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

Beeline Petro, Inc., and **Nicholas & Bell, P.A.**,

Petitioners,

v.

HSA Golden, Inc.,

Respondent.
_____/

CASE NO.: 2016-CA-2977-O

Petition for Writ of Certiorari from an order denying a motion to dismiss, County Court in and for Orange County, Florida, Andrew L. Cameron, County Court Judge.

Daniel A. Nicholas, Esq., for Petitioners.

William J. Denius, Esq., for Respondent.

Before MUNYON, G. ADAMS, and TYNAN, J.J.

PER CURIAM.

Petitioners Beeline Petro, Inc., and Nicholas & Bell, P.A., seek certiorari review of the trial court's order denying their motion to dismiss and staying the case pending mediation. This Court has jurisdiction. Art. V, § 5(b), Fla. Const. (circuit courts have the power to issue writs of certiorari); *Kissimmee Health Care Assocs. v. Garcia*, 76 So. 3d 1107, 1108 n.1 (Fla. 5th DCA 2011) (certiorari is available to review denials of motions to dismiss based on lack of compliance with conditions precedent). Because the contract between the parties did not make mediation a condition precedent to filing suit, the trial court did not depart from the essential requirements of the law in denying the motion to dismiss.

Respondent HSA Golden, Inc., filed a complaint against Petitioners for their alleged failure to pay it for professional services. Petitioners moved to dismiss, arguing, among other things, that the contract between HSA Golden and Beeline Petro mandates that the parties engage in mediation before suing each other. The trial court found that the contract did require the parties to mediate the dispute before commencing litigation, but denied the motion to dismiss and stayed the action pending mediation. The order set forth deadlines for the parties to select a mediator, set the mediation, and have the mediation.

Petitioners now seek certiorari review of that order, arguing that their motion should have been granted and the case dismissed, rather than stayed. "A party seeking certiorari review of an interlocutory order must show that (1) the order departed from the essential requirements of the law, and (2) the harm caused by the error will not be correctable in a post-judgment appeal." *Kissimmee Health Care Assocs. v. Garcia*, 76 So. 3d at 1108.

Petitioners argue that mediation was a condition precedent to litigation, and, since it was not accomplished before Respondent sued them, the action should be dismissed, not stayed. Respondent asserts that the contract does not state that mediation is a condition precedent to filing suit, and thus the trial court did not depart from the essential requirements of the law in denying the motion to dismiss.

The court in *Reilly v. Reilly*, 94 So. 3d 693, 697 (Fla. 4th DCA 2012), discussed what constitutes a condition precedent in a contract. In that case, the marital settlement agreement stated, "The Husband agrees to pay the Wife $15,177 from his share of the closing proceeds as and for equitable distribution." *Id.* at 696. The marital home was sold without generating any proceeds, and the former husband argued that the sale generating proceeds was a condition precedent to the $15,177 payment. *Id.* The Fourth District noted that generally, conditions precedent are not

favored. *Id.* at 697. Provisions will not be construed as conditions precedent unless the plain, unambiguous language requires the provision to be construed that way or it is necessarily implied. *Id.* Typically, words such as "if," "provided that," or "on condition that," imply an intent for a provision to be a condition precedent. *Id.* If such words are missing, then whether a provision is a condition precedent should be determined by reviewing the contract as a whole and the parties' intent. *Id.* The court noted that the marital settlement agreement did not contain any phrases of conditional performance and that the former husband agreed to pay the amount as equitable distribution. *Id.* The amount was specifically labelled as equitable distribution, and the agreement was entered into before the home was sold, so the former husband and former wife did not know what the proceeds from its sale would be, if any. *Id.* Additionally, the agreement did not state what would happen if the proceeds from the sale were not enough for the former husband to pay the former wife. *Id.* After reviewing the contract as a whole, the court concluded that the sale generating proceeds was not a condition precedent to the payment. *Id. See also Covelli Family, L.P. v. ABG5, L.L.C.*, 977 So. 2d 749, 752-53 (Fla. 4th DCA 2008) (provision was not a condition precedent where lease did not contain express conditional language).

The provision in this case states:

> In an effort to resolve conflicts or disputes that may arise during the execution of the project or following the completion of the project, CLIENT and CONSULTANT agree that disputes between them arising out of or relating to this Agreement or the project shall be submitted to nonbinding mediation, unless: (a) the dispute involves non-payment of CONSULTANT's invoices by CLIENT for sums not exceeding $5,000.00, exclusive of costs, interest, and attorney's fees; or (b) the parties mutually agree otherwise. In the event of (a), the dispute will be resolved in the Small Claims Court of Orange County, Florida.

