[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-12518

BAER'S FURNITURE CO., INC.,

Plaintiff-Appellant,

versus

COMCAST CABLE COMMUNICATIONS, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:20-cv-61815-AMC

Before JORDAN, LAGOA, and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

This lawsuit arises out of a dispute between Baer's Furniture Co., Inc. ("Baer's Furniture") and Comcast Cable Communications Management, LLC ("Comcast"),[1] over Comcast's distribution of Baer's Furniture ads on cable television. These ads did not garner the viewership Baer's Furniture hoped for, so Baer's Furniture complained, and Comcast agreed to show Baer's Furniture ads for free to make up the shortfall. Before the shortfall was made up, Comcast decided to stop running the free ads. Baer's Furniture sued for breach of contract and fraud in the inducement. The district court granted summary judgment to Comcast, finding that Baer's Furniture's lawsuit was untimely under a limitation clause found in a contract that the parties had previously agreed to. After careful review, we affirm.

I.

A.

Baer's Furniture is a family-owned furniture store based in Florida and headed by Jerry Baer. Comcast is a media and technology company offering cable television programming and advertising. Baer's Furniture bought advertising slots from Comcast from 2002 to 2019 in four geographic market areas: Miami/Fort

[1] The parties and the district court refer to Comcast as "Comcast Cable Communications Management, LLC," despite the case caption referring to "Comcast Cable Communications, LLC."

Lauderdale, West Palm Beach, Naples/Fort Myers, and Sarasota. Toward the end of each year, Baer's Furniture would negotiate sample schedules (also known as "insertion orders" or "IOs") for each market area for the following year. The schedules specified when and where Baer's Furniture's ads would run, and they set forth ratings points estimates for each advertising slot based on Baer's Furniture's target demographic: women aged 35 to 64. These ratings points reflected the percentage of the target demographic expected to view a given ad.

According to Comcast, Baer's Furniture had a "cost per spot" agreement: they selected specific advertising spots and paid for the number of ads that were aired in the spots they selected. This type of contract does not guarantee ratings. Though Comcast may offer ratings estimates in its schedules, the customer is free to decide if it thinks that spot will overperform or underperform those estimates. Baer's Furniture, on the other hand, believed it had a "cost per point" or "ratings" agreement under which Baer's Furniture paid for certain ratings, and Comcast was contractually obliged to make up any ratings shortfall.

Despite the parties' long-running relationship, they point to only one document specifying any conditions to that relationship. This agreement is titled "Advertiser Terms and Conditions." It contains a cover sheet followed by seven pages of terms. The cover sheet was signed in November 2016 by Baer and Fran Perpich, Comcast's regional account executive for the West Florida market. It includes this line: "Subject: RE: BAER'S FURNITURE

COMPANY ANNUAL 2017 AGREEMENT-WF - Comcast Spotlight Documents Require Your Att."

On the following page, the Advertiser Terms and Conditions state:

> The following are the terms and conditions (the "Terms and Conditions") on which Comcast Spotlight, LP ("Comcast") or Comcast Affiliates (defined below) will distribute advertisements ("Ad(s)") via linear spot cable ("Spot Cable") . . . pursuant to one or more insertion orders (each, an "IO") that the parties may negotiate from time-to-time. As used herein, the term "Contract" shall mean these Terms and Conditions, together with any IO.[2]

The Terms explain that an IO specifies the contours of each ad campaign: the type and quantity of ads being run, rates, start and end dates, and the networks on which the ads will appear.

The Terms also say that they are governed by New York state law and that Baer's Furniture must bring any action "arising out of or relating to the transactions under this Contract" within a 120-day limitation period. They also contain an integration and modification clause, which reads this way:

> This Contract contains the entire agreement between the parties relating to the subject matter hereof, and no change or modification of any of its provisions shall be effective unless made in writing and signed by

[2] We use "Contract" in this opinion to mean the same.

> both parties, except that no change(s) or modification(s) can be made in any IO or advertising schedule under any circumstances.

B.

In late 2018, Baer's Furniture began to suspect that their ads were not receiving the audience ratings they were expecting. Baer's Furniture requested a summary of the ads that had run over the preceding two years, alongside the ratings for each one (called a "post"). Comcast provided the posts, which showed a drastic shortfall in the number of ratings points Baer's Furniture had expected to receive from its ads in Miami/Fort Lauderdale and West Palm Beach. Baer's Furniture complained.

