niss were heard. There is no dispute that at that hearing the trial rt orally granted Harriet's motion to dismiss and granted Joel ıger thirty days to file an amended complaint either attaching a y of the insurance policy or attesting that he was not in possession he policy. There also is no dispute that the trial court took the tion to compel arbitration under advisement, directing the parties ile additional legal memoranda. The parties do, however, dispute at happened next.

Specifically, Joel Kruger claims that having taken the arbitration ue under advisement, the trial court stated that Kruger could wait to e the amended complaint until after the court had ruled on the ›itration issue. Harriet claims that no such statement was made. No itten order on either motion was ever entered.

Ten months later, in July 2013, a status hearing on the pending otion to compel arbitration was held. At that time, the trial court was lvised that Joel Kruger had yet to file an amended complaint. Upon arning this, the court below *sua sponte* dismissed with prejudice all aims against Harriet:

> By this Court's previous *ore tenus* Order on September 13, 2011, Defendant HARRIET KRUGER'S Motion to Dismiss was granted. Plaintiff, Joel R. Kruger, . . . was given thirty (30) days to amend the Complaint. Having failed to do so by July 17, 2012, the Court hereby dismisses, *sua sponte*, Plaintiff's claims against HARRIET KRUGER with prejudice.

We reverse this order for as this court explained in *Sekot Labs., Inc. Gleason*, 585 So. 2d 286, 287 (Fla. 3d DCA 1990), where a omplaint is dismissed with leave to amend, a trial court should not hereafter dismiss the complaint with prejudice for failure to timely do o unless the original order of dismissal provides that failure to omply will result in a dismissal with prejudice or the plaintiff eceives separate notice that the action will be dismissed with rejudice for failure to amend and a hearing thereon:

> An order granting leave to amend permits the party to amend; it does not require it. *See Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51, 54 (Fla. 3d DCA 1982), *review denied*, 424 So. 2d 763 (Fla. 1982). From a procedural standpoint, "[o]nce a court has dismissed a complaint with leave to amend, it cannot subsequently dismiss with prejudice for failure to timely amend unless (1) separate notice is given to plaintiff of the hearing on the motion to dismiss with prejudice, or (2) the order dismissing the complaint with leave to amend specifically provides that on failure to amend within the stated time, the cause will be dismissed without further notice." *Neu v. Turgel*, 480 So. 2d 216, 217 (Fla. 3d DCA 1985), *cause dismissed*, 486 So. 2d 598 (Fla. 1986); *accord Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d at 54-55.

Neither circumstance occurred here. No order of dismissal was entered in this case providing that failure to amend within thirty days would result in dismissal with prejudice. And, the subject of the hearing at which the action was dismissed was whether the action should be arbitrated, not whether the action should be dismissed with prejudice as a sanction for Kruger's failure to timely amend. The action should not, therefore, have been dismissed simply because Joel Kruger failed to file an amended complaint attaching the insurance policy or attesting that he did not have a copy.[2]

More to the point, "[a]mong the other factors which should be taken into account in the exercise of discretion [in dismissing an action for failure to file an amended complaint] is Florida's long-standing policy in favor of adjudication on the merits, and against procedural default." *Id.* at 289 (citations omitted). As the Florida Supreme Court in *Kozel v. Ostendorf*, 629 So. 2d 817, (Fla. 1993), confirmed, dismissal with prejudice for failure to file an amended complaint is an extreme sanction which generally cannot be justified absent a showing that the failure to amend was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; that previous sanctions had already been imposed; that the client as opposed to counsel was involved in the failure to amend; that the delay prejudiced the opposing party through undue expense, loss of evidence, or otherwise; that no reasonable justification was offered for noncompliance; and that the delay created significant problems of judicial administration. Neither the order of dismissal nor the record before us indicates that any of these criteria were met. *See McMillan v. Horan*, 632 So. 2d 1091, 1091 (Fla. 5th DCA 1993) ("Any final dismissal of a defaulting plaintiff, or the record upon which it is based, should demonstrate that the decision to dismiss conforms with the *Kozel* factors.").

