Filing # 202078484 E-Filed 07/08/2024 05:30:50 PM

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SIXTH DISTRICT

CHITTRANJAN K. THAKKAR,

Appellant,

v.

GOOD GATEWAY, LLC, and
ORLANDO GATEWAY
PARTNERS, LLC,

Appellees.
____________________________/

Case No. 6D23-1546

L.T. Case No. 2010-CA-015315-O
(Fla. 9th Jud. Cir. Ct.)

REPLY BRIEF OF APPELLANT CHITTRANJAN THAKKAR

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ARGUMENT

I. The Trial Court Erred in Granting Plaintiffs' Summary Judgment Motion as Uncontested.

In their Answer Brief, Plaintiffs admit that the trial court predicated the Disguised Wages Summary Judgment on Plaintiffs' summary judgment motion supposedly being uncontested. Ans. Br. at 20. Plaintiffs attempt to defend that characterization based on Chittranjan Thakkar's multiple responses to the motion all supposedly being untimely. Plaintiffs also suggest that the trial court resolved the motion on its merits, rather than as uncontested. *Id.* at 20, 32–33. However, the record and Florida law confirm that Plaintiffs are incorrect in both respects—the motion ***was*** contested, with arguments against it timely presented for purposes of opposing a summary judgment motion, and the supposed lack of opposition regarding the motion was the ***only*** ground the trial court relied upon to enter the summary judgment order.

To be clear, the record cannot reasonably be viewed in any manner that would permit the trial court to deem Plaintiffs' summary j0udgment motion "uncontested." On April 10, 2021—three days before the October 13, 2021 summary judgment hearing (*see*

R 35543)—Chittranjan Thakkar filed a response in opposition to Plaintiffs' summary judgment motion. R 32332. Chittranjan Thakkar's counsel next participated in arguments against the motion at the hearing, after which the trial court took the matter under advisement. R 35543–81. Following the hearing, and after the amendments to Florida Rule of Civil Procedure 1.510 became effective, the trial court invited the parties to file additional briefing under the new standard (R 32645–46), and Chittranjan Thakkar again filed a response in opposition to Plaintiffs' motion. R 32780–87. In each of these ways, not to mention the motion for sanctions Chittranjan Thakkar filed after Plaintiffs filed a notice stating their motion was ready to be heard without opposition (R 32138) and the reconsideration motions filed after the trial court initially ruled (R 32915, 43029, 43417), Chittranjan Thakkar contested Plaintiffs' summary judgment motion. Such facts are simply not disputable.

Plaintiffs attempt to rely on amended rule 1.510's 20-day requirement to suggest that Chittranjan Thakkar's response came too late. Ans. Br. at 21, 34. But that requirement did not exist until weeks after the trial court heard the summary judgment motion, and nothing supports applying that requirement retroactively in this

case. The prior version of rule 1.510 permitted evidence (and thus surely arguments) to be filed in opposition to a summary judgment motion up to three days before the hearing on the motion. *See* Fla. R. Civ. P. 1.510(c) (2020).

Plaintiffs next spend pages of the Answer Brief discussing section 56.29, Florida Statutes, which authorizes supplemental complaints to be filed for collection purposes. Ans. Br. at 22–26. But that statute does not obviate the Rules of Civil Procedure or the law regarding summary judgment procedures. It has no bearing on whether Plaintiffs' summary judgment motion was contested.

Plaintiffs similarly invoke the trial court's Business Court Procedures 5.13, which applies to motions in general and states that failure to file a timely memorandum in opposition may result in a motion being considered uncontested. Ans Br. at 33. But Plaintiffs fail to account for BCP 5.5, which specifically addresses summary judgment motions and states that they will be decided based on the summary judgment evidence and "if a hearing is not waived, based on arguments at the summary judgment hearing." A-17.

BCP 5.5 is consistent with the principle that a trial court cannot grant a summary judgment motion without giving the nonmovant the

opportunity to appear at a hearing and be heard to contest the motion. *See, e.g.*, *McElroy v. Oaks on the Bay, LLC*, 288 So. 3d 1259, 1261 (Fla. 2d DCA 2020); *Chiu v. Wells Fargo Bank, N.A.*, 242 So. 3d 461, 463 (Fla. 3d DCA 2018). Were the local rule otherwise, it would be invalid for conflicting with the rules of civil procedure. *See, e.g.*, *WG Evergreen Woods SH, LLC v. Fares*, 207 So. 3d 993, 996 (Fla. 5th DCA 2016). Plaintiffs never acknowledge, or challenge, these points.

