First Amended Complaint was fatally flawed due to 1) each count incorporated the preceding counts, 2) Central Florida Investments, Inc. and Westgate Resorts, Inc. were not parties to the contract, 3) the complaint failed to state a cognizable cause of action against Westgate, and 4) Count III was not pled with sufficient specificity. On April 3, 2012, the motion was granted with prejudice as to Central Florida Investments, and granted without prejudice as to Appellees Westgate Resorts, Inc. and Westgate Vacation Villas, LLC. Appellant was given 10 days to amend his First Amended Complaint. On April 16, 2012, Appellant filed his Second Amended Complaint against Westgate Vacation Villas, LLC alone, making the same claims and using the same arguments as in his previous complaint. On August 24, 2012 Westgate Vacation Villas, LLC filed a Motion to

Dismiss for failure to state and inability to state a cognizable cause of action, and for failure to sufficiently plead Count III with specificity. The Second Amended Complaint was dismissed on July 29, 2013, allowing Appellant 20 days to amend his Second Amended Complaint. On August 20, 2013, Appellant filed his Third Amended Complaint, including Central Florida Investments, Inc. and Westgate Resorts, Inc. as defendants. On April 17, 2014, this Complaint was dismissed in open court, with a written order filed on April 30, 2014, dismissing the Complaint with prejudice, rejecting Appellant's argument of small font, and finding that the Third Amended Complaint was fatally flawed for citing to inapplicable statutes and failing to state a cause of action which could result in an award of damages.

Arguments on Appeal

On appeal, Appellant argues that the lower court abused its discretion in dismissing the Third Amended Complaint with prejudice as he still had a viable cause of action to raise under the language of the contract. He asserts that he should have been allowed the opportunity to amend his complaint as the amendment would not prejudice the opposing party, the privilege to amend had not been abused, and the amendment would not be futile.

Appellees argue in response that Appellant failed to preserve an argument for further amendment and, therefore, it is not appropriate for appellate review. Alternatively, they argue that Appellant failed to present the court with an adequate record for review and that the trial court did not abuse its discretion by dismissing his Third Amended Complaint with Prejudice as he has abused his privilege to amend and any further amendment would prejudice Appellees and be futile.

Standard of Review

The standard of review for orders denying leave to amend a complaint is abuse of discretion. *Port Marina Condo. Ass'n, Inc. v. Roof Services, Inc.*, 119 So. 3d 1288, 1291 (Fla. 4th DCA 2013). Leave to amend should be liberally granted "when justice so requires," Fla. R. Civ. P. 1.190(a), and should be denied unless there is prejudice to the opposing party or amendment would be futile. *PNC Bank, N.A. v. Progressive Employer Servs. II*, 55 So. 3d 65, 660 (Fla. 4th DCA 2011).

Analysis

Where no request for a leave to amend is made in the lower court, the issue cannot be raised for the first time on appeal. *Vorbeck v. Betancourt*, 107 So. 3d 1142, 1148 (Fla. 3d DCA 2012) (citing *Stander v. Dispoz-O-Products, Inc.*, 973 So. 2d 603, 605 (Fla. 4th DCA 2008) (noting that "a party who does not seek to amend in the trial court cannot raise the issue of amendment for the first time on appeal")); *Jelenc v. Draper*, 678 So. 2d 917, 918 n. 1 (Fla. 5th DCA 1996) (the claim of dismissal with prejudice could not have been addressed because the record did not disclose that the Jelencs ever requested the opportunity to amend, and thus, the issue was not reserved for appellate review); *Century 21 Admiral's Port, Inc. v. Walker*, 471 So. 2d 544, 545 (Fla. 3d DCA 1985) (holding that the appellant's failure to seek a leave to amend prior to the dismissal with prejudice precludes consideration of the issue for the first time on appeal); *Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1198 (Fla. 4th DCA 2006) (Merkle never sought leave to amend by moving for a rehearing so the right to amend his complaint may not be heard for the first time on appeal). The record reflects that no such leave was requested by Appellant.