The order dismissing this action with prejudice is therefore reversed and this action remanded with instructions to determine what, if any, sanction is appropriate short of dismissal with prejudice. *See McMillan*, 632 So. 2d at 1091 ("As emphasized in [*Kozel*], our supreme court is concerned with efficiency in the judicial system at all levels. When attorneys fail to adhere to filing deadlines . . ., the trial courts, where appropriate, should utilize fines, public reprimands and contempt orders to expedite the progress of cases.").

Reversed and remanded with instructions.

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[1]Additional grounds for dismissal not at issue here were raised by all parties.

[2]"Where a court has permitted an amendment, the failure to amend timely is most nearly analogous to a failure to prosecute the action, which is the classic case for a dismissal without prejudice." *Sekot Labs., Inc.*, 585 So. 2d at 288; *see* Fla. R. Civ. P. 1.420(e). "It would be anomalous if other forms of failure to prosecute would be subject to the one-year rule of Rule 1.420(e), Florida Rules of Civil Procedure (which results in a dismissal without prejudice) while a shorter delay after leave to amend would result (under defendant's view) in a dismissal with prejudice." *Id.* at 289, n.1 (on rehearing); *see* Fla. R. Civ. P. 1.420(e) (providing for dismissal of action for failure to prosecute where no record activity has occurred for a period of ten months and where, after receiving notice, "no record activity occurs within the 60 days immediately following the service of such notice").

* * *

Insurance—Environmental policy—Storage tank liability insurance policy on gas station—Action against surplus lines insurance carrier which denied coverage of storage tank incident based on conclusion that incident took place prior to retroactive date of policy—Jurisdiction—Foreign forum selection clause—Insured failed to show that mandatory foreign forum selection clause at issue in this case violated any of the factors set forth by Florida Supreme Court in *Manrique v. Fabbri*—Trial court erred in denying motion to dismiss based upon improper forum

ILLINOIS UNION INSURANCE COMPANY, Appellant, v. CO-FREE, INC., Appellee. 1st District. Case No. 1D13-927. Opinion filed November 6, 2013. An appeal from the Circuit Court for Suwannee County. David W. Fina, Judge. Counsel: Lauren S. Curtis, Scot E. Samis and Jennifer J. Kennedy of Traub Lieberman Straus & Shrewsberry, L.L.P., St. Petersburg, for Appellant. Robert D. Fingar and George W. Hatch, III, of Guilday, Schwartz, Simpson, West, Hatch & Lowe, P.A., Tallahassee, for Appellee.

(THOMAS, J.) Appellant seeks review of the trial court's order denying its motion to dismiss based upon improper forum. The motion to dismiss was based upon a mandatory foreign forum selection clause contained within an environmental insurance policy. We have jurisdiction to review this non-final order. *See* Fla. R. App. P. 9.130(a)(3)(A). Based upon our analysis below, we reverse.

Factual Background

Appellant, a surplus lines insurance carrier, issued a storage tank liability insurance policy on Appellee's gas station. Appellee filed a complaint for declaratory and affirmative relief in Suwannee County, Florida, after Appellant denied coverage of a storage tank incident based upon its conclusion that the incident took place prior to the retroactive date of the policy.

Appellant filed a motion to dismiss based upon improper venue based upon the forum selection clause contained in the policy at issue.

The clause states:

> J. Jurisdiction and Venue
> It is agreed that in the event of the failure of the Insurer to pay any amount claimed to be due hereunder, the Insurer and the "Insured" will submit to the Jurisdiction of the State of New York and will comply with all requirements necessary to give such court Jurisdiction. Nothing in this clause constitutes or should be understood to constitute a waiver of the Insurer's right to remove an action to a United States District Court.

Appellee conceded that this was a mandatory forum selection clause, but argued below that it should not be enforced, as enforcement would be unreasonable and unjust. The trial court agreed, and denied Appellant's motion to dismiss.

