IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D22-0984
L.T. CASE NO. 2019-37110 CA 01

GABRIELA AREVALO, individually and as personal representative of the ESTATE OF CESAR GABRIEL AREVALO,

Plaintiff-Appellants,

MENADA, INC., a Florida corporation d/b/a SEACOAST SUITES,

Defendant-Appellee.
_____/

DEFENDANT-APPELLEE, MENADA, INC.'S, ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

This is an appeal of an Order entered by the circuit court on May 10, 2022 granting partial summary judgment in favor of Appellee, Menada, Inc., a Florida corporation d/b/a Seacoast Suites.

Appellant, Gabriela Arevalo, shall be referred to as "Gabriela Arevalo." Appellee, Menada, Inc., a Florida corporation d/b/a Seacoast Suites, shall be referred to as "Menada."

B. BACKGROUND

Menada owns and operates a multi-story residential building, Seacoast Suites, located at 5101 Collins Avenue, Miami Beach, Florida 33140 ("Seacoast Suites"). R.178 at ¶10, R.1466[1]. Gabriela Arevalo lived at Seacoast Suites from 2009 through June 2019. S.R.3390:7-16.[2]

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[1] The Corrected Record filed with this Court on August 30, 2023, and Corrected Supplemental Record filed on August 31, 2023, are cited as "R." and "S.R.," respectively, followed by the appropriate page numbers.

[2] Citation is made to the full form deposition transcript of Gabriela Arevalo dated 9-11-2020, filed by Gabriela Arevalo on August 16, 2023 and included in the Corrected Supplemental Record. S.R. 3290-

Gabriela Arevalo entered a one-year written residential lease with Menada to rent Apartment 10K at Seacoast Suites from June 1, 2016, to May 31, 2017. R.178 at ¶11, R.1466, R.1488-98. She has no recollection of signing another lease with Menada, but continued to live at Seacoast Suites and paid rent monthly by delivering a check to the downstairs office. R.121, 1467, 1488; S.R.3391:8-3392:25, 3393:10-13, 3393:22-3394:18. Gabriela Arevalo moved to Apartment 15K in November 2018. R.121; S.R.3391:5-24.

On April 6, 2019, there was a fire in Apartment 15K. S.R.3413:5-9. Gabriela Arevalo's adult son, Cesar Gabriel Arevalo, was found inside and pronounced dead at the hospital. R.176-77,182 at ¶¶1,8,31-32, R.1968 at ¶9; S.R.3427:10-11. Gabriela Arevalo was away at work when the fire occurred. S.R.3452:1-17. She has no personal knowledge of how the fire started or the circumstances surrounding the fire. S.R.3452:1-3, 3455:11-21, 3460:16-22, 3463:22-24.

Following the fire, Gabriela Arevalo moved to Apartment 11E at Seacoast Suites. R.182 at ¶¶33-35; S.R.3392:12-14. Shortly after the

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91. The transcript was initially filed in circuit court on September 1, 2021. *See* S.R. 3275 at Index #243.

fire and while living in Apartment 11E, Gabriela Arevalo went back into Apartment 15K to retrieve personal items. S.R.3413:10-3415:17. At some point thereafter, Gabriela Arevalo was told not to access Apartment 15K because it was under investigation. S.R.3415:14-21, 3417:5-21.

On April 29, 2019, and May 1, 2019, Gabriela Arevalo attempted to pay her past-due monthly rent for April 2019 at the downstairs office. R.200 at ¶106; R.1969 at ¶¶14,16; S.R.3396:7-21, 3400:2-12. The office would not accept her check. R.183 at ¶37; R.1969 at ¶¶14,16; S.R.3396:7-21; 3399:2-23; 4000:2-12. According to Gabriela Arevalo, at her request, she spoke to the building owner on April 29, who said words to the effect of, "You've done enough damage. Get the hell out of my building." R.1969 at ¶14; S.R.3396:20-3397:7; S.R.3399:6-17. There was no mention of any lease. S.R.3399:19-23.