In November 2018, Comcast agreed to make up the shortfall. Specifically, Comcast's local sales manager for Miami/Fort Lauderdale, Michael Elberg, said in an email to Baer that Comcast would "make up points for Baer's [Furniture] from 2018" by "running and monitoring [an under delivery] base schedule in each market in conjunction with Baer's [Furniture's] event/sale weeks for 2019." Comcast would "endeavor" to hit a certain number of points in the Miami and West Palm Beach markets per week and would "look for additional inventory opportunities" each week. "Once we make up this difference," Elberg told Baer, "we can look at future schedules." Elberg agreed that Comcast would run these ads for free: "we feel it is best to first make up the points in [Miami] and [West Palm Beach] before we consider adding money from Baer's [Furniture] in 2019."

Later in November, Baer and Elberg met to discuss the shortfall issue. Elberg summarized the meeting in an email he sent to Baer, stating "we will be implementing the following plan" and laying out steps "to correct[] this situation." He said, among other things, that "[i]n 2019 we will run [under delivery] schedules in [West Palm Beach] and [Miami] that are coordinated with your advertising flight weeks," and gave target numbers of points per week that Comcast would "endeavor to achieve" in those markets. Elberg added that "[a]djustments to the schedule(s) will be made to ensure performance."

In December 2018, Comcast began running free ads for Baer's Furniture.

Comcast and Baer continued to discuss the plan to remedy the shortfall in the early months of the following year. In January 2019, Elberg promised "to ensure that the plan is implemented."

In February 2019, Comcast's Vice President and General Manager for Miami, Chris Oberholtzer, emailed Baer. He wrote: "To say that we are disappointed in our shortfall is an understatement. Given the complexities of the current media landscape and the inherent flaws in cable television ratings measurement it would be easy to shirk responsibility. We are not doing that. We will not do that. We appreciate your understanding and willingness to let us remedy this deficit." Attached to the email was a letter from Oberholtzer, saying:

> During the years of 2017 and 2018 our delivery of audience estimates has drastically under delivered. For

> the discussed time periods of broadcast 2017 and 2018, Comcast Spotlight has under delivered by 19,285 gross rating points. We will endeavor to run Baer's [Furniture] advertising moving forward at no charge until the audience short fall is made up. We understand there are many factors great and small that have contributed to this and take the matter very seriously. Again, you are a valued partner and we look forward [to] making good on our shortfall and putting this matter behind us.

In March 2019, Comcast's director of sales for Miami/Fort Lauderdale, Todd Weissman, told Baer:

> Mike [Elberg] and I are fully committed to burning of[f] the weight owed and getting back to our successful partnership. . . . Starting in April . . . , we will be coding your spots as "VIP" so that they have a much greater chance of clearing in the networks you covet, thus garnering you higher ratings and helping us get to a zero sum total much faster. We hope to show you the great results in weeks and months to come.

But in September 2019, Comcast backed off its initial November 2018 promise to "endeavor to achieve" certain benchmarks. Comcast's Vice President of Sales in Florida, Mark Runge, informed Baer that, "regarding under delivery from prior schedules, [Comcast] will not accept, run or steward previously executed campaigns." At this point, Comcast had made up 4,856 points of the shortfall, leaving 25,580 points remaining. Baer's Furniture's

expert opined that the remaining shortfall was worth around $936,040.

C.

Baer's Furniture sued Comcast in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, on August 3, 2020, 11 months after Comcast had informed Baer's Furniture that it would no longer run free ads to make up the shortfall. Comcast removed the case to the United States District Court for the Southern District of Florida, grounding jurisdiction in diversity. After the district court dismissed Baer's Furniture's complaint in part, Baer's Furniture filed a second amended complaint, the operative complaint for our purposes. The complaint alleged that Comcast breached their agreements concerning Miami/Fort Lauderdale and West Palm Beach for 2017 and 2018 (Counts I–IV); Comcast breached its promise to remedy the shortfall (the "Shortfall Agreement") (Count V); and Comcast fraudulently induced Baer's Furniture into entering different agreements, including those at issue in the breach-of-contract claims (Counts VI–VIII). Baer's Furniture sought compensatory damages, specific performance, and costs.

The parties filed cross-motions for summary judgment. Comcast sought summary judgment on all Counts, while Baer's Furniture sought summary judgment only as to Count V, the breach of the Shortfall Agreement. The district court granted Comcast's motion in full and denied Baer's Furniture's motion. The court concluded that the Terms and Conditions

unambiguously governed the parties' entire relationship, including the Shortfall Agreement and any related fraud claims. The court then found the Contract's 120-day limitation clause valid, and so determined that all of Baer's Furniture's claims were untimely. Specifically, Baer's Furniture was required to bring its claims by January 14, 2020 at the latest, but it did not initiate this action until August 3, 2020, about six-and-a-half months late.

