SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 2D16-3798

BIOLOGIC, INC., a/a/o ELIZABETH MORGAN,

Appellant,

vs.

ASI PREFERRED INSURANCE CORPORATION,

Appellee.

ANSWER BRIEF

OF

ASI PREFERRED INSURANCE CORPORATION

On Appeal from the Twelfth Judicial Circuit
Manatee County, Florida
Case No.: 2016-CA-458

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STATEMENT OF THE CASE AND THE FACTS

Nature of the Case: Appellant, Bio Logic, Inc., ("Bio Logic") seeks review of two orders. The first order granted Appellee, ASI Preferred Insurance Corporation ("ASI")'s motion to dismiss Bio Logic's complaint alleging breach of contract. The second order denied Bio Logic's motion seeking rehearing. (R. 698.) The trial court dismissed Bio Logic's complaint because the assignment of benefits Bio Logic relied upon did not include the written consent of the mortgagee as required by the unambiguous "Assignment of Claim Benefits" provision of the contract sued upon. (R. 643.)

I. Statement of the Facts

The insurance policy. Paul B. Morgan ("Mr. Morgan") and Elizabeth R. Morgan ("Ms. Morgan") entered into a homeowner's insurance contract with ASI. (R. 270.) The declarations page identifies the "1st Mortgagee" on the Morgan's residence as "M&T BANK, ISAOA ATIMA" ("the mortgagee" or "M&T Bank"). (R. 270.)

The contract includes a condition on assignments of its claim benefits:

> **SPECIAL PROVISIONS FOR FLORIDA**
> * * *
> **SECTION I – CONDITIONS**
> *** * ***
> **18. Assignment of Claim Benefits.** *No assignment of claim benefits*, regardless of whether made before loss or after loss, *shall be valid without the written consent of all 'insureds', all additional insureds and all mortgagee(s)* named in this policy.

* * *

(R. 301, 308 (emphasis added).)[1]

The loss and attempted assignment. Mr. Morgan was discovered deceased inside a vehicle located in the home's garage. (R. 7.) Ms. Morgan contracted with Bio Logic to remediate the home. She alone signed Bio Logic's "contract for services, *assignment of benefits*, direct payment authorization, and hold harmless agreement." (R. 6 (emphasis added).) M&T Bank, the named first mortgagee, did not sign or otherwise give written consent to the assignment. (R. 6.)

Bio Logic's $50,895.05 remediation claim. Bio Logic submitted a claim directly to ASI of $50,895.05 for removing the body and related odors from the property. (R. 22, 649.) ASI accepted coverage of Ms. Morgan's claim, but disagreed with the amount submitted by Bio Logic. Instead, ASI paid the amount it believed was reasonable. (R. 333, 650.)

II. Statement of the Case

Bio Logic files suit against ASI. Relying solely on the assignment of claim benefits it obtained from Ms. Morgan, Bio Logic filed a one-count, breach of contract complaint against ASI seeking recovery of the remaining balance on its

[1] Bio Logic's complaint referenced the insurance policy and attached the written "assignment," thereby incorporating them both. (R. 2-6); *see One Call Prop. Servs. Inc. v. Security First Ins. Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015) (holding that the trial court properly considered the contents of the insurance policy that was filed in connection with the insurer's motion to dismiss, where the complaint impliedly incorporated the policy by reference); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246 (Fla. 2d DCA 2011).

$50,895.05 remediation claim. Alleging that it was "as an assignee of Elizabeth Morgan ("Insured") pursuant to a valid assignment," Bio Logic asserted ASI had breached the insurance contract by failing to pay or by underpaying the bill as submitted. The assignment was attached to the complaint. It and the insurance contract were incorporated into the complaint by reference. (R. 2-6.)

ASI moves to dismiss. ASI moves to dismiss Bio Logic's complaint on the basis that Bio Logic had no standing to sue for breach of contract because the assignment it relied upon failed to include the written consent of the named mortgagee and, therefore, was invalid. (R. 190-99.) ASI explained that the contract did not require the insured to obtain ASI's permission to the assignment of claim benefits, but instead protected all insureds (including the mortgagee) by ensuring they all consented to an assignment that would potentially affect their rights to claim benefits under the policy. (R. 195-96.) Given that the assignment Bio Logic relied on did not have the consent of the named mortgagee, as the contract required, ASI argued the assignment was invalid.

Bio Logic responded that the Assignment of Claim Benefits clause was invalid because (1) it prohibited the insured from freely assigning the rights to her post-loss benefit, or alternatively, (2) the language was ambiguous and unenforceable. (R. 334-38.) In support of this argument, Bio Logic relied upon

case law that prohibits an insurer from requiring *the insurer's* consent to a post-loss assignment of claim benefits. (R. 334-35.)

ASI replied that the case law prohibiting an insurer from requiring its consent to a post-loss assignment of claim benefits was inapplicable because the contract at issue does not require the insurer's consent. (R. 348-49.) Instead, M&T Bank—as the named mortgagee—has an insurable interest in the property, and Florida law permits parties to require the consent of the mortgagee, in order to protect its interest in the claim benefits. (R. 350-53.) ASI further argued the policy language requiring a mortgagee to consent to any assignment of the claim benefits was unambiguous. (R. 356.)