Gabriela Arevalo's check for past-due monthly rent for April 2019 was never accepted by Menada. S.R. 3397:11-14. However, she continued to live in the building. S.R.3400:19-22. She made no attempt to pay monthly rent for May or June 2019. S.R.3401:3-11.

In May 2019, several notices to vacate the premises were posted on the door of Apartment 11E. R.121-22, R.1969 at ¶¶18-19; S.R.3401:13-20, 3402:16-3403:11. One such notice advised that the apartment must be vacated by May 25, 2019. R.121-22; S.R.3403:15-19. Gabriela Arevalo remained in Apartment 11E into June 2019, until she moved out of Seacoast Suites to live elsewhere. R.123; R.1970 at ¶20; R.121-23; S.R.3403:15-3404:2. Her lease for her new apartment started on July 1, 2019. S.R.3405:7-9.

Gabriela Arevalo and her attorney entered Apartment 15K multiple days in June or July 2019 to remove items from the unit. S.R.3406:14-21, 3407:20-21, 3408:19-22; R.1970 at ¶21. By that time, she had already found a new place to live. S.R.3406:14-21, 3480:18-3481:1. On one of those days, Gabriela Arevalo was served with eviction paperwork by an unknown woman who said nothing and left. S.R.3407:9-3408:2, 3409:15-24, 3410:19-23, 3411:3-13. Gabriela Arevalo gave the paperwork to her attorney, who was with her. S.R.3407:20-21, 3409:2-6.

On June 19, 2019, Menada filed a complaint for eviction in the County Court of Miami-Dade County, Florida against Gabriela Arevalo ("Eviction Case"). R.123, 1508-11. The two-count complaint

sought possession of Apartment 11E and damages for past due rent pursuant to Sections 83.59 and 83.48, Florida Statutes. R.1508-11. Specifically, Menada alleged that Gabriela Arevalo failed to deliver possession of and was continuing to occupy Apartment 11E at Seacoast Suites after being served notice under Section 83.57, Florida Statutes, on May 10, 2019, that her month-to-month tenancy was terminated, and she was to deliver possession of Apartment 11E. R.1509-10 at ¶¶12-14; R.1522-23. It also alleged that, on June 6, 2019, Menada served a Three-Day Notice to Pay or Vacate as Gabriela Arevalo failed to pay monthly rent for April, May, and June 2019. R.1510 at ¶15; R.1524; R.1970 at ¶20. The attached Notice demanded payment of rent or possession of Apartment 11E within three days from the date of its delivery, which would have been on or before June 11, 2019. R.1524.

On July 30, 2019, Gabriela Arevalo was served with Menada's complaint for eviction. R.1970 at ¶21. Gabriela Arevalo filed a motion to dismiss on August 19, 2019 in the Eviction Case. R.2987-3013. Among other things, Gabriela Arevalo argued that the claim for possession was moot because she left the apartment on June 6, 2019. R.2988.

Gabriela Arevalo has not received any treatment for emotional distress or mental health issues at any time since the April 6, 2019, fire. S.R.3422:10-13, 3463:11-14.

C. CIRCUIT COURT PROCEEDINGS

On December 20, 2019, Gabriela Arevalo initiated the underlying action against Menada by filing a complaint in the Circuit Court of Miami-Dade County, Florida ("Wrongful Death Case"). R.50-78.[3] The operative Amended Complaint was filed effective January 14, 2021. R.1447-48, R.176-213.

Gabriela Arevalo alleges she was a tenant living with her adult son, Cesar Gabriel Arevalo, at Seacoast Suites. R.178, ¶11. The action is alleged to arise from the death of Cesar Gabriel Arevalo in the fire in Apartment 15K on April 6, 2019. R.176, ¶1.

As to Menada, Counts I through V assert claims grounded in negligence in connection with Cesar Gabriel Arevalo's death and seek damages under the Florida Wrongful Death Act. R.184-97.

[3] Among other things, the initial complaint included claims for wrongful eviction, intentional infliction of emotional distress ("IIED"), and negligent infliction of emotional distress ("NIED"). R.70-77.