In the alternative, the district court held that the Shortfall Agreement was not a valid, legally binding contract because Baer's Furniture had not provided any consideration for Comcast's promise to make up the shortfall, and because it was barred by the modification clause in the Terms and Conditions since none of the emails making up the Shortfall Agreement were signed. Also, in the alternative, the court held that the fraud claims were barred by the independent tort doctrine[3] because they could not be meaningfully distinguished from the contract claims. On these bases, the district court entered final summary judgment for Comcast on all counts.

[3] The independent tort doctrine reflects the "fundamental, long-standing common law principle that a plaintiff may not recover in tort for a contract dispute unless the tort is independent of any breach of contract." *Island Travel & Tours, Ltd. v. MYR Indep., Inc.*, 300 So. 3d 1236, 1239 (Fla. 3d DCA 2020).

Baer's Furniture timely appealed this judgment to our Court.[4]

II.

"We review *de novo* a district court's grant of summary judgment, applying the same legal standards as the district court." *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc). We "view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Id.* (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). Summary judgment is appropriate if the record evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Baer's Furniture concedes that it brought this action far outside of the contractual limitation period. Baer's Furniture also does not challenge the validity of that contractual limitation period on appeal and so we assume it to be valid for purposes of our analysis. The limitation clause mandates that Baer's Furniture bring any action arising out of or relating to the Contract within 120 days of the occurrence giving rise to the action. Baer's Furniture filed its initial complaint on August 3, 2020, ten-and-a-half months after Comcast notified Baer's Furniture that it would no longer honor its Shortfall Agreement on September 16, 2019 -- and six-and-a-half months too

[4] Baer's Furniture does not challenge on appeal the district court's entry of summary judgment for Comcast as to one fraud claim (Count VIII) with respect to an agreement governing Sarasota.

late. Baer's Furniture nevertheless argues that its claims were not governed by the limitation clause found in the Contract.

We proceed in three parts. First, we explain why Baer's Furniture remains bound by the Terms and Conditions, and that they cover the parties' entire agreement, regardless of geographic location. Second, we hold that the Terms also cover the Shortfall Agreement, and that the Shortfall Agreement did not comply with the Terms' modification clause. Finally, we determine that the two fraud claims on appeal are governed by the Terms' limitation clause and are therefore untimely.

A.

Baer's Furniture argues that (1) it is not bound by the Contract because there is no record evidence that Baer signed the Terms and Conditions, or, in the alternative, (2) the Terms and Conditions were intended only to cover West Florida, so any claims either arising out of or relating to disputes in other parts of Florida are timely. We disagree on both fronts and conclude that the Terms and Conditions govern the parties' entire agreement, making all claims for breach of the original Contract -- Counts I through IV -- untimely.

1.

Baer's Furniture argues that the district court erred in finding, as an undisputed fact, that Baer had signed the Terms and Conditions. Comcast filed a Statement of Undisputed Facts in support of its motion for summary judgment. The very first statement of undisputed fact is that "Jerry Baer signed the Advertiser Terms and

Condition[s] on November 11, 2016 on behalf of Plaintiff," which Comcast supported by reference to two exhibits (Exhibits A and B). Exhibit A is the Contract. The first page of that exhibit is a cover sheet generated by DocuSign, which shows Perpich's and Baer's signatures. The next seven pages are the Terms and Conditions. Exhibit B consists of excerpts from Baer's deposition transcript, in which Baer acknowledged his electronic signature on the Contract. Baer's Furniture unambiguously responded "undisputed" to this statement of fact.

Comcast therefore asserted that Baer had signed the Terms and Conditions, and supported this assertion with record evidence. Baer's Furniture did not dispute the assertion. In fact, it affirmatively acquiesced to it. The district court did not err in finding, as an undisputed fact, that Baer had signed the Terms and Conditions. *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1044 (11th Cir. 2014) ("[Defendant] did not dispute material facts before the district court[, so] . . . the district court was left with no material facts in dispute, and thus did not err in granting [plaintiff] summary judgment . . . ."); *Harrison v. Culliver*, 746 F.3d 1288, 1302 n.22 (11th Cir. 2014) (noting that summary judgment to the defendant was proper on the basis of a given fact asserted by the defendant because the plaintiff "did not dispute this assertion and presented no evidence to the contrary").