Of course, the trial court in this case held a hearing, Chittranjan Thakkar appeared (through counsel), and he incontestably contested Plaintiffs' motion. On these facts alone, the motion was by no means uncontested and could not be granted on that supposed basis.

Rather than confess error, Plaintiffs attempt to rewrite Florida law. They argue, "Because Appellant did not file a response with a supporting factual position, the trial court properly deemed Appellees' motion for summary judgment uncontested." Ans. Br. at 22. Plaintiffs further contend that, having supposedly "failed to timely and properly contest the facts and allegations" of Plaintiffs' summary judgment motion, Chittranjan Thakkar's "effort to do so at the hearing came far too late." *Id.* at 32. Those contentions—for

which Plaintiffs cite no authority—are irreconcilable with the trial court's local rule 5.5, rule 1.510's hearing requirement, and the case law, cited above, requiring trial courts to hold hearings on all summary judgment motions. No authority requires the nonmovant on a summary judgment motion to present competing facts to oppose the motion—the nomovant can also point to deficiencies in the movant's position, including factual deficiencies where the movant bears the burden of proof, as well as legal deficiencies. Moreover, even if Chittranjan Thakkar had filed nothing in response to the summary judgment motion (and he filed a motion for sanctions, an amended response, and a second amended response, as well as two motions for reconsideration), he was legally entitled to appear at the hearing on the motion and oppose it there, which he did, and at that point the trial court could not grant the motion as uncontested.

Finally, Plaintiffs suggest that the trial court entered the Disguised Wages Summary Judgment not only because it was supposedly uncontested but on its merits. Ans. Br. at 20, 32–33. For support, Plaintiffs merely point to the trial court's engagement with Chittranjan Thakkar's counsel at the hearing when counsel contested the motion on its merits. *See id.* at 32. But the trial court

made no ruling at the hearing. Instead, the trial court took the matter under advisement, and, months later, entered an order that stated only a single basis for granting the motion—that it was "uncontested" because the nonmovants supposedly "did not file, and have never filed, a responsive pleading . . . ." R 32817. That nonfinal order was then the subject of multiple reconsideration motions before the trial court entered a final version—the February 17, 2023 order referenced in this briefing as the Disguised Wages Summary Judgment. A-4. (This Court has already determined, after issuing and discharging a show cause order and by denying Plaintiffs' motion to dismiss the appeal, that this appeal is taken from the February 17, 2023 order, which was a final order.) That final order also made clear that summary judgment was entered against the nonmovants based solely on the ground that Plaintiffs' motion was uncontested because the nonmovants supposedly "never filed" a responsive pleading.

For all of the reasons set forth above, and in the Initial Brief, the trial court erroneously entered the Disguised Wages Summary Judgment. Plaintiffs' motion was not uncontested and the trial court erred in ruling otherwise and entering summary judgment on that

basis. The order on appeal should be reversed and the case remanded for further proceedings.

II. The Trial Court's Summary Judgment Ruling Is Erroneous Even on the Merits of Plaintiffs' Motion.

The Initial Brief proceeded to demonstrate that, even if the trial court had reached the merits of Plaintiffs' Disguised Wages Summary Judgment Motion (which the trial court did not), it was error to enter summary judgment in Plaintiffs' favor for three reasons, each of which presents yet another basis to reverse the summary judgment. The Answer Brief fails to show otherwise.

A. The Summary Judgment Order Grants Relief on Unpled Claims.

The Initial Brief first showed that Plaintiffs' summary judgment motion sought the entry of summary judgment on Counts XI and XII of the federal supplemental complaint but the motion presented factual grounds that had nothing to do with the claims presented in those counts. This point is so clear that, in their Answer Brief, Plaintiffs do not even attempt to dispute it. They instead make other arguments in an attempt to excuse the complete lack of connection between the fraudulent transfer claims Plaintiffs pled in Counts XI

and XII and the grounds they pursued in their summary judgment motion.

To be clear, Plaintiffs do not dispute that Counts XI and XII alleged that Niloy, Inc., employed Chittranjan Thakkar, but rather than accept wages or compensation due him for his services, he allegedly ordered Niloy, Inc., to pay the amounts owed to him for his services to Saloni Thakkar. R 31834. Nor do Plaintiffs dispute that the Disguised Wages Summary Judgment Motion had nothing to do with those claims. That motion asserted that Chittranjan Thakkar "transferred cash to a joint account held by him and Saloni Thakkar in an effort to shield his personal assets from collection," with reference to four specific checks, none of which had any connection to Niloy, Inc., or to compensation Niloy, Inc., owed to Chittranjan Thakkar for his services. R 31734-35, 31898-903. Three of the four checks at issue were not even in existence when Plaintiffs filed their federal supplemental complaint.