Count VI asserts "Wrongful Eviction" against Menada under the Florida Residential Landlord and Tenant Act, including Sections 83.64 and 83.67, Florida Statutes, as specifically cited. R.198, ¶94. It also alleges that the Florida Residential Landlord and Tenant Act imposes an obligation of good faith in performance or enforcement of a rental agreement. R.198-99, ¶95. The claim is based on eviction proceedings brought against Gabriela Arevalo. R.199, ¶98. Additionally, Gabriela Arevalo seeks attorney's fees under Section 83.48, Florida Statutes, and the higher of her actual and consequential damages or three-months' rent. R.200, ¶102.

Count VII asserts IIED against Menada in connection with actions taken relating to Gabriela Arevalo's rent and tenancy at Seacoast Suites and eviction proceedings against her. R.200-02. More specifically, Count VII alleges that Menada's conduct in refusing Gabriela Arevalo's rent payments on April 29 and May 1, 2019, instructing her to leave the building, and pursuing eviction proceedings was "outrageous, beyond all bounds of decency, odious, and intolerable." R.200-2, ¶¶106-110,113.

Similarly, Count VIII asserts NIED against Menada. R.202-05.[4]

Menada's counsel in the Wrongful Death Case was not counsel of record in the Eviction Case in county court. R.102 at fn.1. Following a July 31, 2020 status conference in county court in the Eviction Case, county court entered an Order on August 7, 2020 granting an Agreed Order to Transfer and Consolidate and transferring the Eviction Case to circuit court and consolidating it with the Wrongful Death Case. R.102 at fn.1, R.156-57. Menada's counsel in the Wrongful Death Case had not been present at the status conference in county court. R.102 at fn.1, R.156-57.

On August 25, 2020, Menada filed a Motion to Sever from the Wrongful Death Case the eviction claim and Counts VI, VII and VIII of the Amended Complaint for resolution of those claims in a separate action. R.100-05. Menada argued that the eviction claim and

[4] Gabriela Arevalo has not raised any issue in this appeal as to her NIED claim asserted in Count VIII of the Amended Complaint. Therefore, it is deemed abandoned. *Garcia v. Milport Investors*, 334 So. 3d 734, 738 (Fla. 3d DCA 2022)(finding that an issue not raised by appellant in his initial brief on appeal was deemed waived and abandoned). For that reason, the NIED claim is not substantively addressed in this brief.

Gabriela Arevalo's related Counts VI, VII and VIII were wholly unrelated to Counts I to V of the Amended Complaint. R.102.

On February 16, 2021, Menada filed its Motion for Summary Judgment ("Motion") as to Counts VI, VII and VIII. R.1464-1683. As to Count VI for "Wrongful Eviction," Menada argued that Section 83.64 does not create an affirmative right of action for retaliatory eviction, but rather only that the defense of retaliatory conduct can be brought by a tenant in an eviction action for possession by the landlord. R.1472-74. In addition, it argued that Section 83.67 enumerates specific prohibited practices in the landlord-tenant context and is inapplicable. R.1474-76. Further, even if Gabriela Arevalo's wrongful eviction claim could properly proceed, the Eviction Case commenced by Menada in county court was lawful. R.1471-80. Menada also argued it was entitled to summary judgment on Count VII because Gabriela Arevalo failed to fulfill the elements of IIED, including that the "outrageous" element was not met. R.1480-84.

Following Gabriela Arevalo's Response, Menada filed its Reply in support of its Motion on July 23, 2021. R.2237-55; *see also* R.1932-2058. In its Reply, Menada emphasized that the alleged conduct upon which Gabriela Arevalo based her IIED claim was

Menada's actions relating to its lawful termination of her tenancy and Eviction Case and that it acted within its legal rights. R.2244-46, 2252-54. Additionally, Menada argued that the Florida Residential Landlord and Tenant Act was the sole basis from which Gabriela Arevalo filed her Counts VI and VII and that she failed to provide any legal authority supporting the statutory causes of action. R.2248-51.

On July 26, 2021, the circuit court heard argument of counsel on the Motion. R.2403-52. Gabriela Arevalo's counsel relied upon cases not cited in the Response to the Motion. R.2430-35. She also argued that Count VI asserts a claim of retaliatory eviction under the language of the Florida Residential Landlord Tenant Act. R.2436:21-25. The circuit court deferred ruling on the Motion to allow the opportunity to review the new cases and for Menada's counsel to provide any supplemental cases and argument. R.2449-52.