Baer's Furniture suggests, however, that although Baer signed the cover sheet to the Terms and Conditions, he did not sign the Terms themselves. But that is not what Baer's Furniture

agreed to before the district court: it agreed that "Jerry Baer signed the Advertiser *Terms and Condition[s].*" And because Baer's Furniture made no argument before the district court that the Terms and Conditions were not part of the same document as the cover sheet Baer signed, it cannot be heard to make that argument for the first time on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (providing that issues raised for the first time on appeal will not be considered). Baer's Furniture argued in district court only that Baer did not recall signing the document, but that argument is of no moment because, in Florida, a party who signs a contract is generally bound by that contract even if he was not aware of what he had signed. *See Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344, 347–48 (Fla. 1977). In any event, any argument that the Terms and Conditions had no relation to the cover page is undermined by the header on the first page of the Terms, which states, "Parties agreed to: Fran Perpich, Jerry Baer," the very same parties whose signatures appear on the cover page.

Baer's Furniture argues that the district court still erred in accepting Comcast's statement of undisputed fact because the court failed to check for record support even where the fact was uncontested. *See Reese v. Herbert*, 527 F.3d 1253, 1268–70 (11th Cir. 2008); *United States v. 5800 SW 74th Ave.*, 363 F.3d 1099, 1103 n.6 (11th Cir. 2004). But the district court *did* cite to evidence in the record supporting its conclusion that Baer agreed to the Terms and Conditions. Specifically, the court cited to the cover page of the Terms and Conditions, which contains Baer's signature. The

district court did not err in finding, as an undisputed fact, that Baer had signed the Terms and Conditions.

2.

Baer's Furniture also claims that the Terms and Conditions were intended to cover only West Florida (meaning Naples/Fort Myers and Sarasota), and thus their limitation period does not cover any claims relating to disputes arising in other parts of Florida (specifically, Miami/Fort Lauderdale and West Palm Beach). We remain unpersuaded.

In interpreting the Contract, we apply Florida law. Though the Terms and Conditions specify that New York law will govern any disputes and the district court applied New York law in interpreting some aspects of the Contract, both parties assume on appeal that Florida law applies to the disputes before us, and we defer to their decision. *See Bah. Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 (11th Cir. 2012) ("If the parties litigate the case under the assumption that a certain law applies, we will assume that that law applies.").

Under Florida law, then, the general rule is that parol evidence can be introduced only when there is a latent ambiguity; if the ambiguity is patent, parol evidence cannot be considered. *See Bd. of Regents, Univ. of S. Fla. Bd. of Trs. v. Rowsey*, 320 So. 3d 954, 962 (Fla. 2d DCA 2021); *Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1310 (11th Cir. 1998); 24 Fla. Jur. 2d Evidence and Witnesses §§ 475, 476 (June 2024 update). "Patent ambiguities are on the face of the document, while latent ambiguities

do not become clear until extrinsic evidence is introduced and requires parties to interpret the language in two or more possible ways." *Bd. of Regents*, 320 So. 3d at 962 (quoting *Prime Homes, Inc. v. Pine Lake, LLC*, 84 So. 3d 1147, 1151–52 (Fla 4th DCA 2012)); *see also Taylor v. Taylor*, 183 So. 3d 1121, 1122 (Fla. 5th DCA 2015) ("A latent ambiguity exists where the language of an agreement is facially clear but an extrinsic fact or extraneous circumstance creates a need for interpretation or reveals an insufficiency in the contract or a failure to specify the rights or duties of the parties in certain situations."). When construing a contract under Florida law, we consider "the entire contract" and not an "isolated" provision. *All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC*, 274 So. 3d 438, 448 (Fla. 3d DCA 2019) (citations omitted).

The language of the Contract here makes clear that it covered the parties' entire relationship, regardless of geographic area. The Terms stated, broadly, that they constituted "the terms and conditions . . . on which Comcast . . . will distribute advertisements." There is no mention of any geographic limitation to that distribution. Moreover, the Terms expressly contemplated covering future agreements, stating that they covered "one or more insertion orders . . . that the parties may negotiate from time-to-time." And they contained an integration clause, mandating that "[t]his Contract contains the entire agreement between the parties relating to the subject matter hereof."

The only indication from the face of the Contract that it might govern only West Florida are the initials "WF" in one line of

the cover sheet, which states: "Subject: RE: BAER'S FURNITURE COMPANY ANNUAL 2017 AGREEMENT-WF - Comcast Spotlight Documents Require Your Att." This appears to be "the subject line of the email transmitting the Terms and Conditions," as the district court determined. It is not part of the Terms and Conditions themselves, which begin on the next page.