> CLIENT and CONSULTANT further agree to include a similar dispute resolution provision in all agreements with independent contractors and consultants retained for the project and to require all independent contractors and consultants also to include a similar mediation provision in all agreements with their subcontractors, subconsultants, and suppliers, thereby providing for mediation as the primary method for dispute resolution between the parties to all these agreements.

(Ex. A to Mot. Dismiss, Attachment 1-4 ¶ 16.)

Like the provision in *Reilly*, the provision here does not contain any conditional phrases. Although it does state that disputes "shall" be mediated, it does not state when the mediation must take place. It is therefore not plain and unambiguous that, under the contract, mediation must occur before filing suit.

Kissimmee Health Care Associates v. Garcia, 76 So. 3d 1107, 1108 (Fla. 5th DCA 2011), demonstrates that mediation as a condition precedent cannot be implied from the parties' contract, either. In *Kissimmee Health Care Associates*, the trial court denied the motion to dismiss the complaint that was based on violations of Florida's nursing home residents' rights. The defendant argued that the plaintiff "had not met the statutory condition precedent of presuit mediation." *Id.* The statute stated:

> "Within 30 days after the claimant's receipt of the defendant's response to the claim, the parties or their designated representatives shall meet in mediation to discuss the issues of liability and damages.... At the conclusion of mediation, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit."

Id. at 1109 (quoting § 400.0233(11), Fla. Stat. (2010)). The court noted that the statute did not "expressly state that mediation is a condition precedent to filing suit." *Id.* Nor did it state "which party must initiate mediation." *Id.* Other provisions of the statute did "set forth conditions that are clearly labeled as conditions precedent to filing suit." *Id.* Thus, the Fifth District held that there was no departure from the essential requirements of the law when the trial court denied the motion to dismiss based on the plaintiff's failure to conduct presuit mediation. *Id.*

Petitioners argue that *Kissimmee Health Care* should not be followed because the trial court here found that the language was clear that the parties must mediate their dispute before litigation and there is no issue regarding whether the term is unclear or who had to initiate litigation in this case. Petitioners also argue that the trial court's determination that mediation is a condition precedent to litigation is not subject to appellate review in this proceeding.

Petitioners' arguments are unavailing. The issue before the *Kissimmee Health Care* court was whether the motion to dismiss should have been granted because the plaintiff and defendant did not mediate before the plaintiff filed suit. Here, the issue is the same: whether the motion to dismiss should have been granted because the Petitioners and Respondent did not mediate before the Respondent filed suit. The Fifth District did not state that it was unclear whether mediation was a condition precedent; instead, it compared the provision to other parts of the statute that clearly set forth conditions precedent. *Kissimmee Health Care Associates*, 76 So. 3d at 1109.

The tipsy coachman doctrine nullifies Petitioners' argument that the part of the trial court's order finding the mediation provision to be a condition precedent is not subject to appeal. Under the tipsy coachman doctrine, if the trial court came to the right result, but for the wrong reason, the appellate court will uphold the trial court's order if there is a basis in the record to do so. *Robertson v. State*, 829 So. 2d 901 (Fla. 2002). Even if the trial court incorrectly found that the

mediation provision was a condition precedent, its order denying the motion to dismiss was not a departure from the essential requirements of the law and will be upheld.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Certiorari is **DENIED**.
2. "Respondent's Motion for Award of Attorneys' Fees," filed on April 22, 2016, is **GRANTED**, contingent on Respondent ultimately obtaining a judgment in its favor, and the assessment of those fees is **REMANDED** to the trial court.
3. Petitioners' motion for an award of attorney fees, filed on April 28, 2016, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24th day of October, 2016.

/S/
LISA T. MUNYON
Presiding Circuit Judge

G. ADAMS and TYNAN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Andrew L. Cameron, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **Daniel A. Nicholas, Esq.**, SunTrust Financial Centre, 401 E. Jackson St., Suite 1825, Tampa, FL 33602; and **William J. Denius, Esq.**, Killgore, Pearlman, Stamp, Ornstein & Squires, P.A., 2 S. Orange Ave., 5th Floor, P.O. Box 1913, Orlando, FL 32802-1913; on this 24th day of October, 2016.

/S/
Judicial Assistant