Consistent with the circuit court's instructions, Menada filed a Supplemental Memorandum of Law in support of its Motion on January 31, 2022. R.2385-96, 2450.

On February 4, 2022, the circuit court heard continued arguments of counsel on the Motion. R.2465-512. First, Menada's counsel pointed out that there was no common law wrongful eviction

claim plead as the Amended Complaint relies upon specific statutory provisions under the Florida Residential Landlord and Tenant Act. R.2471-72. As he later pointed out, the Amended Complaint alleges that the retaliatory conduct was the fire. R.2509-10. Next, Menada's counsel argued that the cases relied upon by Gabriela Arevalo were distinguishable. R.2472-85. Menada's counsel concluded that the claim in Count VI was improperly brought in the Wrongful Death Case and could only have been brought as a defense or compulsory counterclaim in the preexisting Eviction Case. R.2486-90. The circuit court found that Gabriela Arevalo's failure to raise the claim set forth in Count VI as a compulsory counterclaim in the Eviction Case was fatal to the claim. R.2506-07. At the conclusion of the hearing, the court granted summary judgment in favor of Menada on Counts VI, VII and VIII. R.2511-12. To the extent that Gabriela Arevalo's requested an opportunity to brief the issue of compulsory counterclaim, claiming it was new argument, the circuit court invited her to file a motion for reconsideration. R.2510-11.

Thereafter, on April 25, 2022, Gabriela Arevalo filed a purported Answer, Affirmative Defenses, and Counterclaims to the complaint for eviction that had been filed in the Eviction Case in June 2019.

R.2549-61. Gabriela Arevalo asserted "[r]etaliatory conduct under Fla. Stat. §83.64(1)-(2)" as an affirmative defense and counterclaims for wrongful eviction and IIED. R.2549-61. Menada filed a Motion to Strike arguing that this April 25, 2022 Answer directed to the eviction complaint was unauthorized and untimely anyway. R.2562-95.

On May 10, 2022, the circuit court entered an Order Granting Final Summary Judgment on the Motion ("May 10, 2022 Order"). R.3241-51. Specifically citing Sections 51.011 and 83.64, Florida Statutes, and Florida Rule of Civil Procedure 1.170, the circuit court found "that all of [Gabriela Arevalo]'s challenges to the post-fire eviction should have been pled as either counterclaims or defenses to Menada's preexisting eviction action." R.3244-45. It further found that Gabriela Arevalo failed as a matter of law to establish that Menada's conduct satisfied the "outrageous" prong as required to assert an IIED claim. R.3246-47.

On May 25, 2022, Gabriela Arevalo filed a Motion for Rehearing of the May 10, 2022 Order. R.2596-3213. Gabriela Arevalo argued she did not have the opportunity to address grounds on which summary judgment was granted, which she then addressed. R.2596-606. On July 1, 2022, Menada filed its opposition to the Motion for

Rehearing. App. 606-750[5]. On November 15, 2022, Gabriela Arevalo filed a Reply. App. 751-1298. Menada responded by filing summaries of case law relied on by Gabriela Arevalo in her Reply to explain its inapplicability. R.__.[6]

On May 1, 2023, the circuit court held rehearing on the Motion. App. 1302-1471. The court found that Gabriela Arevalo was properly on notice of Menada's legal arguments and issues raised in support of its Motion, specifically finding that Menada had first brought up the compulsory counterclaim issue in response to Gabriela Arevalo's counsel relying on new case law not in the record. App.1395-96. The circuit court stood by its prior rulings on Counts VI and VII. App.1395-1400. It entered its Order on the rehearing on June 15, 2023. App.1479-85.

On June 8, 2022, Gabriela Arevalo filed a Notice of Appeal. R.3214-38. After the circuit court entered its June 15, 2023, Order

[5] Gabriela Arevalo's Appendix to Initial Brief filed January 5, 2024 is cited herein as "App." followed by the page number.