The presence of the initials "WF" in the subject line does not limit the Contract to West Florida just as the presence of the date "2017" in the subject line does not limit the Contract to the ads shown in 2017. This is one of those cases in which "the headings or subheadings of a document do not dictate the meaning of the entire agreement, especially where the literal language of the heading is contrary to the agreement's overall scheme." *Hinely v. Fla. Motorcycle Training, Inc.*, 70 So. 3d 620, 624 (Fla. 1st DCA 2011). The parties may have been discussing the ads they would show in West Florida in 2017 when they signed the Contract, but the Contract's terms unambiguously govern all of their agreements. The Contract expressly contained an integration clause stating that it governed "the entire agreement between the parties relating to [its] subject matter," and it further said that the parties would negotiate new schedules laying out their future agreements "from time-to-time." Considered in its entirety, there is no way to understand this Contract to be limited only to West Florida based on that designation in a subject line. *See All Seasons Condo. Ass'n, Inc.*, 274 So. 3d at 448.

Baer's Furniture cannot introduce parol evidence to contradict this clear meaning. The only ambiguity that Baer's Furniture asserts is a purported "conflict[]" between the initials "WF" in the subject line of the cover page and the Terms and Conditions' "purported application to all agreements." This is an assertion of a patent ambiguity because it appears on the face of the Contract, and so does not justify the admission of parol evidence under Florida law. *See Bd. of Regents*, 320 So. 3d at 962. Nor does the evidence put forth by Baer's Furniture identify a latent ambiguity in the Contract. Baer's Furniture did not put forward evidence to rebut the language of the Terms and Conditions or otherwise render that agreement insufficiently specific as to the rights or duties of the parties. *See Taylor*, 183 So. 3d at 1122. While Jerry Baer stated in a declaration that, when signing the Terms, he did not intend or understand that he was "agreeing to any terms that would govern [his] separate, future agreements with Comcast concerning the non-West Florida markets," this assertion is not enough to create a latent ambiguity. Baer's statement was apparently based on the cover page's "WF" notation and the fact that Comcast's signatory, Fran Perpich, was the regional account executive for the West Florida region. But these coincidental details do not "create[] a necessity for interpretation or a choice among two or more possible meanings" as to the scope of the Terms and Conditions, which remains clear based on the language of the contract in its entirety. *Bartolotta v. Bartolotta*, 380 So. 3d 535, 538 (Fla. 2d DCA 2024) (citation omitted). And thus, no latent ambiguity exists. *See id.*

In short, the Contract covered Comcast's distribution of Baer's Furniture's ads throughout the whole of Florida. Baer's Furniture's claims for breach of contract relating to these agreements -- Counts I through IV -- are untimely under the Contract's 120-day limitation clause.

B.

Meanwhile, the Shortfall Agreement is not a valid modification of the Contract. As we've noted, the Contract's integration clause states that it "contains the entire agreement between the parties relating to the subject matter hereof" and, indeed, it bars any "change or modification of any of its provisions . . . unless made in writing and signed by both parties." The Contract's subject matter can be gleaned from its first paragraph, which says that it provides "the terms and conditions . . . on which Comcast . . . will distribute advertisements . . . via linear spot cable . . . pursuant to one or more insertion orders," also known as "schedules."

The Shortfall Agreement, even if we assume that it was a valid agreement supported by consideration,[5] relates to the subject matter of the Contract and is therefore subject to the integration clause. The Shortfall Agreement was an agreement that Comcast would distribute Baer's Furniture's ads for free until the shortfall in Baer's Furniture's expected viewership was made up. Comcast

[5] Because we conclude that Baer's Furniture's claim for breach of the Shortfall Agreement was an invalid modification of the Contract, we need not consider Comcast's additional argument that there was no valid, legally binding Shortfall Agreement in the first place.

promised to make up the shortfall by setting up new schedules and altering existing schedules. The emails from Comcast employees make this clear: in one such email, Elberg promised to set up "[under delivery] schedules in [West Palm Beach] and [Miami] that are coordinated with [Baer's Furniture's] advertising flight weeks" and said that "[a]djustments to the schedule(s) will be made to ensure performance." In other words, the Shortfall Agreement was an agreement to "distribute advertisements . . . pursuant to [schedules]" -- the exact conduct governed by the Contract. And in promising to make up the shortfall for free, the Shortfall Agreement also, as the partially dissenting opinion points out, modifies the provisions controlling how Baer's Furniture was to pay for advertisements.

