County Civil Court: CIVIL PROCEDURE—Dismissal. The record demonstrates the complaint was sufficient to withstand a motion to dismiss at this stage in the proceedings. Reversed and remanded. *Baycraft Restoration Corp. a/a/o Suzanne Newton v. Safeway Property Ins. Co.*, No. 13-AP-0009-ES (Fla. 6th Cir. App. Ct. March 11, 2015).

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

BAYCRAFT RESTORATION CORPORATION a/a/o SUZANNE NEWTON,
Appellant,

v.

SAFEWAY PROPERTY INSURANCE COMPANY,
Appellee.
_____/

UCN: 512013AP0009APAXES
Appeal No: 2013-AP-9-ES
L.T. No: 2013-CC-0048-ES

Motion for Rehearing of Appeal from Final Judgment,
Pasco County Court,
Honorable William G. Sestak,

Julie E. Bauman, Esquire,
Guy H. Gilbert, Esquire,
Susan W. Fox, Esquire,
for Appellant,

Kimberly A. Salmon, Esquire,
Andrew A. Labbe, Esquire,
for Appellee.

ORDER AND OPINION ON REHEARING

This matter is before the Court on consideration of Appellee's Motion for Rehearing of the Order and Opinion of this Court dated January 5, 2015, and Appellant's Motion for Rehearing as to Attorney's Fees. This Court, acting in its appellate capacity, previously reversed the order of the Pasco County Court dismissing Appellant's complaint and remanded the cause for further proceedings.

"A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding." Fla. R. App. P. 9.330(a). "Motions for rehearing are strictly limited to calling an appellate court's attention—without argument—to something the appellate court has overlooked or misapprehended." *Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004). The motion for rehearing is not a proper way to challenge the court's findings or to continue advocacy of issued previously considered and ruled upon by the court. *See Payne v. Ivey*, 93 So. 143 (Fla. 1922); *Cleveland*, 887 So. 2d at 364; *Parker v. Baker*, 499 So. 2d 843 (Fla. 2d DCA 1986).

Appellee's Motion for Rehearing attempts to argue issues previously considered and ruled on by this Court. Such arguments are not proper in a Motion for Rehearing. The Motion fails to demonstrate that any issues raised in the Motion were misapprehended or overlooked by the Court. Rather, the Motion takes issue with the Court's findings in the Opinion. Appellee's Motion is therefore denied.

Appellant's Motion requests rehearing as to the issue of attorney's fees only. The Court's January 5, 2015, Order and Opinion denied Appellant's request for attorney's fees as the prevailing party as premature, because such an award would be contingent on Appellant prevailing in further proceedings in the trial court below. Appellant requests the Court modify the order to award appellate attorney's fees contingent on any success Appellant may have on the merits in the trial court below. The previous Order of the Court did not deny appellate attorney's fees, but intended to leave such an award for future determination, dependent on the outcome of further proceedings in the trial court. The Court therefore grants Appellant's Motion for Rehearing as to Attorney's Fees, which are awarded contingent on Appellant's prevailing on the merits in the trial court below.

It is hereby ORDERED that Appellee's Motion for Rehearing is DENIED.

It is further ORDERED that Appellant's Motion for Rehearing as to Attorney's Fees is GRANTED. The portion of the January 5, 2015, Order and Opinion of this Court denying attorney's fees as premature is VACATED, and attorney's fees are awarded contingent on a determination that Appellant is the prevailing party in the trial court below. The January 5, 2015, Order and Opinion is hereby withdrawn and the following Order and Opinion substituted therefor.

ORDER AND OPINION

We find it was error to grant the motion to dismiss the complaint for failure to state a claim on which relief may be granted, based on the grounds alleged in the Motion. The order granting the motion to dismiss is reversed and the cause is remanded for further proceedings consistent with this Opinion.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on appeal of an order dismissing the cause with prejudice for failure to state a claim and entering final judgment in favor of Appellee. Appellant filed suit for breach of contract against Appellee based on an assignment by Suzanne Newton, the insured under a home owner's insurance policy with Appellee, of post-loss benefits allegedly owed pursuant to the policy. The assignment purports to transfer Newton's right to payment for a claim of water damage pursuant to the policy in exchange for Appellant's services. Appellee paid a portion of the invoice submitted by Appellant for services rendered, which was less than the total amount Appellant claims was owed. Appellant then filed a claim for breach of contract, attaching the assignment to the complaint. Appellee filed a motion to dismiss, claiming the assignment was invalid and unenforceable under both the terms of the insurance policy and Florida law. A hearing was held after which the trial court granted Appellee's motion to dismiss. Appellant filed a timely notice of appeal in this Court.

STANDARD OF REVIEW

When "reviewing the trial court's interpretation and application of Florida law, the standard of review on appeal is de novo." *Pichowski v. Florida Gas. Transmission Co.*,

857 So. 2d 219, 220 (Fla. 2d DCA 2003). An order granting a motion to dismiss for failure to state a claim is reviewed de novo. *Swope Rodante, P.A. v. Harmon*, 85 So. 3d 508, 509 (Fla. 2d DCA 2012). "A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." *Roberts v. Children's Med. Servs*., 751 So. 2d 672, 673 (Fla. 2d DCA 2000). A complaint should not be dismissed on this basis unless the movant can demonstrate there is no set of facts that would support a claim for relief. *Meadows Cmty. Ass'n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006).