[6] Menada filed a Motion to Supplement the Record on June 5, 2024 as to this document and additionally certain items contained in Gabriela Arevalo's Appendix that are cited herein. That motion was granted by the Court on June 6, which directs the clerk of the circuit court to supplement the record accordingly.

on rehearing, this Court lifted abeyance of this appeal. *See* Order entered 6/23/23.

SUMMARY OF THE ARGUMENT

Gabriela Arevalo brings this appeal of the circuit court's May 10, 2022 Order as a partial final judgment. As a preliminary matter, she concedes in her Notice of Appeal that Counts VI and VII addressed in the May 10, 2022 Order are landlord-tenant claims that are separate and distinct from the remaining Wrongful Death Act claims asserted in the Amended Complaint filed in Wrongful Death Case.

Count VI of the Amended Complaint is expressly brought under the Florida Residential Landlord Tenant Act. It cites Section 83.64, Florida Statutes, and seeks relief thereunder for Menada's alleged retaliatory conduct in seeking to evict Gabriela Arevalo. Neither Section 83.64, nor any other provision in the Florida Residential Landlord Tenant Act, creates an affirmative right of action for retaliation.

Therefore, the relief requested by Gabriela Arevalo in Count VI is not available pursuant to the statute under which it is sought. Count VI of the Amended Complaint in the Wrongful Death Case fails

to set forth a cognizable cause of action as plead and summary judgment was proper in favor of Menada.

Count VI was also improperly plead in the Wrongful Death Case where Menada previously filed a pending Eviction Case against Gabriela Arevalo in county court seeking relief under the Florida Residential Landlord and Tenant Act. Because Gabriela Arevalo did not timely file the claim set forth in Count VI as a defense or compulsory counterclaim under the applicable summary procedure and timelines in the Eviction Case, it is waived and not properly included in the Wrongful Death Case.

Even if Count VI in the Wrongful Death Case filed in December 2019 or the Answer filed in the Wrongful Death Case in April 2022 could be considered as a defense to the complaint in the Eviction Case, the defense would still be untimely under the applicable summary procedure. Moreover, even if the Florida Residential Landlord Tenant Act creates an affirmative right of action for retaliation and the relief sought in Count VI, Gabriela Arevalo would be required to assert it as a compulsory counterclaim in a timely answer to the eviction complaint as it arises out of the same transaction and occurrence that formed the subject matter of

Menada's Eviction Case. Because she failed to timely do so, it is waived.

Summary judgment was properly granted in favor of Menada on Count VI for the additional reasons that the record fails to support a claim for retaliatory conduct under Section 83.64 or for constructive eviction in any event.

Count VII for IIED is based on Menada's alleged outrageous conduct in connection with Gabriela Arevalo's tenancy and rent payments and pursing eviction proceedings against her. Because the record and applicable law establishes that Menada had the legal right to take its alleged actions, Menada's conduct is privileged and Menada cannot be liable for IIED as a matter of law. Moreover, the allegations and record fail to demonstrate that Menada's conduct satisfies the level of extreme and outrageous that is required to bring a cognizable claim for IIED. Thus, summary judgment was properly granted in favor of Menada on Count VII for IIED.

STANDARD OF REVIEW

An appellate court reviews a trial court's order granting summary judgment *de novo*. *Hunt v. SCI Funeral Servs. of Fla., LLC*, 307 So. 3d 891, 894 (Fla. 3d DCA 2020).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF MENADA COUNTS VI AND VII OF THE AMENDED COMPLAINT.

As a preliminary matter, Gabriela Arevalo asserts in her Notice of Appeal that the May 10, 2022 Order is a partial final judgment over which this Court has jurisdiction. R.3214-15.

By way of background, Gabriela Arevalo initiated the underlying Wrongful Death Case in circuit court on December 20, 2019 by filing her complaint. R.50-78. In the operative Amended Complaint, Gabriela Arevalo alleges that the action arises from the death of her late son, Cesar Gabriel Arevalo. R.176-77. She further alleges that, as personal representative of the Estate of Cesar Gabriel Arevalo, Gabriela Arevalo brings the action on behalf of the Estate and all beneficiaries and survivors. R.177.

