IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BISCAYNE BEACH CLUB CONDOMINIUM ASSOC.,

Appellant,

vs.

TOORAK CAPITAL FUNDING, LLC,

Appellee.
_____/

Case No. 3D2024-0693

APPELLEE'S MOTION FOR SANCTIONS AGAINST APPELLANT COA AND APPELLATE COUNSEL PURSUANT TO FLA. STAT. § 57.105(1) AND FLA. R. APP. P. 9.410(b)

Appellee Toorak Capital Funding, LLC ("Toorak") moves this Court pursuant to Florida Statute § 57.105(1) and rule 9.410(b), Fla. R. App. P., to tax attorney's fees for this motion and this appeal as a sanction against Appellant Biscayne Beach Club Condominium Association ("COA") and its appellate counsel, Attorneys Jesmany Jomarron, Esq. and Robin F. Hazel, Esq., (collectively, "the Respondents"), and to award such other and further relief as the Court deems appropriate, and says:

Introduction

This appeal is frivolous and was not brought in good faith.

Legal Standard

Sanctions Generally

Florida Statute Section 57.105(1) provides that:

> Upon the court's initiative or motion of any party, the court shall[1] award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that the claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

Section 57.105(1) applies to appellate proceedings. *See Waddington v. Baptist Med. Ctr. of the Beaches, Inc.*, 78 So.3d 114, 117 (Fla. 1st DCA 2012) citing *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 570 (Fla. 2005).

In addition, Rule 9.410, Fla. R. App. P., authorizes this Court to impose sanctions for any appeal that is frivolous or filed in bad faith.

[1] It has long been established that "shall" in section 57.105 evinces legislative intent to make the penalty mandatory. *See Aspen Air Conditioning, Inc. v. Safeco Ins. Co. of America*, 170 So.3d 892, 897 (Fla. 3d DCA 2015).

Frivolity

This Court has "defined an appeal as frivolous if it presents no justiciable question and is so devoid of merit on the face of the record that there is little prospect it will ever succeed." *Lidsky Vaccaro & Montes, P.A. v. Morejon*, 813 So.2d 146, 152 (Fla. 3d DCA 2002) citing *Visoly v. Security Pac. Credit Corp.*, 768 So.2d 482, 490-491 (Fla. 3d DCA 2000). "An appeal which lacks a factual basis or a well-grounded legal argument will be considered devoid of merit." *Braun v. Sager*, 373 So.3d 1251, 1251 (Fla. 3d DCA 2023)) citing *Visoly*, 768 So.2d at 490-491. This appeal lacks *both* a factual basis *and* a well-grounded legal argument.

Although the term "frivolous" is "incapable of precise determination," this Court has recognized "established guidelines for determining when an action is frivolous." *JPMorgan Chase Bank, N.A. v. Hernandez*, 99 So.3d 508, 513 (Fla. 3d DCA 2011) (internal quotation marks omitted). The Court stated:

> [t]hese include instances where cases are found:
>
> > (a) To be **completely without merit in law** and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; [or] (b) to be **contradicted by overwhelming evidence**; [or] (c) as **having been undertaken primarily to delay or prolong the resolution of**

> **litigation**, or to harass or maliciously injure another; or [(d)] **as asserting material factual statements that are false**.

Hernandez, 99 So.3d at 513 quoting *Visoly*, 768 So.2d at 491 (bold type original in *Hernandez*).

Although even one such instance is sufficient for sanctions, each of the four instances recited above (and more) exist here. These multiple instances are particularly egregious here because they rest upon unfounded assertions that a member of the Florida bar, Toorak's attorney Aamir Saeed, "lied" to and "deliberately misled" the trial court. R. 651:4-10 ("lie"); R. 665:4-6 ("lie"); R. 1808:6-8 ("misrepresentation"). The Respondents continue with those disproven accusations on appeal. IB. at 6 ("material misrepresentation"); IB. at 8 ("deliberately misleading"); IB. at 10 ("deliberately misleading").