It is unusual for a motion to seek summary judgment on factual and legal theories not set forth in the complaint. But that is exactly what happened here, and the resulting error cannot be overlooked or excused.

Plaintiffs nonetheless ask the Court to overlook and excuse their actions. The Initial Brief cited a multitude of cases explaining that a trial court errs when it grants summary judgment on a claim or theory not pled in the pleadings. Ini. Br. at 31–33. Plaintiffs argue, however, that none of those cases involved proceedings supplementary under section 56.29. Ans. Br. at 40–41. But the rules of civil procedure do not cease to exist when proceedings supplementary are brought. To the contrary, where a judgment creditor seeks to assert fraudulent transfer claims under section 56.29 and chapter 726—which is the type of claim Plaintiffs pursued in Counts XI and XII as pled and in their summary judgment motion—section 56.29(9) clearly requires that such claims be presented in a supplemental complaint "subject to chapter 726 and the rules of civil procedure." § 56.29(9). The fact that the case below now continues post-judgment as proceedings supplementary does not permit Plaintiffs to seek summary judgment on claims they did not plead.

Plaintiffs also argue that the cases cited in the Initial Brief were not cited to the trial court and that the nonmovants did not present "legal authority" requiring Plaintiffs to file amended complaints to

raise the four transfers at issue. Ans. Br. at 40, 43. Of course, Plaintiffs do not argue that this issue is unpreserved—the nonmovants asserted multiple times that the Court should deny (and lacked jurisdiction to grant) Plaintiffs' summary judgment motion because it sought relief based on claims that were not pled in the federal supplemental complaint. R 32336, 32338–39, 32918, 32923, 35562-63, 35567-68, 35576, 43043–44. Preservation does not require that the case law cited on appeal have been cited to the trial court. *See, e.g.*, *Lincare Holdings Inc. v. Ford*, 307 So. 3d 905, 912–13 (Fla. 2d DCA 2020) (holding that a party need not cite the cases on point to the trial court to preserve a claim of error); *State v. Wynn*, 948 So. 2d 945, 947 (Fla. 5th DCA 2007) ("Because the State made the correct legal argument, we find that the issue was properly preserved for appeal despite the failure to cite cases on point.").

Finally, in yet another effort to avoid this point, Plaintiffs argue extensively that the nonmovants did not present factual evidence in support of the potential defenses discussed at page 35 of the Initial Brief. *See* Ans. Br. at 37–38, 50. Plaintiffs

misunderstand. The Initial Brief raised the potential defenses in an effort to counter any harmless error argument that Plaintiffs might make in their Answer Brief. As it turns out, Plaintiffs' Answer Brief never argues harmless error. Nor could it. The error was plainly harmful.

Because the trial court granted Plaintiffs summary judgment on fraudulent transfer claims that Plaintiffs never pled, the trial court erred. The summary judgment should accordingly be reversed.

B. The Summary Judgment Order Cannot Rely on the New York Actions to Establish Facts at Issue in This Case.

The Initial Brief next showed that even if the trial court had ruled on the merits of the Disguised Wages Summary Judgment Motion (and the trial court did not), and even if Plaintiffs had pled the claims on which they sought summary judgment (and Plaintiffs did not), the trial court nonetheless erred in permitting Plaintiffs to rely on res judicata in connection with two New York judicial decisions to demonstrate the supposedly fraudulent transfers at issue. The Initial Brief focused on how, earlier in this same litigation, this Court's

predecessor, the Fifth District, reversed the Debt Forgiveness Summary Judgment, which also attempted to rely upon res judicata in connection with the Rohan Thakkar debt forgiveness action. The Answer Brief fails to refute this additional ground for reversal.