The hearing on the motion to dismiss. ASI's counsel argued at the hearing on its motion to dismiss that:

- The ASI policy's "assignment of claim benefits" condition "is different than any of the insurance policies that have been evaluated by courts before," (R. 650.);
- ASI was not arguing that, as the insurer, it had to consent to the assignment, and thus the case law on that issue was inapplicable, (R. 651.); and
- Although the policy contains a separate anti-assignment clause, ASI was not relying on that provision. (R. 651.)

ASI explained that it was simply relying on the unambiguous provision that required any mortgagee named in the policy to consent to the Assignment of Claim Benefits. (R. 651.)

In response, Bio Logic argued that the Assignment of Claim Benefits provision was an anti-assignment clause (R. 652-53), and that ASI was not entitled to place *any* condition on the assignment of benefits. (R. 655.) It further argued the policy was ambiguous as to which "insureds" needed to consent to the assignment. (R. 658.) ASI noted that none of the cases Bio Logic relied upon addressed a policy condition that required consent of another insured that had an interest in the property and insurance benefit being claimed. (R. 659-60.)

The trial court's dismissal. The trial court announced it would grant ASI's motion to dismiss, reasoning that the case law Bio Logic relied upon was distinguishable and that the policy conditioned, but did not restrict, assignment; thus, the provision was enforceable. (R. 665-66.) In its written order, the trial court dismissed the case "due to the assignment of benefits not including the written consent of the mortgagee." (R. 643.) The court's order did not state the dismissal was with prejudice. (R. 643).

Bio Logic does not file an amended complaint, but instead moves for rehearing. Even though ASI had not filed a responsive pleading, Bio Logic did not exercise its right to file an amended complaint under Rule 1.190(a) either

before or after the trial court's order of dismissal. It also never sought leave to amend the complaint.

Instead of filing an amended complaint, Bio Logic chose to file a Motion for Reconsideration and/or Rehearing. Bio Logic argued that "the Court has overlooked authority on the rule against restrictions on assignments of benefits." (R. 441-42.) It also asserted that ASI was not a party to the assignment and, therefore, it had no right to contest the assignment. (R. 444.)

Bio Logic further argued for the first time that whether the assignment was valid was not an appropriate subject for a motion to dismiss, that it should have had a right to amend its complaint, and that an equitable assignment was pled even if the assignment was technically invalid. (R. 445-47.) Bio Logic also urged that it could establish Ms. Morgan was acting as an apparent agent of the mortgagee. (R. 446.) However, Bio Logic did not file or proffer a proposed amended complaint or any proposed factual allegations to support its contention that an amendment would cure the complaint's defects.

In response, ASI again explained that Bio Logic's reliance on case law addressing assignment clauses requiring the insurer's consent to assignments of post-loss claim benefits was misplaced. ASI reiterated that the contract clause simply requires the consent of other "insureds, additional insureds and mortgagees;" but *not* ASI, the insurer. (R. 681-84.) ASI also argued that Bio

Logic's argument on standing was inconsistent. ASI urged that on one hand, Bio Logic could not assert the assignment put it in contractual privity with ASI so that it could collect policy benefits, yet on the other hand argue that ASI was not in privity with Bio Logic for the purposes of requiring compliance with contractual conditions. (R. 684-85.)

ASI further argued that Bio Logic could not cure its lack of standing, and that Bio Logic's equitable assignment argument was refuted by longstanding Florida law. Finally, ASI asserted Bio Logic's new, proposed agency theory was unsupported, given that Bio Logic had proffered no allegations that could demonstrate an agency relationship. (R. 685-88.)

Rehearing is denied and Bio Logic (not ASI) seeks entry of final judgment. The trial court denied Bio Logic's motion for rehearing, but again it did not indicate the dismissal was with prejudice. (R. 690.) In response, Bio Logic again chose not to file an amended complaint pursuant to Rule 1.190(a). It also never sought leave to amend its allegations. Instead, Bio Logic—***not ASI***—moved for entry of final judgment in favor of ASI so that Bio Logic could file an appeal. (R 691-697).

Significant to the issues on appeal, Bio Logic's motion for final judgment: (1) acknowledged the trial court's dismissal order was not with prejudice; (2) informed the trial court that it could not amend the complaint; and, (3)

acknowledged the named mortgagee did not sign the Assignment of Claim Benefits form. Bio Logic also asserted that the trial court's two orders (dismissal and denial of rehearing) "do not include language of finality necessary for an appeal to be taken." (R. 692.)

Bio Logic filed its Notice of Appeal without obtaining a ruling on its motion for final judgment. So, instead of appealing a final order of dismissal with prejudice, Bio Logic is appealing the order dismissing the complaint and the denial of its motion for rehearing. (R. 698.) And, briefing on the merits has proceeded without this Court questioning or ASI challenging the finality of the two orders on appeal.

SUMMARY OF ARGUMENT

The trial court properly dismissed Bio Logic's breach of contract action. The Assignment of Claim Benefits provision in the contract sued upon unambiguously conditions assignment of claim benefits on the written consent of all named mortgagees in the policy. Bio Logic's complaint was based upon an assignment that does not include the written consent of the named mortgagee. As such, Bio Logic's assignment is invalid.