Procedural History

Respondents appeal the trial court's April 17, 2024 order denying, after an evidentiary hearing, the [Defendant] COA's three motions to vacate three final judgments in three related commercial foreclosure cases. R. 1865-1881. The three judgments foreclosed Toorak's mortgages on three condominium units within the COA. R. 1875. The COA was not the borrower in any of the three cases. R. 1875 at ¶ 1. Toorak then purchased the units

at clerk's sales. R. 570 (verified memorandum) at ¶ 14; R. 1080 (Toorak's Exhibit U) at ¶ 9; R. 1167 (Toorak's Exhibit V) at ¶ 13; R. 1822:9 – 1823:7.

On December 27, 2022—365 days after judgment was entered in two of the cases and 327 days after judgment was entered in the third—the COA filed motions to vacate the judgments, citing the same grounds and invoking rule 1.540(b)(3), Fla. R. Civ. P. R. 1875 at ¶ 2. In those motions, the COA accused Saeed of making a "[written] misrepresentation [to the trial court] requiring vacatur of the Final Judgment[s] … following an evidentiary hearing"). *See* R. 352-353 at ¶ 14.

The three motions to vacate were materially identical. R. 1875 at ¶ 2. After the motions were filed, the three cases were transferred to and consolidated for all purposes by Circuit Judge Valerie Manno Schurr. R. 1875. Judge Schurr heard the COA's motions to vacate at the same time. R. 638-701 (hearing transcript); 1767-1860 (continued hearing transcript). Judge Schurr denied the motions, finding that "[n]either Toorak nor its counsel engaged in any fraud, misrepresentation, or misconduct whatsoever, let alone anything sufficient to warrant an order vacating the judgments under [rule 1.540(b)(3)]. R. 1878 at ¶ a.

Respondents appealed.

Argument

There are three reasons why this Court should impose sanctions against the Respondents.

1. Respondents have little if any prospect for success on appeal.

The Respondents are appealing an order denying the COA's motions following an evidentiary hearing the COA sought[2] but during which the COA called no witnesses to testify and introduced no exhibits into evidence. R. 1876 at ¶ 4. Instead, the COA relied on "court filings" and one transmittal letter to the trial judge that Toorak introduced into evidence during its case-in-chief, *i.e.*, Toorak's Exhibit B. R. 1876 at ¶ 4.

Based on the competent, substantial evidence Toorak introduced at the hearing, the trial court denied the motions to vacate. R. 1878 at ¶ a. That evidence consisted of Saeed's live testimony and Toorak's 22 documentary exhibits, including the deposition transcript of the COA's "corporate representative," unaffiliated Attorney Don Dutton.[3] Given this Court's

[2] R. 352-353 ¶ 14 (request for evidentiary hearing); 638-701 (2023 hearing transcript); 1767-1860 (2024 continued hearing transcript).

[3] R. 1809:11-1825:11 (Saeed's testimony); 1813 (Toorak's exhibits admitted). In a separate order imposing sanctions on the COA, Judge Schurr found Attorney Dutton to have been wholly "unprepared to testify as a corporate representative, in violation of rule 1.310, Fla. R. Civ. P." Appx. at 12-13.

deference to the trial court's findings of fact and exercise of discretion, the COA's failure to present evidence in support of its motions, and the presumption of correctness afforded the trial court's order, the Respondents have no real prospect for success on appeal.

2. The COA has no legitimate need for relief on appeal.

The COA has no legitimate need for the relief it seeks on appeal. Rather, the Respondents are pursuing the appeal in a surreptitious effort to avoid the COA's substantial liability to Toorak in another related case, *Toorak Capital Partners, LLC v. Biscayne Beach Club Condominium Association, et al.*, Miami-Dade Case No.: 2022-8908-CA-01 (the "Safe Harbor Case"). That case was also transferred to Judge Schurr and consolidated for all purposes with the three foreclosure cases. R. 1875 (first paragraph).