LAW AND ANALYSIS

Appellant claims it provided services to the insured in exchange for an assignment which purports to assign and transfer "any and all insurance rights, benefits, and causes of action" under the property insurance policy to Appellant. The assignment provides that it is made "in consideration of [Appellant's] agreement to perform services and supply materials and otherwise perform its obligations under this contract, including not requiring full payment at the time of service." Appellant performed what it characterizes as necessary emergency remediation services, and submitted an invoice, along with the document purporting to be an assignment, to Appellee. The complaint alleges Appellee paid a portion of this amount to Appellant which was less than the amount of the invoice. Appellant then filed an action for breach of contract for non-payment, based on the assignment.

Appellant contends Florida law supports assignments by an insured of the right to payment of post-loss claims pursuant to an insurance policy. *See Continental Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, n.7 (Fla. 2008); *West Florida Grocery v. Teutonia Fire Ins. Co.*, 77 So. 209 (Fla. 1917); *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190 (Fla. 3d DCA 2012). "Florida law is clear that an insured can assign rights to an insurance policy even in the presence of an anti-assignment clause if the assignment occurs after the loss." *Erickson's Drying Systems, Inc. v. QBE Ins. Corp.*, not reported in F. Supp. 2d, 2012 WL 469746, at *2 (M.D. Fla. 2012). *See Better Constr., Inc. v. Nat'l Union Fire Ins.*, 651 So. 2d 141 (Fla. 3d DCA 1995); *Gisela Inv., N.V. v. Liberty Mutual*

Ins. Co., 452 So. 2d 1056 (Fla. 3d DCA 1984). *See also NextGen Restoration, Inc. v. Citizens Property Ins. Corp.*, 126 So. 3d 1255 (Fla. 2d DCA 2013).

Appellant asserts the right to maintain suit for payment of post-loss insurance benefits pursuant to the policy, based on a valid assignment. *See Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.*, 969 So. 2d 962, 968 (Fla. 2007). Appellant maintains this has long been a practice of contractors performing repairs for customers with homeowner's insurance policies, which allows a homeowner who may lack immediate funding for repairs, or who may require services in emergency situations to prevent further damage, to obtain services by ensuring a contractor may rely on insurance proceeds for payment. Appellant maintains that assignments in favor of service providers of post-loss benefits are a common and valid means of securing payment for services, citing *State Farm Fla. Ins. Co. v. Unlimited Restoration Specialists, Inc.*, 84 So. 3d 390 (Fla. 5th DCA 2012). *See Aldana v. Colonial Palms Plaza, Ltd.*, 591 So. 2d 953, 955 (Fla. 3d DCA 1991).

Appellant claims the provisions of Florida law cited in the Motion to Dismiss, including § 626.854, Fla. Stat. (prohibiting adjustment of claims on behalf of an insured by a licensed contractor); § 713.32 (addressing mechanic's liens); and § 627.405 (addressing the existence of an insurable interest at the time of the loss), either are not applicable in this case or do not demonstrate that dismissal is warranted at this stage.

Appellant states it was not required to attach the insurance policy to the complaint, based on the exception to the general rule for pleadings that an assignee is not required to attach an insurance policy to a complaint if the complaint alleges the policy is in the exclusive possession of others and would be produced by discovery.[1] *See Parkway Gen. Hosp., Inc. v. Allstate Ins. Co.*, 393 So. 2d 1171 (Fla. 3d DCA 1981). Although Appellant was not required to attach the policy to the complaint, it was error to dismiss the claim if the dismissal was based on a policy that was not properly within the trial court's record at this stage in the proceedings, when the court may only look to the

[1] Appellee attempts to argue that dismissal is warranted by Appellant's failure to attach the insurance policy to the complaint, while at the same time maintaining that the policy is appropriately a part of the court's record.

four corners of the complaint.[2] When considering "a motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff," and "the trial court is limited to consideration of the allegations contained within the four corners of the complaint." *Swope Rodante, P.A.*, 85 So. 3d at 509. *See NextGen Restoration, Inc.*, 126 So. 3d 1255. The "distinction between a motion to dismiss and a motion for summary judgment" is clear, and "[a] motion to dismiss may not act as a substitute for summary judgment." *Reyes ex rel. Barcenas v. Roush*, 99 So. 3d 586, 591 n.5 (Fla. 2d DCA 2012). *See Zarra v. Burke*, 20 So. 3d 191, 191-92 (Fla. 2d DCA 2010).

Appellee acknowledges it tendered payment to Appellant in an amount that was less than Appellant's invoice.[3] Appellee states the only document submitted in support of Appellant's allegations in the complaint was the assignment from the insured, and because Appellant did not attach the invoice or the insurance policy to the complaint, there was nothing within the four corners of the complaint to suggest Appellant is entitled to more than what was paid. Appellee challenges the validity of the assignment on many grounds. We find the arguments as to the validity of the assignment or a dispute as to the right or interest assigned, are not appropriate for resolution at this stage in the proceedings, and the complaint is sufficient on its face to survive a motion to dismiss.