This contract's condition precedent to a valid assignment is consistent with Florida law and public policy and should be enforced. Trying to circumvent this fact, Bio Logic relies on inapplicable case law in which Florida courts have refused to enforce a contractual provision that requires an insurer's consent to a post-loss assignment of claim benefits. That case law does not apply here because this Assignment of Claim Benefits provision does not require ASI's consent. Instead, under the undisputed facts in this appeal, it simply requires the consent of the affected co-insureds—the named insureds and the named mortgagees—who both have a vested interest in the insurance proceeds being assigned. Indeed, given each insured's interest, and particularly the mortgagee's priority interest in those proceeds, requiring the consent of these co-insureds to any such assignment protects their respective rights and interests.

Bio Logic's alternative contention that the trial court erred because Bio Logic could have amended its allegations to state a valid claim fails to acknowledge the procedural history below. First, with no responsive pleading having been filed, Bio Logic had the unfettered right to file an amended complaint. It chose not to file an amended complaint and, though unnecessary, it never even sought leave of court to do so. Second, the original complaint is the subject of this appeal only because Bio Logic—not ASI—has appealed a dismissal that was without prejudice; and, Bio Logic brought this appeal while its motion for an entry of final judgment was still pending. In that motion, Bio Logic concedes (1) it did not obtain the consent of the named mortgage, and (2) that it could not amend its pleading. Given this procedural history, Bio Logic's argument on appeal that it was not afforded the opportunity to amend its allegations or that it should be given further opportunity to properly investigate other theories of relief is, at best, specious. That argument has been waived, is without merit and should be rejected on appeal.

Bio Logic's assertion it properly pled equitable assignment and its conclusory allegation that all conditions precedent to assignment have been satisfied or waived likewise must be rejected. The only cause of action Bio Logic pled was for breach of contract; it did not allege an equitable assignment. Moreover, the complaint's conclusory allegations do not meet the fact-pleading

standard for equitable assignment under the Florida Rules of Civil Procedure. Under these facts and the procedural history discussed above, Bio Logic cannot now argue that a dismissal without prejudice was improper because it could prosecute an alternative cause of action if only this Court would give it that opportunity.

Bio Logic's remaining arguments, which rest on legal issues and facts never presented to the trial court, fail as a matter of law. Most improperly, Bio Logic relies on an appendix containing Office of Insurance Regulation ("OIR") documentation it never presented to or argued before the trial judge and, therefore, is not part of the record on appeal. Beyond the fact that this extra-record evidence should not be considered on appeal, that information also is irrelevant. It represents no more than an unsubstantiated and unfortunate attempt to portray ASI in a bad light. The irrefutable truth is that ASI filed its contract form with OIR as required, and OIR has never disallowed or otherwise disapproved of ASI's AOB clause.

Bio Logic extensively argues that a right to insurance proceeds is a property right to which rules regarding alienation apply. This argument was not raised below and should not be considered on appeal. If considered, this new, unpreserved argument relies on inapplicable case law from other jurisdictions.

Finally, Bio Logic's decided to appeal the two trial court orders without obtaining the final judgment it urged in its motion for final judgment. This appeal is technically premature. If so, this Court's precedent dictates that the parties be given time to obtain the final order Bio Logic requested in its pending motion for final judgment. This procedure allows for the much needed appellate decision on the assignment of benefits issue that is properly before this Court.

The trial court's orders on appeal should be affirmed.

ARGUMENT

I. The assignment Bio Logic relies upon lacks the written consent of the named mortgagee, an enforceable condition of the contract's Assignment of Claim Benefits provision. That deficiency renders the assignment invalid.

The Assignment of Claim Benefits provision is clear and unambiguous. For an assignment to be valid under the undisputed facts in this case, it must include the written consent of all named mortgagees in the policy. This provision is a permissible condition precedent to the disbursement of claim proceeds. It is consistent with Florida law and public policy and protects those with a vested interest in the claim benefits. As such, because it is undisputed that Bio Logic failed to obtain the named mortgagee's written consent to the assignment, the assignment is invalid. Consequently, Bio Logic's breach of contract claim fails as a matter of law.

A. Standard of Review

The standard of review on an order granting a motion to dismiss is *de novo*. *Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 3d DCA 2007).

B. Florida law favors the enforcement of contracts absent a violation of law or policy.

Florida has long espoused a "policy that favors the enforcement of contracts." *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 260 (Fla. 2015). "It is only in clear cases that contracts will be held void as contrary to public policy as it is a matter of great public concern that freedom of contract be not lightly interfered with." *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944) (reversing lower tribunal determination that contract was void as against public policy).

And, this Court has counseled courts to exercise "extreme caution" before invaliding a contractual provision freely entered into by private parties:

> [C]ourts should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clear to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract.

Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 318 (Fla. 2d DCA 2011) (internal quotation marks omitted).

It is also well established that "if [an insurance] policy provision is clear and unambiguous, it should be enforced according to the terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996). As such, "[u]nder Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Id.*; s*ee also State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986). Thus, under Florida law, the intent of the parties as reflected within the contract is paramount.