Baer's Furniture does not attempt to argue that the Shortfall Agreement was a valid modification of the Contract. After all, it could not have done so because the Shortfall Agreement was not signed, as expressly required by the integration/modification clause. Instead, Baer's Furniture claims that the Shortfall Agreement was not governed by the Contract because it was not itself a schedule. But the integration clause bars any "change or modification" of the Contract, except under certain conditions not applicable here. Nowhere does it state that the Contract applies only to schedules. The Shortfall Agreement modified the Contract precisely because it "[a]djust[ed]" Baer's Furniture's "schedules . . . to ensure" that the shortfall was made up, and the schedules are part of the Contract. The Shortfall Agreement was therefore not a valid modification of the Contract and is not enforceable.

The partially dissenting opinion asserts that there is a jury question as to whether Comcast waived the integration clause's signed-writing requirement. But Baer's Furniture never presented us with this argument and so has abandoned it. "When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). That is because, "[i]f an argument is not fully briefed (let alone not presented at all) to the Circuit Court, . . . the appellee would have no opportunity to respond to it," and also because our adversarial system generally entails that "the appellants may control the issues they raise on appeal." *Access Now*, 385 F.3d at 1330; *see also United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." (citation omitted)). To properly raise an argument on appeal, a party must "plainly and prominently raise it" in their opening brief, "for instance by devoting a discrete section of his argument to those claims." *Sapuppo*, 739 F.3d at 681 (quotation marks and citation omitted); *see also id.* at 682–83 (arguments raised for the first time in a party's reply brief "come too late").

Despite the fact that the district court explicitly determined that "the Shortfall Agreement does not comport with the modification clause," Baer's Furniture never argued that Comcast waived reliance on the integration/modification clause in its opening brief.

No one discussed this theory at oral argument. The only mention of this argument appears in a single footnote in Baer's Furniture's reply brief, which states: "even if the Terms and Conditions did apply, a written agreement may be modified by a subsequent course of conduct 'even though the written contract purports to prohibit such modification,'" citing *ConSeal International Inc. v. Neogen Corp.*, 488 F. Supp. 3d 1257, 1268 (S.D. Fla. 2020). Baer's Furniture does not elaborate on this single sentence in any way. This does not suffice to raise the argument. We will not consider an argument that a party has mentioned only in "passing reference[]." *See Sapuppo*, 739 F.3d at 681. Nor will we consider an argument raised for the first time in a reply brief. *See id.* at 683. Baer's Furniture simply did not argue that Comcast had waived reliance on the integration clause and so we will not reverse on that ground. *See id.* at 680.

In any event, even if Comcast had waived the signed writing requirement and the Shortfall Agreement did modify the Contract, the Shortfall Agreement would then be governed by the Contract's limitation clause, and so Baer's Furniture's claim for breach of the Shortfall Agreement would be untimely. The limitation clause, as we have discussed earlier, *see supra*, at 11, covers all actions "arising out of or relating to the transactions under th[e] Contract." As we and the partial dissent agree, the Shortfall Agreement relates to the transactions under the Contract because it alters how Baer's Furniture will pay for its advertising. Thus, even if the Shortfall Agreement was a valid modification of the Contract, it would be subject to the Contract's 120-day limitation period and Count V, breach of

the Shortfall Agreement, would be untimely along with the other breach-of-contract claims.

C.

Finally, the two fraud claims on appeal are governed by the Contract's limitation clause. The limitation clause states that it applies to any "action, regardless of form, arising out of or relating to the transactions under this Contract."

"[T]he phrase 'arising out of or relating to' the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 637 (Fla. 1999);[6] *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 406 (1967) (describing agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" as "easily broad enough to encompass" claims that the agreement was procured by fraud). "[F]or a tort claim to be considered 'arising out of or relating to' an agreement" under Florida law, "it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself." *Seifert*, 750 So. 2d at 638; *see Rolls-Royce PLC v. Royal Caribbean Cruises Ltd.*, 960 So. 2d 768, 771 (Fla. 3d DCA 2007).

Baer's Furniture brought three claims for fraud in the inducement (two of which are on appeal), alleging that Comcast had

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[6] For the reasons we have already explained, *supra*, at 14–15, again we apply Florida law to this interpretive question.

falsely represented that the ratings estimates in its schedules or other communications were based on Nielsen audience estimates, when they were not. The first of these fraud claims relates to the Miami/Fort Lauderdale schedules (Count VI). Resolution of this claim requires "construction of some portion of the contract" -- specifically, the schedules, a basic element of the Contract -- to determine whether the ratings estimates in those schedules were based on estimates from Nielsen company. *See Seifert*, 750 So. 2d at 638. The first claim thus arises out of or relates to the Contract and is governed by the limitation clause. As a result, it is untimely.