In *NextGen Restoration, Inc.*, the Second District Court of Appeals reversed a trial court's order because it "resolved the case on an issue that was not raised in the motion to dismiss *and could not have been resolved on this record even if it had been raised*." 126 So. 3d at 1256 (emphasis added). The Court found the insurance company "was asking the trial court to grant summary judgment in its favor based on the theory

[2] Appellant states that additional documents included in Appellee's appendix submitted on appeal are not properly a part of the record before this Court, and that Appellee may have misrepresented the law to the trial court, or relied on documents during proceedings below not appropriately included in the record.

[3] Appellant claims the trial court should have given leave to amend the complaint. *See Reyes ex rel. Barcenas v. Roush*, 99 So. 3d 586, 590 (Fla. 2d DCA 2012) ("at this stage of the proceeding, public policy favors the liberal amendment of pleadings). The complaint alleges partial payment of Appellant's claim after the invoice was submitted, which indicated acceptance of Appellant as an assignee of the insured or waiver of this issue. *See AMC/Jeep of Vero Beach, Inc. v. Funston*, 403 So. 2d 602 (Fla. 4th DCA 1981); *All Ways Reliable Bldg. Maint., Inc. v. Moore*, 261 So. 2d 131 (Fla. 1972); *Progressive Ins. Co. v. McGrath Com.Chiro.*, 913 So. 2d 1281 (Fla. 2d DCA 2005).

briefly identified in the third affirmative defense contained in its answer," which relied on the insurance contract which was not included in the record. *Id.* The Court further expressed "serious doubts that the anti-assignment clause of the insurance contract bars the assignment attached to the complaint," but the Court could not consider the contract as it was not in the record. *See id.*

Although it was error to dismiss the cause at this stage in the proceedings and we do not address the merits of the parties' claims on appeal, we recognize, as the Court did in *NextGen*, that other courts have permitted assignees to bring actions involving "an assignment of benefits or proceeds owing by virtue of a claim arising under the policy." *See id.* at 1256-57 (citing *Miami–Dade Cnty. v. Associated Aviation Underwriters*, 983 So. 2d 618 (Fla. 3d DCA 2008); *State Farm Fla. Ins. Co. v. Unlimited Restoration Specialists, Inc.*, 84 So. 3d 390 (Fla. 5th DCA 2012).

Appellee acknowledges Florida law that a prohibition in a policy against assignment may not prevent assignment of the right to payment of post-loss benefits owed pursuant to a policy, but claims that such a term may be used to prohibit assignment of duties or obligations under the contract. Appellee characterizes the complaint as an attempt to perform a non-assignable post-loss duty placed on the insureds to adjust loss with the company. Appellee claims it was not obligated to make any payments pursuant to the policy because the insured failed to adjust loss with the company prior to the assignment, which Appellee claims was a condition precedent to payment of benefits, despite having admitted partial payment was made to Appellants. These are issues for consideration by the trial court and are not appropriate for this Court to consider. However, it does not appear from the record that these claims are supported by existing Florida law.

We find Appellant sufficiently stated a claim to demonstrate possible relief and survive a motion to dismiss. Any defense based on the alleged provisions of the insurance policy is an invalid basis for dismissal because the policy was not a part of the record. Appellee's argument that the absence of the policy from the record is somehow a basis for dismissal is not well taken. Additional arguments raised by Appellee in the Motion did not warrant dismissal at this stage in the proceedings.

MOTION FOR ATTORNEY'S FEES

Appellant seeks appellate attorney's fees pursuant to § 627.428, Fla. Stat., as the assignee of the insured, claiming that such fees would be available to the insured in this case. *See Allstate Ins. Co. v. Regar*, 942 So. 2d 969, 972 (Fla. 2d DCA 2006); *All Ways Reliable Bldg. Maint., Inc. v. Moore*, 261 So. 2d 131, 132 (Fla. 1972). Appellate attorney's fees may be awarded in the event Appellant succeeds on the merits in proceedings before the trial court below. Therefore the Motion for Attorney's Fees is granted contingent on a finding by the trial court that Appellant is the prevailing party in proceedings below.

CONCLUSION

Appellant's complaint was sufficient to withstand the Motion to Dismiss. The arguments raised by Appellee in the Motion did not warrant dismissal at this stage in the proceedings. The order is therefore reversed and remanded for further proceedings.

It is ORDERED AND ADJUDGED that the cause is hereby REVERSED AND REMANDED for further proceedings consistent with this Opinion.

It is further ORDERED that Appellant's Motion for Attorney's fees is GRANTED conditioned on a determination by the trial court that Appellant is the prevailing party in further proceedings below.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 11 day of March, 2015.

Original order entered on March 11, 2015, by Circuit Judges Stanley R. Mills, Daniel D. Diskey and Linda Babb.