With respect to assignments, both the Legislature and the Florida Supreme Court agree that an insurance contract "may be assignable, or not assignable, as provided by its terms." Fla. Stat. § 627.422 (2012); *Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998). Accordingly, conditions on assignability are a matter of contract to be determined by the parties. The only restrictions on that right are clear pronouncements from the Legislature. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) ("The Legislature has the final word on declarations on public policy."); *see also Griffin v. ARX Holding Corp.*, 41 Fla. L. Weekly D2342 (Fla. 2d DCA Oct. 14, 2016) (recognizing that

courts should not ignore legislative directives regarding the insurance business where they appear to protect the public welfare).

Thus, courts should not void an assignability provision in an insurance contract absent clear direction from the Legislature indicating the provision violates public policy or Florida law.

C. Under Florida law, parties may require all insureds and mortgagees with a vested interest to consent to the assignment of claim benefits.

Florida law and public policy permits parties to condition the assignment of claim benefits on the consent of all insureds and mortgagees with a vested interest in those benefits. Bio Logic's contrary argument fails for several reasons.

Such a provision is not an impermissible anti-assignment clause as Bio Logic argues; it is simply a condition precedent to the payment of claims benefits. Florida law recognizes that an insurer may write a policy to impose reasonable conditions precedent on the payment of claims designed to protect the interests of the insurer, other insureds, and named mortgagees. Indeed, reasonable conditions precedent to claims payments have long been accepted within insurance policies. *See, e.g.*, *Continental Cas. Co. v. Shoffstall*, 198 So. 2d 654, 657 (Fla. 2d DCA 1967) ("[T]he requirements in the standard insurance policy that the insured shall give notice of loss and make proofs of loss are conditions precedent to the right to sue."). In such circumstances, the failure to comply with that condition precedent

relieves the insurer from its duty to make payment. *See Edwards v. State Farm Fla. Ins. Co.*, 64 So. 3d 730, 731 (Fla. 3d DCA 2011) ("Failure to comply with a condition precedent to payment relieves the insurer of its duty to make payment.").

A condition precedent that is applied to require consent to the assignment of claims benefits by all parties with a vested interest in those proceeds is reasonable and consistent with public policy. Given the insureds and named mortgagee's interests in the insurance proceeds in question, particularly the named mortgagee's priority interest in those proceeds, requiring that the insureds and the named mortgagee consent to assignment protects these co-insureds from losing their respective rights and benefits under the insurance policy without their knowledge and consent. *See Sumlin v. Colo. Fire Underwriters*, 158 Fla. 95, 98 (Fla. 1946).

A mortgagee named in the policy has a vested interest in mitigation and loss payments made under that policy. Its mortgage gives it an interest in protecting the property and the policy acknowledges that interest. Florida has long recognized a mortgagee's interest in any insurance proceeds derived from insurance which protects the mortgagee's interest in the insured property. *See id.*; *Langford v. Wauchula State Bank*, 148 Fla. 236, 4 So. 2d 10 (1941); *Atwell v. Western Fire Ins. Co.*, 120 Fla. 694, 163 So. 27 (1935); *Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n*, 691 So. 2d 1104 (Fla. 3d DCA 1997). This includes, but is not limited to,

the express interests in any loss payable under Coverage A or B, and any payments made therefor, pursuant to the Mortgage Clause of the policy.

Mortgagees named in an insurance contract also have a vested interest in ensuring that any damage to the property given as security for its loan is properly repaired. Payment of insurance benefits in a proper amount for the proper repair or mitigation of damage to its security interest is of vital interest to any such named mortgagee. A named mortgagee also has an interest in avoiding unnecessary litigation with the insurer, its borrower and any purported assignee of benefits after payment has already been issued by the insurance company, especially if the assignment was contrary to the terms of the insurance contract.

Bio Logic relies solely on inapplicable cases where Florida courts have declined to enforce an insurance contract provision which required the insured to obtain *the insurer's consent* to the assignment. *See, e.g., Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 642-43 (Fla. 2d DCA 2016) ("[P]ost-loss assignments do not require an insurer's consent"); *Security First Ins. Co. v. Fla. Dep't. of Fin. Servs.* 177 So. 3d 627, 628 (Fla. 1st DCA 2015) (policyholders have the right to assign proceeds without insurer consent); *W. Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 210-11 (Fla. 1917) (recognizing that consent of insurer is not required for post-loss assignment).

The rational underlying that common law "public policy" does not apply to the Assignment of Claim Benefits provision at issue here. The primary rationale for the limited, public policy exception in those cases is that the consent of the insurer to post-loss claim benefits is "superfluous" because the insurer's rights and interests are in "no way affected by" the assignment. *See W. Fla. Grocery*, 77 So. at 224. An additional concern is that the insurer, as the obligor, could delay repairs by delaying or withholding its consent to assignment, thus injuring the public. *See, e.g.*, *Bioscience W., Inc.*, 185 So. 3d at 643 (explaining that it is "imprudent to place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs.").