The second fraud-in-the-inducement claim (Count VII) on appeal is somewhat different. It relates to the Shortfall Agreement, which, as we have explained, does not alter the Contract because it failed to comply with the modification clause. But this claim remains covered by the limitation period because it too requires reference to the Contract. In the Contract, Comcast "specifically disclaim[ed] and ma[de] no representations and warranties of any kind, expressed or implied regarding ratings and impressions estimates." Comcast also explained that any "ratings and impressions estimates" it provided "are based on data provided by a third party and are for informational purposes only." Because, as we have explained, the Contract covers Comcast's dissemination of Baer's Furniture's ads throughout Florida, any fraud claim concerning Comcast's use of ratings points would require, at the least, "reference to" this disclaimer provision. *Id.* And thus, like the first fraud claim on appeal, the second one also arises out of or relates to the

Contract. Therefore, it is also governed by the limitation clause and, as a consequence, is untimely.

In sum, the Shortfall Agreement was an invalid attempt to modify the parties' Contract, so the district court properly granted final summary judgment to Comcast on Baer's Furniture's claim for breach of the Shortfall Agreement. And each of the other claims in this lawsuit was governed by the Contract's limitation period, which gave Baer's Furniture 120 days to bring an action. Because Baer's Furniture initiated this lawsuit long after the limitation period had expired, the district court properly granted final summary judgment to Comcast as to each of the other four breach-of-contract claims and the two fraud claims on appeal.

AFFIRMED.

JORDAN, Circuit Judge, Concurring in Part and Dissenting in Part.

I agree with and join Parts I, II.A.1, and II.C of the court's opinion. As to Part II.A.2, I concur in the judgment. As to Part II.B, I respectfully dissent.

I

With respect to Part II.A.2, I would reject the argument, made by Baer's Furniture, that the Terms and Conditions only applies to and covers the West Florida region. As the court explains, there is no language in the seven pages comprising the Terms and Conditions which limits the agreement to West Florida. The letters "WF" only appear in the subject line of the "Certificate of Completion" indicating that the Terms and Conditions had been signed. *See* COM000827. For me this is one of those cases in which "the headings or subheadings of a document do not dictate the meaning of the entire agreement, especially where the literal language of the heading is contrary to the agreement's overall scheme." *Hinely v. Fla. Motorcycle Training, Inc.*, 70 So. 3d 620, 624 (Fla. 1st DCA 2011).

Under Florida law the general rule is that parol evidence can be introduced only when there is a latent ambiguity; if the ambiguity is patent, such evidence cannot be considered. *See Bd. of Regents, U. of S. Fla. Bd. of Trustees v. Rowsey*, 320 So. 3d 954, 962 (Fla. 2d DCA 2021); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1310 (11th Cir. 1998); 24 Fla. Jur. 2d Evidence and Witnesses § 475 (June 2024 update). "A latent ambiguity exists where the language of an agreement is facially clear but an extrinsic fact or extraneous circumstance creates a need for interpretation or

reveals an insufficiency in the contract or a failure to specify the rights or duties of the parties in certain situations." *Taylor v. Taylor*, 183 So. 3d 1121, 1122 (Fla. 5th DCA 2015). Here, even if there was a latent ambiguity—I don't think there was—the parol evidence put forth by Baer's Furniture did not rebut the language of the Terms and Conditions or otherwise render that agreement insufficiently specific as to the rights or duties of the parties. *See Crown Mgmt. Corp. v. Goodman*, 452 So. 2d 49, 54 (Fla. 2d DCA 1984).

Baer's Furniture did not put forth any evidence of any additional contracts—say from 2016 or 2018, or regarding West Palm Beach or East Florida—to substantiate its assertion that the at-issue Terms and Conditions were limited only to the West Florida region for 2017. Jerry Baer did not testify at his deposition about his understanding of the Terms and Conditions or what the cover page's "WF" notation purportedly stood for, but he did provide a declaration stating that he never intended nor understood that his signature on the cover page would bind Baer's Furniture to any terms that would govern separate, future agreements with Comcast concerning the non-West Florida markets. *See* D.E. 75-10 at ¶ 5. In my view, this statement does not "create[ ] a necessity for interpretation or a choice among two or more possible meanings" as to the scope of Terms and Conditions when the contract is read in its entirety. *See Bartolotta v. Bartolotta*, 380 So. 3d 535, 538 (Fla. 2d DCA 2024) (citation omitted). And there is no latent ambiguity created in the Terms and Conditions by the fact that Comcast has a West Florida region for advertising or that Fran Perpich was Comcast's regional account executive for the West Florida region. Those may be coincidental details, but they do not make the Terms and

Conditions difficult or impossible to enforce based on the language the parties used.