Analysis

We review the trial court's order denying a motion to dismiss based on the interpretation of a forum selection clause *de novo*. *See Mgmt. Computer Controls Inc. v. Charles Perry Constr. Inc.*, 743 So. 2d 627 630 (Fla. 1st DCA 1999). "A mandatory forum selection clause must be enforced unless it is shown to be unreasonable or unjust." *Land O'Sun Mgmt. Corp. v. Commerce and Indus. Ins. Co.*, 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) (citing *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986)). "In order to show that a clause is unreasonable, the party seeking to escape the clause must demonstrate more than 'mere inconvenience or additional expense.' " *Id.* As noted in *Manrique*:

> [I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

493 So. 2d at 440 n.4 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). In *Haws & Garrett General Contractors, Inc. of Ft. Worth v. Panhandle Custom Decorators & Supply, Inc.*, this court found that "*Manrique* essentially adopted the three-pronged test announced by the United States Supreme Court in *Bremen* . . . ." 500 So. 2d 204, 205 (Fla. 1st DCA 1986). The *Manrique* three-prong test requires

> that the chosen forum not be the result of unequal bargaining power by one of the parties; that enforcement of the agreement does not contravene strong public policy enunciated by statute or judicial fiat in the forum where the litigation is required to be pursued or in the excluded forum; and that the clause does not transfer an essentially local dispute into a foreign forum.

Land O'Sun, 961 So. 2d at 1080 (citing *Haws & Garrett*, 500 So. 2d at 205). A clause that violates any one of these three enumerated factors should not be enforced. *Id.*

The trial court, while questioning the correctness of the Florida Supreme Court's decision in *Manrique* to adopt the three-part test from *Bremen*, applied the correct test; however, the trial court erred in concluding that Appellee met its burden under the test.

The trial court concluded that the parties' bargaining power was clearly unequal, because an insured is not permitted by statute to seek to obtain insurance from the surplus market without first having tried and failed to obtain insurance from admitted carriers. The trial court found that Appellee was left with two options when it could not obtain insurance from an admitted carrier, either to buy surplus lines coverage or go without insurance. The trial court, however, concluded that because federal law requires Appellee to have financial responsibility in order to own or operate underground petroleum tanks, Appellee was in a "take it or leave it" position. We decline to accept Appellee's argument under this factor, and we reject the trial court's conclusion, as it would amount to a *per se* rule that any foreign forum selection clause in a surplus lines policy would be unenforceable.

This is not to say that a foreign forum selection clause in a surplus lines insurance policy cannot be the result of unequal bargaining power. Appellee failed to meet its burden below, however, in submitting evidence to establish that this insurance policy was the result of unequal bargaining power. In particular, Appellee did not submit any evidence to establish that it had unsuccessfully tried to negotiate removing the foreign forum selection clause, that Appellant was the only surplus lines carrier offering such a policy to Florida insureds, or that Appellee had contacted other surplus lines carriers, but their policies also contained a foreign forum selection clause.

The trial court also found that the foreign forum selection clause was unenforceable, as its enforcement would contravene strong public policy enunciated by statute and judicial fiat, and cited for support unreported federal district court decisions applying a different test established based upon federal statutory *forum non conveniens* factors. *See D/H Oil & Gas Co. v. Commerce and Indus. Ins. Co.*, No: 3:04-CV-448-RV/MD, 2005 WL 1153332 (N.D. Fla. May 9, 2005). In its reasoning under this factor, the trial court also concluded that this court's opinion in *Land O'Sun* was distinguishable. *Land O'Sun* involved a storage tank policy from an admitted Florida carrier, and, unlike the surplus carrier's policy in this case, the policy there had been reviewed by the Office of Insurance Regulation (OIR). *Land O'Sun*, 961 So. 2d at 1080. The trial court, however, ignored the language in *Land O'Sun* where this court held that the "legislature has not specifically addressed forum selection clauses contained in environmental insurance policies." 961 So. 2d at 1080.

The trial court instead focused on this court's analysis that a foreign forum selection clause reviewed in a policy approved by OIR could not be said to violate a strong public policy. The trial court asserted that the accuracy of this conclusion had been called into question, as Appellee had introduced evidence of two storage tank policies that OIR had reviewed and had rejected the foreign forum selection clauses in the policies. But this evidence still supports the conclusion that there is no clear Florida public policy prohibiting foreign forum selection clauses in environmental insurance policies, as OIR has both approved and disapproved of such clauses. Thus, this factor was not proven.