These concerns are not implicated with the assignment provision at issue. Only the parties with a direct and vested interest under the contract to the proceeds being assigned (and the repair work being done correctly)—the insureds and the named mortgagee in this case—must consent to the assignment. Requiring the named mortgagee's consent is particularly appropriate. That mortgagee's security interest in the property and insurance proceeds related to repair or mitigation of damages to that property generally has priority over the borrower/insured's interests. Moreover, unlike the insurer consent cases, the assignment of claim benefits clause here does not give ASI the right to give or withhold consent to the assignment of claim benefits or to otherwise delay the repairs.

Bio Logic's additional assertion that one party may unilaterally assign benefits to a third party without the consent of others who have a vested interest is untenable and baseless. For example, were this Court to accept this argument, it would condone partial assignments of the same claim benefits by only one of multiple insureds with a vested interest in those benefits. This would improperly lead to split causes of action by the insureds and named mortgagees who did not consent to the assignment. *See MDS (Canada), Inc. v. RAD Source Techs., Inc.*, 720 F.3d 833, 857 (11th Cir. 2013) (Pryor, J. concurring) (explaining that a transfer of less than all the rights to the contract assigned would wrongly permit both the assignor and assignee to sue the obligor in split causes of action).[2]

In sum, requiring the consent of those with a vested, contractual right to the claim benefits being assigned does not prevent the assignment of those benefits. As such, it is not an anti-assignment clause. Instead, it is a reasonable condition precedent that protects all parties with an interest in the claim benefits being assigned. As such, this clause does not violate Florida law or any public policy, and must be enforced by Florida's courts.

[2] The Court in *One Call* expressly limited its holding to the general right of post-loss assignments presented and did not even rule on whether a partial assignment versus a complete or total assignment of an insurance claim was valid. *One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755 (Fla. 4th DCA 2015).

D. The Assignment of Claim Benefits provision requires the named mortgagee's consent to an assignment of proceeds, and the named mortgagee did not consent in this case.

The Assignment of Claim Benefits provision is clear and unambiguous.[3] It requires the written consent of all 'insureds', as well as all named mortgagees, in order for an assignment of insurance proceeds to be valid:

> **18. Assignment of Claim Benefits.** *No assignment of claim benefits*, regardless of whether made before loss or after loss, *shall be valid without the written consent of all 'insureds', all additional insureds and all mortgagee(s)* named in this policy.
>
> * * *

(R. 308) (emphasis added).

It is undisputed that the mortgagee named in the policy did not give written consent to the assignment upon which Bio Logic relies. Indeed, Bio Logic conceded this fact in its motion for entry of final judgment. (R. 691) ("[I]t is undisputed that the 'Assignment of Claim Benefits' was not signed by the mortgagee."). And the complaint does not allege that the mortgagee's consent was not required or was otherwise obtained. As such, Bio Logic's general allegation that all conditions precedent have been satisfied or waived does not suffice. (R. 445.) Florida is a fact-pleading jurisdiction. *Deloitte & Touche v. Gencor Indus.,*

[3] The Initial Brief does not contend that the Assignment of Claim Benefits provision is ambiguous. Accordingly, Bio Logic has waived any argument regarding ambiguity of the provision on appeal. *See, e.g.*, *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("An issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief." (internal quotation marks omitted)).

Inc., 929 So. 2d 68, 68 (Fla. 5th DCA 2006). A general allegation such as this does not overcome the conceded fact that the mortgagee did not sign the assignment.

Accordingly, because Bio Logic failed to obtain the written consent of the mortgagee named in the policy, the assignment Bio Logic relies upon was invalid. And, without a valid assignment of the contract's claim benefits, the trial court correctly dismissed Bio Logic's breach of contract action.

E. ASI has standing to contest Bio Logic's failure to satisfy the contractual requirement of obtaining the named mortgagee's consent to the assignment.

Bio Logic's assertion that ASI lacks standing to contest Bio Logic's failure to comply with the conditions precedent in the insurance contract is nonsensical and self-defeating. On one hand Bio Logic contends that ASI cannot enforce the assignment of claim benefits clause in ASI's contract because ASI is not a party to the attempted assignment. On the other hand, even though it is not a party to that contract, Bio Logic asserts it has standing to challenge the validity of that contract. In other words, Bio Logic suggests it is in contractual privity with ASI because of Ms. Morgan's execution of the assignment, but ASI has no standing to require Bio Logic to meet the contract's assignment requirements because ASI is not privy to the assignment itself. This is assertion is absurd.

The case law Bio Logic cites not only does not support its argument, but actually demonstrates that ASI has standing to contest Bio Logic's failure to obtain the mortgagee's consent. For example, in *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So. 2d 1281, 1283 (Fla. 2d DCA 2005), a health care provider filed suit against an insurance company, alleging that it had been assigned the PIP benefits of the insured. However, at the time the provider filed the lawsuit, it had not yet obtained the written assignment from the insured as required by statute. *Id.* The insurance company moved to dismiss the lawsuit on the basis that the provider—like Bio Logic in this case—lacked standing to bring the lawsuit because it was not appropriately assigned the PIP benefits by the insured. *Id.* The Second District Court of Appeal agreed with the insurance company and held that the provider lacked standing to sue because the PIP benefits were not assigned at the time the lawsuit was filed. *Id.* at 1287. In finding in favor of the insurance company—which was not a party to the attempted assignment—the court implicitly accepted the fact that the insurance company had standing to contest the failure to appropriate assign the contract's benefits.