Plaintiffs certainly cannot challenge that the Fifth District reversed the Debt Forgiveness Summary Judgment (which was entered just three months before the trial court entered the original order granting the Disguised Wages Summary Judgment Motion, *see* R 32154, 32816), or that the reversal is law of the case from this Court's predecessor in this same action. The Answer Brief instead attempts to downplay the summary judgment motion's reliance on the Rohan Thakkar debt forgiveness action. *See* Ans. Br. at 44 n.5. But the summary judgment motion relied extensively on the Rohan Thakkar debt forgiveness action, to which neither Chittranjan Thakkar nor his wife Saloni Thakkar were parties. Particularly in the absence of any findings by the trial court regarding what evidence sufficiently established the badges of fraud necessary for Plaintiffs to meet their initial burden—which findings were of course not made because the trial court never reached the merits—the prior appellate decision's wholesale rejection of Plaintiffs' efforts to rely on the Rohan

Thakkar debt forgiveness action to establish fraud regarding persons not parties to that action cannot be brushed aside. That very different action was a central focus of Plaintiffs' Disguised Wages Summary Judgment Motion, and this reason alone supports reversal of the final order granting that motion.

Faced with an appellate determination that they cannot rely on the Rohan Thakkar debt forgiveness action, Plaintiffs' Answer Brief shifts their focus to the New York deed transfer case. But, in doing so, Plaintiffs make a series of erroneous representations.

First, Plaintiffs contend that "Appellant acknowledges that he and his Wife were parties to the New York action and that their two defenses here, solvency and equivalent value, are identical to the defenses raised therein which were litigated and rejected in New York." Ans. Br. at 46. That is incorrect. The Initial Brief acknowledged that Chittranjan and Saloni Thakkar were parties in the New York deed transfer case but correctly explained that the court in that case made no determinations regarding solvency at any time (let alone the times at issue here) or value regarding the checks at issue here. Ini. Br. at 39.

Plaintiffs similarly argue that the New York deed transfer case involved "full litigation of the very same defenses (purported solvency and lack of equivalent value) raised in the present case." Ans. Br. at 47. This too is a misrepresentation. As the Initial Brief explained, the New York deed transfer case involved different issues involving different matters and different time periods, and thus neither claim preclusion nor issue preclusion applies. Ini. Br. at 39. The Answer Brief does not even attempt to show otherwise.

Third, Plaintiffs repeatedly frame their argument in terms of "defenses" to their unpled fraudulent transfer claims, and Plaintiffs contend that the supposed facts establishing fraudulent transfers were not challenged and therefore became established facts. That is, again, wholly incorrect. A party seeking to prove a fraudulent transfer must establish sufficient badges of fraud to give rise to a presumption of fraud before the burden will be shifted to the defendant to prove any defenses. *See, e.g.*, *Mejia v. Ruiz*, 985 So. 2d 1109, 1112–13 (Fla. 3d DCA 2008). "While a single badge of fraud may amount only to a suspicious circumstance, a combination of badges will justify a finding of fraud." *Id.* at 1113. Here, Plaintiffs relied ***entirely*** on res judicata in connection with the New York

actions to satisfy their initial burden, and Chittranjan Thakkar expressly contested that those actions could be so used, as they involved different parties, different issues, or both. No facts were admitted.

For the same reason, Plaintiffs' efforts to argue that the amended summary judgment standard supports affirmance likewise fail. Plaintiffs attempt to frame the matter as whether the nonmovants presented sufficient evidence to support fraudulent transfer defenses, *see* Ans. Br. at 48–49, but the point remains that Plaintiffs relied solely on res judicata to meet their threshold burden, and permitting them to do so was error.

Finally, Plaintiffs make a brief but futile attempt to avoid reliance on the New York actions by arguing that a debtor generally not paying his debts can be presumed insolvent, with vague reference to Chittranjan Thakkar's "own information sheets" in this matter. Ans. Br. at 47. But Plaintiffs point to no such information sheets or to where this argument was made in the summary judgment motion itself. *See, e.g.*, *Mitchell v. Higgs*, 61 So. 3d 1152, 1155 n.3 (Fla. 3d DCA 2011) ("The Tipsy Coachman doctrine does not apply to grounds not raised in a motion for summary judgment.").

For all of these reasons, if the trial court had reached the merits of Plaintiffs' summary judgment motion (and the trial court did not), then the judgment would still need to be reversed because Plaintiffs were not entitled to summary judgment on the merits. On this yet additional basis, the Disguised Wages Summary Judgment should be reversed.