Toorak filed its Complaint against the COA in the Safe Harbor Case on May 13, 2022, seeking a single sheet of paper—an estoppel certificate for one of the three units in question. *See* Appendix hereto ("Appx."), at 154-160. Toorak needed the estoppel certificate to resell the unit and was entitled to the certificate under Fla. Stat. § 718.116(8). The COA refused to provide it. R. 1877 at ¶¶ 15, 17. Instead, the COA verbally demanded that Toorak pay $70,000.00 [R. 1877 at ¶ 15], when only $3,801.00 was lawfully

due for all three units combined.[4] Moreover, the COA threatened to undermine Toorak's ability to resell the units unless Toorak paid the $70,000.00 demanded. R. 1877 at ¶ 15.

Toorak requested estoppel certificates for the other two units as well, but the COA refused to provide those too, insisting still on payment of the $70,000.00 demand. *Id*. Toorak amended its Complaint to seek estoppel certificates for the other two units, plus damages, attorney's fees and costs that Toorak incurred (and continues to incur) prosecuting the Safe Harbor Case since it was filed on May 13, 2022. Appx. at 165-193; 294-295. That case is still ongoing, although Judge Schurr found Toorak entitled to the estoppel certificates in the order on appeal[5]—a finding the Respondents do not attack directly but which is the *sine qua non* of their appeal.

Contrary to the Respondents' representations (*see* IB. at 9), this appeal is not about the COA's entitlement to collect lawful assessments. This appeal is about the COA's efforts to avoid substantial liability for the damages, attorney's fees, costs, and interest it caused Toorak to incur in the

---

[4] *See* Fla. Stat. 718.116(1)(b)1 (limiting lender's liability to 1% of original mortgage debt); Appx. at 15, 21, 27 (original mortgage debt of three mortgages combined was $380,100.00; 1% of $380,100.00 is $3,801.00).

[5] R. 1878 (last sentence of penultimate paragraph).

Safe Harbor Case by wrongfully resisting Toorak's effort to obtain the estoppel certificates. In motions seeking to stay that case pending resolution of its three motions to vacate, counsel for the COA explained: "None of the causes of action in the [Safe Harbor Case] will be viable should the final judgments [be] vacated." *See e.g.*, Appx. at 38 (introductory paragraph); 39 at ¶¶ 4, 8.

In other words, if the foreclosure judgments are vacated, the clerk's sales will be undone *nunc pro tunc*. If the clerk's sales are undone, Toorak will retroactively lose its status as an owner at the time it requested the estoppel certificates. If Toorak loses its status as an owner, Toorak will lose the Safe Harbor Case. If Toorak loses the Safe Harbor Case, the COA will escape the damages, attorney's fees, costs, and interest it caused Toorak to incur during two years of litigation over three estoppel certificates.

The COA's *purported* need for relief from the foreclosure judgments is that the judgments supposedly rendered the COA "unable to collect outstanding assessments, as noted in its affirmative defenses, which were not included in the Final Judgment[s]." IB. at 5. To the contrary, as demonstrated below, the COA suffered no adverse effect from the Final Judgments and needs no relief from them.

First, paragraph 7 of the Final Judgments expressly exempted from foreclosure all "claims or rights under Chapter 718 or Chapter 720, Fla. Stat., if any." *See e.g.*, R. 313 at ¶ 7. Second, as the Judge Shurr found, Toorak had "been endeavoring since at least April 11, 2022 [after the three Final Judgments had been entered] to obtain estoppel certificates *so it could pay the [COA] whatever it [was] lawfully owed*" under Chapter 718. R. 1878 at ¶ b. (emphasis supplied).

Third, the COA has no legitimate need for relief on appeal because Toorak *has already paid* all assessments lawfully owed to the COA (and then some). At the hearing and in the order on appeal, Judge Schurr found Toorak entitled to the estoppel certificates.[6] The COA provided the certificates thereafter, but inflated them by adding late fees, penalties, and interest to the $3,801.00 due. Toorak paid under protest, and that issue is still pending before the trial court. Appx. at 31. The three units have since been sold—two of them to the COA after it exercised its right of first refusal, and the third to a non-party purchaser. Appx. at 141-153.