Thus, ASI clearly has standing to contest the validity of the purported assignment of rights under the contract Bio Logic seeks to enforce against ASI by way of a breach of contract action. And, under the terms of that contract, the

failure to comply with the condition precedent to a valid assignment— in this case, obtaining the consent of the named mortgagee—renders that assignment invalid.

II. Bio Logic's remaining arguments were not properly preserved below or otherwise fail as a matter of law.

Bio Logic's remaining arguments were not preserved below or otherwise fail as a matter of law.

A. Bio Logic waived any right to amend its complaint by filing this appeal after choosing not to file an amended complaint and conceding it could not do so.

Bio Logic's contention that the trial court erred in dismissing the complaint because Bio Logic could have amended its allegations is an unfortunate distortion of the record. (I.B. 31-33.) Procedurally, the only reason the dismissal of the original complaint is on appeal is because Bio Logic—***not ASI***— chose to appeal the trial court's dismissal without prejudice instead of filing an amended complaint or seeking leave to do so. Moreover, in the motion for final judgment Bio Logic filed but failed to set for hearing (or otherwise get a ruling upon), Bio Logic stated it "cannot amend the complaint" and asked the trial court to enter final judgment so that it could appeal its ruling. (R 691-692).

So, contrary to its suggestions on appeal, the trial court never denied Bio Logic the opportunity to amend its allegations. In truth, Bio Logic never attempted to file an amended complaint as a matter of right and never sought leave to amend its complaint at any point in the trial court proceeding. As such, the trial court did

not deprive Bio Logic of its right to amend. *See Boca Burger, Inc. v. Forum*, 912 So. 561, 567-68 (Fla. 2005) (trial court may not deny party's right to amend original complaint before filing of answer). For Bio Logic to suggest otherwise is, at best, misleading.

The trial court's order granting ASI's motion to dismiss does not state that the dismissal was with prejudice. (R. 700). Likewise, the order denying Bio Logic's motion for reconsideration and/or rehearing also does not state the dismissal was with prejudice. (R. 701.) Indeed, Bio Logic's still pending motion for entry of final judgment acknowledges that the order of dismissal was not with prejudice, yet asks the trial court to enter final judgment. (R. 691-97). Under these circumstances, by filing this appeal instead of filing an amended complaint, Bio Logic has waived its right to do so.

Moreover, having admitted in its motion for entry of a final order that it could not amend its allegations and taken this appeal instead of filing an amended complaint, Bio Logic cannot now assert on appeal that it may be able to plead agency or that there may be other theories that could be developed with further factual investigation. *See Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1198 (Fla. 4th DCA 2006) (party's failure to seek leave to amend waives on appeal the argument that it should have been permitted to amend allegations to add claim). Bio Logic may not choose to forego filing an amended complaint, represent to the

trial court that it cannot amend its complaint, ask the trial court to enter final judgment on its allegations as originally pled, and then argue on appeal the trial court failed to afford it the opportunity to amend its pleading and develop its case.[4]

B. The complaint did not allege a claim for equitable assignment.

Bio Logic also argues that its complaint alleged an equitable assignment of the insurance benefits, and thus, the trial court erred in dismissing the complaint. (I.B. 31.) This argument fails as a matter of fact and law.

The complaint does not allege an equitable assignment, and the cases Bio Logic cites do not support such a claim. An equitable assignment may only arise where *all* parties to the assignment and the underlying contract behave as though the contract was assigned. *See Giles v. Sun Bank, N.A.*, 450 So. 2d 258, 261 (Fla. 5th DCA 1984). For example, in *SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526 (Fla. 2d DCA 2007), this Court recognized an equitable assignment because all parties to the transaction in question—both parties to the assignment, as well as

[4] Bio Logic does not explain why it has not had the opportunity to conduct an investigation into its other speculative theories of the case, given that this lawsuit was filed over one year ago. Also, Bio Logic never sought a continuance in the trial court so that it could conduct any investigation it thought necessary. *See, e.g., Leviton v. Philly Steak-Out, Inc.*, 533 So. 2d 905, 906 (Fla. 3d DCA 1988) (on summary judgment, holding that failure to move for continuance before the hearing waives any issue for appeal that the party was not given reasonable time to complete discovery). Thus, Bio Logic's suggestion on appeal that the mortgage agreement "may" permit Ms. Morgan to assign the proceeds without the mortgagee's consent, and that it has not yet determined the veracity of the insurance policy itself is pure conjecture that should be rejected by this Court.

the party to the underlying contract that was assigned—treated the contract as assigned, even if no formal assignment was memorialized in writing. *Id.* at 526.

Bio Logic pled no facts alleging that either ASI or the named mortgagee behaved as though the insurance proceeds were assigned to Bio Logic (indeed, the words "equitable assignment" cannot be found in the complaint). Instead, Bio Logic relies solely on its assertion that "[t]he contract [between Ms. Morgan and Bio Logic] itself demonstrates the requisite intent" to assign, though it is undisputed that only Ms. Morgan consented to the assignment of the insurance proceeds to Bio Logic, and there is no allegation in the complaint that ASI ever treated the claim benefits as having been assigned. (I.B. at 32.)