C. The Summary Judgment Order Cannot Impose a Monetary Judgment on Chittranjan Thakkar, the Alleged Transferor.

Finally, the Initial Brief showed that the Disguised Wages Summary Judgment should be reversed for reasons unique to Chittranjan Thakker—he was not named a defendant in Counts XI and XII, no monetary relief was sought from him in those counts or in the summary judgment motion, and Florida law does not permit a monetary judgment an additional, double-recovery judgment against the alleged transferor where a fraudulent transfer is supposedly made. Plaintiffs' Answer Brief fails to show otherwise.

Plaintiffs all but ignore the pleading problem. Counts XI and XII did not name Chittranjan Thakkar as a defendant and requested no relief from him. Likewise, Plaintiffs' Disguised Wages Summary Judgment motion did not request monetary relief from him. Yet the

trial court entered a judgment against Chittranjan Thakkar, the supposed fraudulent transferor, for having supposedly deposited a check into a joint account he held with his wife. The Initial Brief set out authority for why this is error, and Plaintiffs address none of it. They argue only that the federal supplemental complaint requested "other equitable relief as the Court may deem appropriate." Ans. Br. at 53 n.7. Whatever value such broad pleading may have as to Saloni Thakkar, who was the defendant named in Counts XI and XII, it can have no value with respect to Chittranjan Thakkar, as he was not even named a defendant in those counts. Moreover, Plaintiffs offer no defense of how their own summary judgment motion did not request monetary relief against Chittranjan Thakkar, and yet the Disguised Wages Summary Judgment entered judgment against him as well as his wife. Plaintiffs cannot defend that result. It was error on these procedural grounds alone.

It was also error for the substantive reason that Florida law does not permit such relief. Plaintiffs acknowledge that *SE Property Holdings, LLC v. Welch*, 65 F.4th 1335, 1344-46 (11th Cir. 2023), recently held that, under Florida law, fraudulent transfers do not result in additional judgments against the transferors. *See* Ans. Br.

at 52. Plaintiffs disagree with the Eleventh Circuit and rely instead on *Hansard Constr. Co. v. Rite Aid of Fla., Inc.*, 783 So. 2d 307, 308 (Fla. 4th DCA 2001), and *McCalla v. E.C. Kenyon Constr. Co.*, 183 So. 3d 1192, 1194 (Fla. 1st DCA 2016), which allowed such relief. Ans. Br. at 52–54. Plaintiffs argue that *SE Property* "essentially wrote the catch-all language out of the statute," *id.* at 52, but that it not accurate. *SE Property* relied on the Florida Supreme Court's decision in *Freeman v. First Union National Bank*, 865 So. 2d 1272, 1276 (Fla. 2004), which held that section 726.108(1)(c)3. "merely facilitates the use of the other remedies provided in the statute." *See SE Prop.*, 65 F.4th at 1344-46. *Hansard* predated *Freeman*, and the courts in *McCalla* and *WRJ Dev., Inc. v. N. Ring Ltd.*, 979 So. 2d 1046, 1047-48 (Fla. 3d DCA 2008), apparently followed *Hansard*'s lead without appreciating that *Freeman* effectively overruled it. Plaintiffs never mention *Freeman*, which controls. The Fourth District correctly resolved the issue in *Yusem v. South Florida Water Management District*, 770 So. 2d 746, 749 (Fla. 4th DCA 2000), when it held that section 726.108 does not permit an additional judgment to be entered against the alleged fraudulent transferor.

Plaintiffs appear to argue that even if *SE Property* is correct, the judgment against Chittranjan Thakkar was substantively permissible because he was, in Plaintiffs' words, "not just a fraudulent transferor, he was a fraudulent transferee." Ans. Br. at 53. That argument simply highlights the absurdity of what is happening in these situations. Plaintiffs contend that Chittranjan Thakkar, a judgment debtor, made deposits into an account he jointly holds with his wife, and on that basis Plaintiffs contend they can get ***additional*** judgments against him for the amounts deposited. That is simply senseless, and Plaintiffs never attempt to show otherwise. If a judgment debtor owes a judgment creditor $100 and the debtor deposits a $100 check into a jointly held account, it makes no sense that, on that basis, the creditor can get another $100 judgment against the debtor, bringing the debtor's debt to $200. Yet that is what happened here. It is wholly illogical, and, under *SE Property* and *Freeman*, not authorized by section 726.108. For this yet additional reason, the Disguised Wages Summary Judgment should be reversed.

Respectfully submitted,

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I hereby certify that on July 8, 2023, a copy of this document was filed with the Florida Courts e-Filing Portal and thereby served by e-mail on all counsel of record, including:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable font and word length requirements set forth in the Florida Rules of Appellate Procedure.

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