This evidence also does not change this court's conclusion in *Land O'Sun* that the legislature has not addressed foreign forum selection clauses contained in environmental insurance policies. 961 So. 2d at 1080. As we have previously held, "the legislature knows precisely how to prohibit the enforcement of forum selection clauses." *Taurus Stornoway Inv., LLC v. Kerley*, 38 So. 3d 840, 843 (Fla. 1st DCA 2010). None of the statutes cited by Appellee prohibit foreign forum selection clauses in environmental policies.

We also reject the trial court's conclusion that the unreported and non-binding federal district court opinion in *Seneca Insurance Company v. Henrietta Oil Company*, No. 02 Civ. 3535 (DC), 2003 WL 255317 (S.D.N.Y. Feb. 4, 2003), enunciates a strong public policy in New York to refuse to allow litigating this action in its courts. In *Seneca*, the federal district court concluded that it was unjust to allow a declaratory action dealing with a storage tank insurance policy to proceed in New York, as all of the significant contacts were with Texas, the insurance company was an admitted carrier doing business in Texas for over 25 years, the insured only did business in Texas, and dealt solely with a Texas brokerage company in obtaining the policy. *Id.* at *3. The *Seneca* court also found it significant that the policy's application form, signed by the insured, did not contain the forum selection clause, and the policy was not received until weeks after it was issued; the court concluded that the insured, as a Texas business seeking insurance from a Texas insurance broker and paying its premiums to the Texas broker, could not have anticipated being

ed into court in New York. *Id.* The *Seneca* court also focused on facts that all significant witnesses and evidence were in Texas. *Id.* litionally, it held that "to the extent policy considerations are vant, they strongly favor litigation in Texas as well." *Id.* at *4. The facts of this case are distinguishable from *Seneca*. Appellee s aware that it was seeking a surplus line for an out-of-state carrier, l there is no evidence that Appellee was unaware of the policy's eign forum selection clause. Moreover, the *Seneca* court did not clude that there was a strong public policy in New York to refuse llow the litigation of such actions within the state, and there is no ication that New York would refuse to allow this litigation if this claratory action is filed in its courts. As Appellee failed to establish trong public policy prohibiting foreign forum selection clauses in vironmental policies, the trial court erred in finding the policy enforceable under this factor.

Finally, in finding that Appellant sought to transfer a local dispute a foreign forum, the trial court focused on the connections of the se to Florida, including that the case involved Florida real property, cleanup is directed by the Florida Department of Environmental otection, and Appellee's expert is in Florida. This, however, ignores at additional expense or mere inconvenience is not enough to validate a foreign forum selection clause. *See Taurus Stornoway* 38). 3d at 840; *see also Farmers Group, Inc. v. Madio & Co., Inc.*, 869). 2d 581 (Fla. 4th DCA 2004). As concluded in *Manrique*, a party eking to escape the foreign forum selection clause agreed to by ntract must "show that trial in the contractual forum will be so avely difficult and inconvenient that he will for all practical rposes be deprived of his day in court." 493 So. 2d at 440 n.4 quoting *M/S Bremen*, 407 U.S. at 18). Here, Appellee failed to meet s burden in establishing that it would be deprived of its day in court the matter proceeded in New York.

Conclusion

As Appellee has failed to show that the foreign forum selection lause at issue violates any of the *Manrique* factors, we hold that the ial court erred in finding that the enforcement of the clause was nreasonable or unjust. Accordingly, we REVERSE the trial court's rder denying Appellant's motion to dismiss based on improper orum. (WETHERELL and RAY, JJ., CONCUR.)

* * *

Child custody—Relocation of children—Appeal filed 34 days after endition of trial court's order granting motion to relocate with parties' minor children was untimely—Motion for rehearing or reconsideration did not toll time for filing appeal from non-final order reviewable pursuant to provisions of rule 9.130

JACK PERRY LOVELACE, Appellant, v. BRANDI LOVELACE, Appellee. 1st District. Case No. 1D13-723. Opinion filed November 6, 2013. An appeal from the Circuit Court for Gilchrist County. Ysleta W. McDonald, Judge. Counsel: Jack Perry Lovelace, pro se, Appellant. No appearance for Appellee.