II

Turning to Part II.B, I disagree that the so-called Shortfall Agreement is completely dependent on the Terms and Conditions. It seems to me that, at the summary judgment stage, Baer's Furniture has presented sufficient evidence to create a jury question on whether the Shortfall Agreement is a valid, stand-alone contract. For example, as I read the record, there is testimony from both witnesses on both sides that Mr. Baer threatened legal action against Comcast if it did not make things right. *See* Appellant's Br. at 29 (discussing the testimony of Mr. Baer and of Comcast's Michael Elberg).

In any event, I do not think Baer's Furniture had to forego legal action against Comcast in order to provide adequate consideration for Comcast's promise to make up the advertising deficiency. In a case like this one, consideration is not necessary for a contractual modification. *See* Fla. Stat. § 672.209(1) (providing that a modification of a sales contract "needs no consideration to be binding").

The Shortfall Agreement modifies the Terms and Conditions because it alters the provisions governing how Baer's Furniture is to pay for advertising. And the Terms and Conditions provide that any modifications must be in writing. *See* COM00834 ("This Contract contains the entire agreement between the parties relating to the subject matter thereof, and no change or modification of any of its provisions shall be effective unless made in writing

and signed by both parties[.]"). That in-writing requirement, however, is not enough in my view to uphold the district court's grant of summary judgment as to the Shortfall Agreement.

If an initial agreement mandates that later modifications be made in writing, Florida law holds parties to that requirement but also specifies that an "attempt at modification . . . can operate as a waiver" of the in-writing requirement. *See* Fla. Stat. § 672.209(4) ("Although an attempt at modification or recession does not satisfy the requirements of subsections (2) or (3) it can operate as a waiver."). Here there is evidence from which a jury could find that Comcast waived the requirement in the Terms and Conditions that any modifications be in writing and signed by both parties. Comcast not only promised Baer's Furniture that it would make good on the advertising deficiency, it also partially performed on that promise by extending advertising credits (my term) to Baer's Furniture for a period of time.

Moreover, the Florida Supreme Court has explained that, even where there is a requirement that modifications be in writing, "[a] written contract or agreement may be altered or modified by an oral agreement if the latter has been accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it." *Professional Ins. Co. v. Cahill*, 90 So. 2d 916, 918 (Fla. 1956). Under *Cahill*, for example, "it is possible to terminate an agreement orally, even though the agreement requires written termination, provided that the parties agreed to waive the requirement of written termination and [a party] relied to its detriment on that modification." *WSOS-FM v. Hadden*, 951 So. 2d 61, 64 (Fla. 5th DCA 2007).

We have applied or considered *Cahill* in at least a couple of cases. *See Canada v. Allstate Ins. Co.*, 411 F.2d 517, 519–21 (5th Cir. 1969) (applying *Cahill* and holding that the parties had subsequently agreed to an oral modification of the agreement with respect to notice); *Fid. & Cas. Co. of Md. v. Tom Murphy Const. Co.*, 674 F.2d 880, 885 (11th Cir. 1982) (agreeing that "*Cahill* and *Canada* stand for the proposition that oral modifications are effective despite prohibitive language in the contract only where clear and unequivocal evidence of a mutual agreement is presented"). From my perspective, there is a material issue of fact as to whether Baer's Furniture relied detrimentally on Comcast's promises and conduct under the standard set out in *Cahill*. *See Okeechobee Resorts L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 995 (Fla. 4th DCA 2014) (explaining that under *Cahill* the plaintiff must prove "(a) that the parties agreed upon and accepted the oral modification (i.e., mutual assent); (b) that both parties (or at least the party seeking to enforce the amendment) performed consistent with the terms of the alleged oral modification (not merely consistent with their obligations under the original contract); and (c) that due to plaintiff's performance under the contract as amended the defendant received and accepted a benefit that it otherwise was not entitled to under the original contract (i.e., independent consideration)").

III

I would reverse the district court's grant of summary judgment with respect to the claim based on the so-called Shortfall Agreement and remand for a jury trial on that claim. In all other respects, I agree that we should affirm.