

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

AUTO GLASS AMERICA LLC,
a/a/o Donald Grimme,

CASE NO. 2017-CV-64-A-O
Lower Case No. 2016-SC-5428-O

Appellant,

v.

ESURANCE PROPERTY AND
CASUALTY INSURANCE
COMPANY,

Appellee.

Appeal from the Order of
Faye L. Allen,
Orange County Judge.

Chad A. Barr, Esq. &
Heather M. Kolinsky, Esq.,
Attorneys for Appellant.

Kyle Maxson, Esq. &
Benjamin S. Thomas, Esq.,
Attorneys for Appellee.

Before ROCHE, SCHREIBER, BLECHMAN, JJ.

PER CURIAM.¹

The Appellant, Auto Glass America, appeals from the trial court’s “Order on Motion to Dismiss and/or Abate and Demand for Appraisal and Motion to Dismiss Count II” entered on April 27, 2017. This Court determines that it does not have jurisdiction to consider Appellant’s claims as an appeal from a non-final order. *See Shell v. Foulkes*, 19 So. 3d 438 (Fla. 4th DCA 2009) (finding a lack of jurisdiction under the appellate rules and general law for circuit courts to review non-final orders). The order in question is clearly non-final because it does not dismiss the entire

¹ We dispense with oral argument. Fla. R. App. P. 9.320.

complaint and merely abates part of the action for a period of 120 days in order for the parties to engage in a contractual appraisal process. Further judicial labor is contemplated by the trial court's order. *See McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992).

However, this court may construe an improper appeal as a petition for writ of certiorari. Fla. R. App. P. 9.040(c). In order to grant certiorari to review an interlocutory order the Appellant must establish three elements: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be correct on post-judgment appeal." *Citizens Property Ins. Corp. v. San Perdid Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012). This analysis necessarily begins with the jurisdictional requirement that the last two elements (lasting material injury and lack of remedy via plenary appeal) are established. *Id.*

The primary harm suggested by Appellant is the added time and expense of engaging in what it views as an unnecessary and inappropriate appraisal. However, Florida law is clear that being required to "expend time and money on an unnecessary arbitration" does not rise to the level of irreparable harm to "justify certiorari review." *Zabawa v. Penna*, 868 So. 2d 1292, 1293 (Fla. 5th DCA 2004). *See also Mariner Health Care v. Griffith*, 898 So. 2d 982, 984 (Fla. 5th DCA 2005) ("[T]he inconvenience and expense of litigation after an allegedly incorrect interlocutory ruling does not constitute the kind of material harm or irreparable injury for which certiorari review is available"). The trial court's decision to abate the first count of the complaint and enforce the contractual appraisal provision does not result in irreparable harm for which plenary review is inadequate.

Accordingly, it is not necessary to determine whether the trial court's decision to require appraisal involved a departure from the essential requirements of the law, as any error would be properly reviewed on plenary appeal. Appellant's arguments regarding the trial court's decision

to invoke the appraisal clause, not to hold an evidentiary hearing or allow limited discovery, and to reject the prohibitive costs argument are akin to allegations of departure from the essential requirements of law. Even if the trial court erred in these respects, the decision is properly considered on plenary appeal. *See Citizens Prop. Ins. Corp.*, 104 So. 3d at 351.

Appellant also challenges the trial court's dismissal of the second count of its complaint, requesting declaratory relief. As discussed above, the case is ongoing. Appellant may yet prevail in some aspect of the case rendering dismissal of the action for declaratory relief moot. Accordingly, the trial court's dismissal of the second count of the complaint does not result in irreparable harm for which plenary appeal is inadequate and substantive review of the trial court's decision is premature. *Id.*

We determine that this case involves no harm which could not be corrected in a post-judgment appeal. Accordingly, Appellant's construed petition for writ of certiorari is **DENIED**. Appellant's Motion for Award of Appellate Attorneys' Fees and Costs, filed January 29, 2018 is also **DENIED**.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida this ___ day of _____, 2020.

RENEE A. ROCHE
Presiding Circuit Judge

SCHREIBER and BLECHMAN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Opinion has been furnished on this ____ day of _____ 2020, to **Judge Faye L. Allen**, 425 N. Orange Avenue, Orlando, FL 32801; **Kyle Maxson, Esq. & Benjamin S. Thomas, Esq.**, Martinez Denbo, LLC, 2935 First Ave. N., Second Floor, St. Petersburg, FL 33713 at ServiceSTP@CivilLit.com; **Chad A. Barr, Esq. & Heather M. Kolinsky, Esq.**, Law Office of Chad A. Barr, P.A., 986 Douglas Ave., Suite 100, Altamonte Springs, FL 32714 at service@chadbarrlaw.com.

Judicial Assistant