Amendment of a complaint is not permitted where the plaintiff did not request leave to amend. *Pokress v. Tisch Florida Properties, Inc.*, 153 So. 2d 346, 351 (Fla. 3d DCA 1963). Although it is possible that Appellant made an oral request at the hearing on Appellees' Motion to Dismiss, Appellant has not made this argument or provided transcripts to support this possibility. A trial court's findings cannot be disturbed absent a record demonstrating reversible error. *Migliori v. Migliori*, 983 So. 2d 670, 671 (Fla. 5th DCA 2008). The burden to provide this information is on the appellant. *JP Morgan Chase Bank v. Combee*, 883 So. 2d 330, 331 (Fla. 1st DCA 2004). Without an adequate record of the proceedings below, an appellate court cannot resolve factual issues or reasonably conclude that the trial court so misconceived the law as to require a reversal. *Id.* Therefore, Appellant's failure to raise the issue of improper dismissal with prejudice and failure to request leave to amend at the trial level results in a waiver of this issue on appeal. *Vorbeck*, 107 So. 3d at 1148 (citing *Keech v. Yousef*, 815 So. 2d 718, 720 (Fla. 5th DCA 2002)).

Additionally, the record reflects that Appellant had the opportunity to file four different complaints, substantially changing each by removing defendants, but not changing his argument despite the Court's direction to do so. The trial court determined in its dismissal order that the Third Amended Complaint was not amendable, specifically stating that it "is fatally flawed" and is "clear to the Court that the Plaintiff's causes of action are still untenable" despite having taken advantage of the privilege to amend. If there had been no such finding, then it would be error to dismiss a complaint with prejudice. *Bouldin v. Okaloosa County*, 580 So. 2d 205, 207-208 (Fla. 1st DCA 1991) (since the final order dismissing the amended complaint with prejudice contained no finding that appellants had abused the amendment privilege or that the amended complaint

was not amendable, it was determined that the dismissal was error and should have been without prejudice in order to allow an opportunity to amend).

Courts are not required to award parties endless bites at the same apple. *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 1001 (Fla. 3d DCA 1998) (dismissal with prejudice of plaintiffs' complaint was affirmed where it was one plaintiff's amended complaint and the other's third amended complaint). It cannot be said that the trial court abused its discretion in denying leave to amend. *McCuin v. Review Fin. Printers, Inc.*, 582 So. 2d 176 (Fla. 3d DCA 1991) (no abuse of discretion where trial court precluded plaintiff from filing fourth amended complaint); *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 181 (Fla. 3d DCA 2010) (where appellant filed a total of six complaints in three years, it was not an abuse of discretion to deny a leave to amend); *Feigin v. Hosp. Staffing Servs., Inc.*, 569 So. 2d 941 (Fla. 4th DCA 1990) (no abuse of discretion in trial court's refusal to grant leave to amend where plaintiff had filed seven complaints over the course of four years). Generally, a trial court is acting within its discretion to dismiss a complaint with prejudice after there have been three opportunities to amend. *Horton v. Freeman*, 917 So. 2d 1064, 1066 (Fla. 4th DCA 2006).

Appellees filed a Motion for Attorney's Fees pursuant to the subject contract, Florida Statute section 59.46, and Florida Rules of Appellate Procedure 9.440(a) and (b). Appellant filed a similar Motion for Attorney's Fees. As Appellees are the prevailing party, they are entitled to attorney's fees. § 59.46, Fla. Stat. (2011); *Granoff v. Seidle*, 915 So. 2d 674, 677 (Fla. 5th DCA 2005) (The prevailing party is the party that prevails on the significant issues in the litigation). A motion for costs must be filed in the trial court. Fla. R. App. P. 9.400(a).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the trial court's order is **AFFIRMED**. Appellant's Motion for Attorney's Fees is **DENIED**. Appellees' Motion for

Attorney's Fees is **GRANTED** and the assessment of those fees is **REMANDED** to the Trial Court.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 19th day of June, 2015.

/S/
LISA T. MUNYON
Presiding Circuit Judge

EGAN and H. RODRIGUEZ, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to **Judge A. James Craner,** 425 N. Orange Avenue, Orlando, Florida 32801; **Michael R. D'Lugo, Esq.,** Wicker, Smith, O'Hara, McCoy & Ford, P.A., at 390 North Orange Avenue, Suite 1000, Orlando, Florida 32801, as counsel for Appellant; and **Victor Kline, Esq.**, and **Edmund O. Loos III, Esq.,** Greenspoon Marder, P.A., at 201 East Pine Street, Suite 500, Orlando, Florida 32801, as counsel for Appellee on the 19th day of June, 2015.

/S/
Judicial Assistant