The COA has no legitimate need for relief on appeal but is pursuing the appeal anyway in effort to avoid liability in the Safe Harbor Case.

[6] R. 1878 ("As announced on the record in open court, [Toorak] is entitled to the certificates.").

3. The Respondents rely upon misstatements of fact and inapposite caselaw while ignoring controlling precedent.

The COA's appeal is frivolous and the Respondents deserving of sanctions because their Initial Brief relies on misstatements of fact and inapposite caselaw, while ignoring controlling precedent of which the Respondents were previously made aware at least twice.

a. Misstatements of fact.

Respondents acknowledge on appeal that, in the foreclosure case initially assigned to Judge Schurr, Saeed emailed the proposed judgment to the COA's counsel soliciting objections to the proposed judgment at least 10 days[7] prior to its entry by Judge Schurr. IB. 3. The Respondents then make a convoluted misstatement to explain their lack of any response to Saeed's email or any objection to the proposed judgment during that 10- or 11-day span.

On page 4 of their Initial Brief, Respondents make two factual assertions in the following sentence.

> Counsel for the [COA] noted [at the hearing] that Toorak's email [conveying the proposed judgment] was first sent to the wrong email address before it was corrected and, during the time between when the email was sent and the Final Judgment was entered, counsel's office was closed

[7] It was actually 11 days. The email was sent December 16, 2021, and the judgment was entered December 27, 2021. R. 1243-1244, 311-316, respectively.

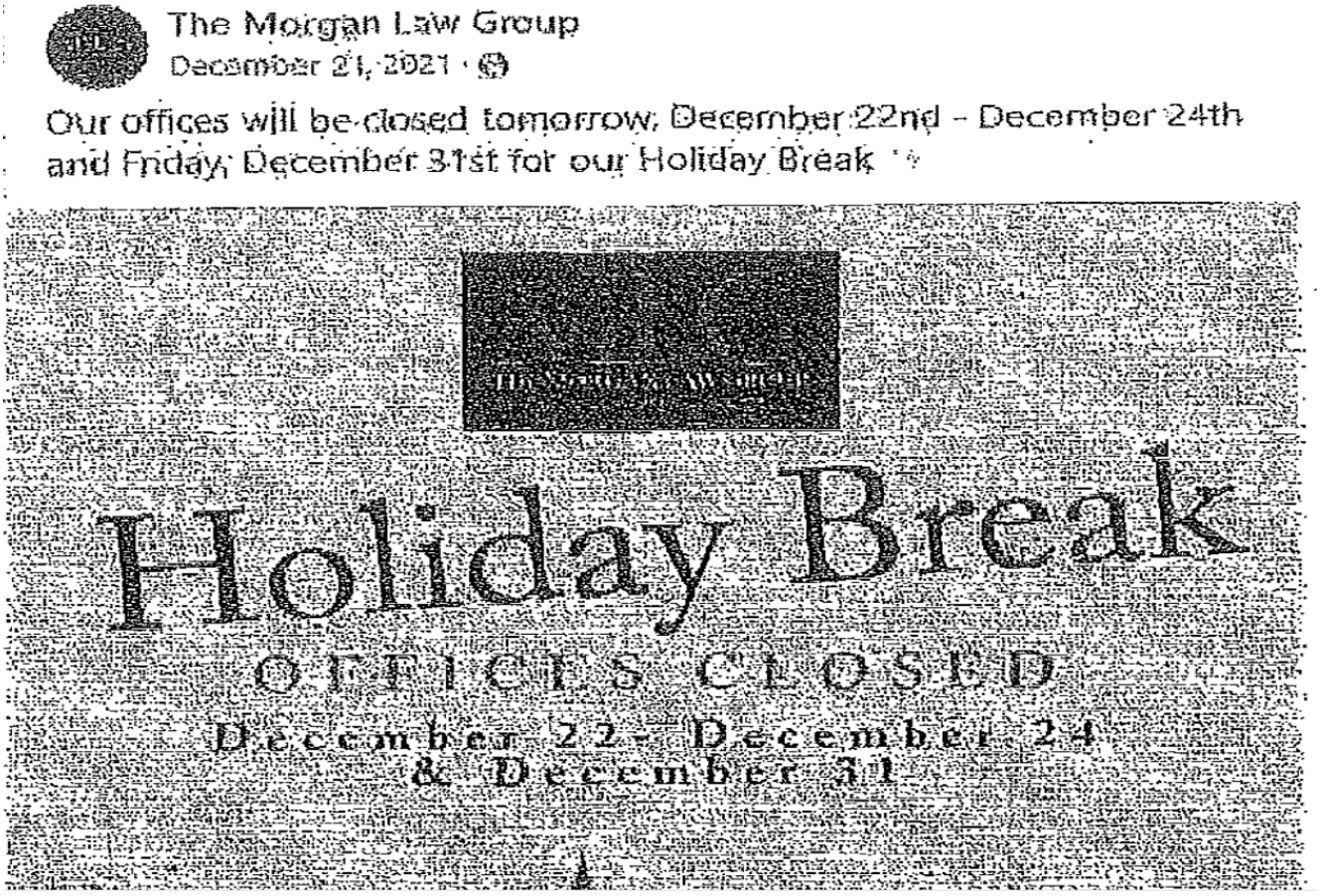
(R. 1784-5).