Accordingly, Bio Logic has waived any right to amend its allegations, and the complaint at issue did not plead a claim for equitable assignment.

C. Bio Logic's belated attempt to rely on evidence outside the record should be rejected.

It is well-settled that "[a]n argument on appeal must present the specific contention asserted as a legal ground for the objection or motion below." *Aills v. Boemi*, 29 So. 3d 1105, 1108-09 (Fla. 2010). Otherwise, the argument is waived. Yet, Bio Logic's appendix presents this Court with materials from the Office of Insurance Regulation ("OIR") that are outside the record before the trial court and

its brief presents an argument thereon that it never presented to the trial court.[5] Bio Logic uses these non-record materials to raise a new, unpreserved argument on appeal: that OIR has concluded that ASI's Assignment of Claim Benefits provision is invalid under Florida law.

This unpreserved, extra-record, improper argument also lacks merit. First, and most importantly, OIR has not questioned or challenged the enforceability of ASI's assignment provision. As shown in Bio Logic's Appendix, ASI submitted the required certified, informational filing to OIR which includes the policy language at issue in this case. (App. 10.) Since that filing, OIR has not taken any action against ASI based on its disapproval of this policy language. Thus, if anything, the OIR's long, post-submission failure to disapprove or otherwise question ASI's right to include this language in its policies is entitled to deference by this Court.

Second, Bio Logic relies heavily on documents showing OIR rejected a later application of another insurer, Security First Insurance Company ("Security First"), as well as the withdrawn submission of American Integrity Company ("American"). Bio Logic contends that these communications by OIR are rulings

[5] ASI moved to strike this appendix as containing improper extra-record materials. This Court denied the motion without prejudice to the parties arguing the motion's merits in the briefs. ASI again asks this Court to strike or otherwise disregard these materials that the trial court never had the privilege of considering, and that are taken from files that do not involve Bio Logic or the insureds, for the reasons stated in ASI's motion to strike.

that are binding on this Court in its consideration of the ASI policy. In addition to the fact that OIR has never rejected or otherwise disapproved of ASI's form, this argument is flawed for several reasons.

Both the Security First and American provisions are not identical to ASI's provision. The American "Assignment of Claim Benefits" provision contains an extra requirement:

> b. For any assignment of benefits after a loss:
>
> (1) You must disclose the assignment to us prior to the payment of any claim; and
>
> (2) You must comply with all of the Section – I Conditions, 2. Your Duties After Loss. We have no duty to provide coverage under this policy if you fail to comply with these duties.

(App. 76). Similarly, the Security First policy proposed amendment includes a statement virtually identical to American's:

> a. For any assignment of benefits after a loss:
>
> (1) You must disclose the assignment to us prior to the payment of any claim; and
>
> (2) You must comply with all of the Section I – Conditions, B. Duties After Loss. We have no duty to provide coverage under this policy if you fail to comply with these duties.

(App. 130). The ASI policy at issue here does not include this same language.

OIR must read the assignment of claim benefits provisions of these policies as a whole, commensurate with standard rules of contractual interpretation. *See Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013) ("In

construing insurance contracts, 'courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect,'" (quoting *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007)). These provisions in their entirety create the potential for different implications on coverage depending on the facts and circumstances surrounding an assignment and a claim. They are materially different in that regard from ASI's policy—and thus, the OIR's consideration of the other companies' policies is inapplicable to this case.

Moreover, according to OIR, "The withdrawal of any filing, including [the American filing] is equivalent to the filing never having been submitted." (App. 122.) Given that the American filing was withdrawn, any suggestions or conclusions by OIR on that filing are irrelevant and do not control this Court's analysis.

Finally, OIR's decision with respect to Security First is currently on appeal before the Fifth District Court of Appeal and will likely be overturned. *See Security First Ins. Co. v. Fla. Office of Ins. Reg.*, case no. 5D16-3425. And, while an agency decision on a particular case is entitled to deference from the appellate court when that decision is on direct appeal, *see BellSouth Telecomm., Inc. v. Johnson*, 708 So. 2d 594 (Fla. 1998), deference does not extend from one agency decision in one matter regarding one insurer, to another appeal in a different

matter, regarding an unrelated insurer. This is especially so because OIR is statutorily required to retroactively disapprove any submitted forms that do not meet the requirements of the code. Fla. Stat. § 627.411(1) (2016). It has not done so regarding ASI's policy. Moreover, as explained above, ASI's Assignment of Benefits Clause is clearly permissible under Florida law and does not violate any public policy; thus, OIR's determination regarding Security First's provision, to the extent it is even relevant, is erroneous as to ASI's provision.

In sum, the OIR documents Bio Logic included in its Appendix are not properly before this Court and should not be considered. If considered, the arguments relying thereon are both unpreserved and meritless.