(PER CURIAM.) The Notice of Appeal having been filed thirty-four days after rendition of the trial court's order granting appellee's motion to relocate with the parties' minor children, we are compelled to dismiss this appeal as untimely. *See* Fla. R. App. P. 9.020(i) & 9.110(b). The law in Florida is well settled that a motion for rehearing or reconsideration does not toll the time for filing an appeal from a non-final order reviewable pursuant to the provisions of Florida Rule of Appellate Procedure 9.130. *See Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 292 (Fla. 1st DCA 2013) (recognizing "a motion for reconsideration of a nonfinal order does not toll the 30-day time limit for appeal"); *SC. Read, Inc. v. Seminole Cnty. Sch. Bd.*, 932 So. 2d 1255, 1256-57 (Fla. 5th DCA 2006) (holding a motion for rehearing from an appealable, non-final order "is not authorized" and "thus does not toll the time for filing an appeal"); *Deal v. Deal*, 783 So. 2d 319, 321 (Fla. 5th DCA 2001) (concluding that a motion for rehearing directed to a non-final order determining child custody in a domestic relations matter and appealable pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iii), "is not authorized under the rules and does not toll the time for filing the notice of appeal").

DISMISSED. (CLARK, ROWE, and SWANSON, JJ., CONCUR.)

* * *

Criminal law—Probation revocation—Revocation order to be corrected to provide, consistent with record, that defendant did not admit to alleged violations and that defendant was found to have violated only condition prohibiting change in approved residence without consent of probation officer

FREDDIE LEWIS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D13-2422. Opinion filed November 6, 2013. An appeal from the Circuit Court for Leon County. James C. Hankinson, Judge. Counsel: Nancy A. Daniels, Public Defender, and Joel Arnold, Assistant Public Defender, Tallahassee, for Appellant. Pamela Jo Bondi, Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) The order revoking appellant's probation and the sentence subsequently imposed are affirmed. However, the cause is remanded to the trial court for entry of a corrected order of revocation which provides, consistent with the record, that appellant did not admit to the alleged violations of the conditions of probation and that appellant was found to have violated only one of the conditions of probation, changing his approved residence without first procuring the consent of his probation officer. Accordingly, the revocation of probation and sentence is AFFIRMED, but the cause is REMANDED for entry of a corrected order of revocation. (VAN NORTWICK, ROWE, and MARSTILLER, JJ., CONCUR.)

* * *

Foreclosure—Appeal from order granting final judgment of foreclosure and directing that foreclosure sale shall take place in 120 days was premature where order did not determine amount due so as to allow indebtedness to be cured—Appeal dismissed without prejudice to bringing timely appeal once trial court renders final judgment of foreclosure that includes amount due

JAMES HENRY KING III; ET AL., Appellant, v. U. S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2006-NC2, ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-NC2, Appellee. 1st District. Case No. 1D13-3109. Opinion filed November 6, 2013. An appeal from an order of the Circuit Court for Leon County. Charles A. Francis, Judge. Counsel: James Henry King III, pro se, Appellant. Kimberly Nolen Hopkins, of Shapiro, Rishman & Gache, LLP, Tampa, for Appellee.

(PER CURIAM.) Appellant timely brought this appeal seeking review of an order that granted final judgment of foreclosure and directed that the foreclosure sale shall take place in 120 days. The order did not, however, determine the amount due so as to allow the indebtedness to be cured. *See* § 45.0315, Fla. Stat. (2010) (providing that the indebtedness may be cured and a foreclosure sale prevented "by paying the amount of moneys specified in the judgment, order, or decree of foreclosure"). *Cf.* Fla. R. Civ. P. Form 1.996(a) ("Final Judgment of Foreclosure"). Therefore, the order did not complete the judicial labor required of the cause and this appeal is premature. *See Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002) (reaffirming the traditional test for finality requiring that "no further action by the court will be necessary"). Accordingly, the appeal is hereby DISMISSED.

This dismissal is without prejudice to appellant's right to bring a timely appeal once the trial court renders a final judgment of foreclosure that includes the amount due. Additionally, because no final order of foreclosure has been entered, the parties are advised that no foreclosure sale shall occur pursuant to the non-final "Order on