The first statement is that Saeed's email was sent to the wrong email address. This is true but belies the fact that the e-mail (first sent at 3:40 p.m.) was forwarded to the correct address *one minute later* at 3:41 p.m. R. 1811:7 – 1812:10; 591-592. To state that the email was sent to the wrong address is irrelevant at best, deliberately misleading at worst. Respondent's cryptic phrase "before it was corrected" does not save the statement from being a factual mischaracterization to this Court, particularly in light of the second statement the Respondents made in the excerpt quoted above.

The second statement is that, during the 11 days between when Saeed sent his email to defense counsel [December 16, 2021] and when the Final Judgment was entered [December 27, 2023], defense counsel's office was closed. IB. at 3-4. The assertion that the entire "office was closed" for that 11-day span is not based on evidence in the record but on Jomarron's unsworn representation at a July 28, 2023, hearing where he told Judge Schurr that his "entire office was closed so we were out of town on vacation." R. 664:9 - 13; *see also* R. 1793:7-9 (Jomarron: "We didn't get back till [*sic*] early in the year [2022] …").

Jomarron's representation—at the hearing and in Respondents' Initial Brief—is flatly contradicted by his own law firm's December 2021 Holiday

Break announcement. The announcement was posted on his firm's website, dated December 21, 2021, and was introduced as Toorak's Exhibit R at the evidentiary hearing. The Holiday Break announcement states that the firm's offices were open except for "December 22 – December 24 & December 31" of 2021:



R. 1544-1545 (Toorak's Exhibit R).[8]

[8] The 25th was a Saturday and the 26th was a Sunday.

The Respondents make it sound as if the December 16, 2021, email was sent to the wrong address and, by the time that email arrived at Jomarron's office, the judgment had been entered and his entire office closed for the holidays—"till early [the next] year," even. IB. 9-10. This is false. Even so, it would not explain why it took the COA up to a full year thereafter to file its motions to vacate, as further argued below.

b. Misstatements of law.

Motions brought under rule 1.540(b)(3) must be brought "within a reasonable time"—with one year from the date of the judgment being the maximum permissible time in which to file the motion. The COA filed its three motions to vacate all on the same day—December 27, 2022. This was 365 days after judgment was entered in two of the three foreclosure cases and 327 days after it had been entered in the third. R. 1867 at ¶ 2.

Judge Schurr found this an unreasonable amount of time to wait to file the three motions to vacate. R. 1878 at ¶ c. Given the broad discretion afforded the trial court in determining what is a "reasonable" amount of time under the rule and the caselaw explicating that rule, it is frivolous for the COA to argue on appeal that Judge Schurr abused her discretion in finding the motions untimely. Generally speaking, "[a] litigant may not sit on his hands, fail to voice his objections, and then claim prejudice when a final judgment is

entered [even when it] may adversely affect him." *Allstate v. Gillespie*, 455 So.2d 617, 620 (Fla. 2d DCA 1984) quoted in *E. J. Assoc., Inc. v. John E. & Aliese Price Foundation, Inc.*, 515 So.2d 763, 764 (Fla. 2d DCA 1987).