D. Bio Logic failed to raise below any argument regarding the creation of personal property rights.

Bio Logic begins its Initial Brief by arguing for the first time on appeal that "insurance companies have recently tried to use policy language to create a new type of property that, when assigned, does not transfer the rights necessary to preserve the value of an AOB." (I.B. 10.) Bio Logic then weaves together a tenuous argument based on marginally-tangential principles of property law, using practically no cases from Florida—instead relying on Kentucky, Mississippi, the Third Circuit, Georgia, California, the District of New Jersey, and others even the Bankruptcy District of Oregon. Bio Logic's arguments asks this Court to travel the following distorted path: Restraints on transfer of personal property are generally

disfavored; real property is similar to personal property; a right to insurance proceeds should be a personal property right; and thus a restraint on alienability of insurance proceeds such as by assignment should require ASI to meet a "high burden." (I.B. 11-15.)

Bio Logic never raised this distorted argument before the trial court. Bio Logic never asserted below that a right to insurance proceeds is a property right, never asserted that rules regarding alienation of property rights apply to insurance proceeds, and never cited any of the authorities it relies upon now. Thus, none of these arguments may be considered because they were not preserved for appeal. *See Aills*, 29 So. 3d at 1108-09.[6]

Assuming *arguendo* that this argument preserved, it is based on a strained string of property arguments—and the cases Bio Logic cites involve the alienability of tangible property, not the assignment of rights to insurance proceeds. ASI's provision asserting that a mortgagee—who has an insurable interest in real property—agree to an assignment of its contractual benefits if that real property is damaged is far different than the situation in *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So. 2d 1166, 1166 (Fla. 3d DCA 1984), where the

[6] Bio Logic also argues in its Initial Brief that ASI "attempted to create a bastardized version of an AOB that gives another the power to 'arbitrarily, capriciously, and unreasonably withhold its consent to transfer.'" (I.B. 13-15.) (quoting *Aquarian Found., Inc. v. Sholom House, Inc.*, 448 So. 2d 1166 (Fla. 3d DCA 1984)). This argument was never raised before the trial court; thus, it cannot be raised now for the first time on appeal, either.

Association gave *itself* the right to withhold consent transfer of property ownership. *Aquarian* is, at best, consistent with cases in which an insurance policy required the *insurer's* right to consent—an issue not found in the policy here. Meanwhile, to the extent the *dissent* in *Metro. Dade County v. Sunlink Corp*, 642 So. 2d 551 (Fla. 3d DCA 1994); and the *New York trial court order* in *Celauro v. 4C Foods Corp*, 958 N.Y.S.2d 644 (Sup. Ct.), could have some persuasive value, neither case involves insurance policies or assignment of contractual rights.

Accordingly, Bio Logic's unpreserved argument fails as a matter of law.

III. Bio Logic's appeal is technically premature. If so, consistent with this Court's precedent, the parties should be given leave to obtain a final order on Bio Logic's still pending motion for final judgment.

Bio Logic is appealing an order granting ASI's motion to dismiss and an order denying Bio Logic's motion seeking reconsideration and/or rehearing of that order. Neither order has language of finality. Recognizing this fact, Bio Logic filed a motion for entry of final judgment. (R. 691-92.) In that motion, Bio Logic asserts these two orders "do not include language of finality necessary for an appeal to be taken." (R. 692.) Specifically, Bio Logic states in its motion that:

> No final judgment has been filed in this case, and the Court's orders do not include language of finality necessary for an appeal to be taken. *See Daniell v. Toney*, 36 So. 3d 665 (Fla. 2d DCA 2010); *see also Great Am. Ins. Co. v. Jalaram*, 927 So. 2d 170, 171 (Fla. 1st DCA 2006) (order not final where it did not "enter judgment or otherwise provide unequivocal language of finality clearly indicating the trial court's intention to bring an end to the judicial labor below."). Accordingly, Bio Logic moves this Court for a final order dismissing

> the complaint with prejudice and entering judgment for the defendant."

(R. 692). Notwithstanding this statement, Bio Logic elected to file its Notice of Appeal before an obtaining an order with sufficient language of finality.

ASI believes that an order granting a motion to dismiss without any language of finality is nonfinal and nonappealable in and of itself. *See Hoffman v. Hall*, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002). Therefore, this appeal is technically premature.

Should this appeal be deemed premature, the procedure this Court adopted in *Better Gov't Ass'n of Sarasota Cty., Inc. v. State*, 802 So. 2d 414 (Fla. 2d DCA 2001) should be followed. Instead of dismissing this appeal, this Court should provide the parties additional time to obtain a final order on Bio Logic's motion for final judgment. *See also*, Rule 9.110(*l*), Fla. R. App. P.; Philip J. Padvano, *Florida Appellate Practice*, § 2:3 (2016 ed.). There is nothing pending before the trial court other than Bio Logic's motion for final judgment. The clerk below has transmitted the entire record, this Court's clerk has expended much time, and only a reply brief is needed for this Court to decide the significant issue of law. On this basis, ASI respectfully requests that this appeal not be dismissed so that the important issues before the Court may be timely decided.

CONCLUSION

For the foregoing reasons, Appellee, ASI Preferred Insurance Corporation respectfully requests this Court affirm the judgment of the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document is being served on March 3, 2017 via an automatic email generated by the Florida Courts E-Filing Portal to the following:

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I HEREBY CERTIFY that this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

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