More specific to rule 1.540(b)(3), "[a] party seeking relief on the basis of [fraud, misrepresentation or misconduct] has an obligation to raise the issues ***as soon as is reasonably possible***." *See Dynasty Express Corp. v. Weiss*, 675 So.2d 235, 240 (Fla. 4th DCA 1996) quoting *Stella v, Stella*, 418 So.2d 1029, 1030 (Fla. 4th DCA 1982) (bold italics supplied).[9] The cases on which the Respondents rely—*Swift & Co. v. U.S.*, 276 U.S. 311 (1928) and *Fields v. Beneficial Florida, Inc.*, 208 So.3d 278 (Fla. 5th DCA 2016)—are inapposite. *See* IB. at 8, 10.

Toorak cited and even quoted the *Gillespie* and the *Dynasty* cases for the Respondents at the hearing below. R. 1800:21 – 1801:25. Judge Schurr included citations to both cases in her order on appeal. R. 1878. Yet, Respondents continue to assert on appeal that their motions to vacate were

[9] Key to the analysis is when the COA, directly or through counsel, learned of the judgments it later sought to vacate. When Toorak's counsel asked the COA's "corporate representative" at deposition when the COA learned of the final judgment, the witness was instructed not to answer on the ground of attorney-client privilege. R. 1370:14 – 1371:11. When asked when the COA decided it wanted the judgments vacated, he was instructed not to answer on the ground of the "work product" privilege. R. 1371:20 – 1372:2.

timely as a matter of law because they were filed within a year of the date on which the judgments they sought to vacate were entered. They state:

> It is undisputed that the Motion to Vacate was filed within the one year period permitted under Rule 1.540. Toorak's belief that the Motion could or should have been filed sooner is immaterial and does not change the fact that the Motion was timely under the Rule.

IB. at 11.

The Respondents do not even address *Gillespie* or *Dynasty* in their Initial Brief. They are aware of the controlling case law but represent the law to be otherwise without a good faith basis.

Conclusion

Except for purposes of driving up costs, fostering delay, and otherwise waging a scorched-earth battle of attrition in effort to stave off liability in the Safe Harbor Case, there is no point to this appeal. It is a waste of the Court's time and of the Appellee's money. It is frivolous and in bad faith, and the Respondents should be held accountable therefor.

WHEREFORE, Appellee Toorak Capital Partners, LLC respectfully moves this Court to sanction Appellant Biscayne Beach Club Condominium Association, Inc., and its appellate counsel, Jesmany Jomarron, Esq. and Robin F. Hazel, Esq., assessing attorney's fees and costs against them and

in favor of Toorak and granting such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/ Robert R. Edwards
ROBERT R. EDWARDS, Esq.
Florida Bar Number 770851
Miller, George & Suggs, PLLC
Counsel for Appellee
210 N. University Drive, Suite 900
Coral Springs, FL 33071
(o) (786) 268-9954
redwards@mgs-legal.com
kcardenas@mgs-legal.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the line spacing, type size and typeface of this document complies with the requirements of Rule 9.045(b), Fla. R. App. P.

/s/ Robert R. Edwards
ROBERT R. EDWARDS

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the following parties by Fed Ex and email on September 20, 2024: Jesmany Jomarron, Esq., THE MORGAN LAW GROUP, 220 Alhambra Circle, Suite 500, Coral Gables, FL 33134 [jjomarron@morganlawgroup.net]; Robin F. Hazel, Esq., HAZEL LAW, P.A., 3900 Hollywood Blvd., Suite 301,

Hollywood, Florida 33021 [rhazel@hazellawpa.com], both individually and as counsel for the COA.

/s/ Robert R. Edwards
ROBERT R. EDWARDS