Florida's Wrongful Death Act establishes a statutory right of action that arises when a person dies from the harm caused by another person. *Sheffield v. R.J. Reynolds Tobacco Co.,* 329 So. 3d 114, 120 (Fla. 2021); §768.19, Fla. Stat; *see* §768.16, Fla. Stat. A wrongful death action is brought by the decedent's personal representative to recover for the benefit of decedent's survivors and

estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. §768.20, Fla. Stat. The statutory mechanism for bringing a wrongful death action requires that a single cause of action for wrongful death be brought by the personal representative claiming each survivor's damages and expenses incurred by the estate. *Talan v. Murphy,* 443 So. 2d 207, 209 (Fla. 3d DCA 1983).

The May 10, 2022 Order at issue granted summary judgment to Menada on Counts VI, VII and VIII of the Amended Complaint. The remaining Counts I, II, III, IV, V, IX, X and XI assert negligence claims under Florida's Wrongful Death Act and punitive damages against Menada and Belinda Meruelo in connection with Cesar Gabriel Arevalo's death. R.184-97.

Piecemeal appeals should not be permitted where claims are legally interrelated and in substance involve the same transaction. *Mendez v. W. Flagler Family Asso.*, 303 So. 2d 1, 5 (Fla. 1974). When partial summary judgment is entered on a count and the pleadings reflect that the claim and underlying facts are interrelated with the remaining causes of action, the order granting partial summary judgment is nonfinal and nonappealable. *See Farrey's Wholesale*

Hardware Co. v. Coltin Elec. Servs., 263 So. 3d 168, 176 n.6 (Fla. 2d DCA 2018); Fla. R. App. P. 9.110(k). However, when it is obvious that a separate and distinct cause of action is pleading that is not interdependent with other pleaded claims, it should be appealable if dismissed with finality at the trial level. *Mendez*, 303 So. 2d at 5.

In her Notice of Appeal, Gabriela Arevalo claims Counts VI and VII addressed by the May 10, 2022 Order are landlord-tenant claims involving Menada's alleged efforts to evict her individually and "not interdependent with the wrongful death claims." R.3214-15. Thus, at the outset, Gabriela Arevalo concedes that Counts VI and VII are separate and distinct landlord-tenant claims and that the underlying facts are not interrelated with the remaining claims of the Amended Complaint arising out of separate conduct alleged to have resulted in decedent's death.

Against this backdrop, as set forth in detail below, the circuit court properly granted summary judgment in favor of Menada on Counts VI and VII of the Amended Complaint filed in the Wrongful Death Case.

i. Count VI is not properly brought as a cause of action filed in the Wrongful Death Case as it seeks relief not available under the Florida Residential Landlord and Tenant Act.

"A claim is, of course, limited by the allegations in the complaint." *S. Motor Co. v. Doktorczyk*, 957 So.2d 1215, 1218 (Fla. 3d DCA 2007). As the Florida Supreme Court has explained, for policy reasons, litigants at the outset of a lawsuit must state their pleadings with sufficient particularity for a defense to be prepared. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instr. Corp.,* 537 So. 2d 561, 563 (Fla. 1988). As a general principle, "there is no obligation to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Shands Teaching Hosp. & Clinics, Inc. v. Estate of Lawson,* 175 So. 3d 327, 331 (Fla. 1st DCA 2015).

Here, under Count VI titled "Wrongful Eviction," Gabriela Arevalo alleges that she brings this count "in her individual capacity pursuant to the Florida Residential Landlord and Tenant Act, including Florida Statutes §83.64 and §83.67." R.198, ¶94.[7] She also

[7] Notably, the original complaint filed December 20, 2019 also included a "Wrongful Eviction" claim as Count VI. R.70-72.

alleges that the Florida Residential Landlord and Tenant Act imposes an obligation of good faith in the performance of every rental agreement and asserts a claim for attorney's fees under Section 83.48. R.198-199, ¶95; R.200, ¶102. Further, in substance, Gabriela Arevalo's claims in Count VI are based on Menada's alleged refusal to accept her rent payment, seeking to evict her in retaliation for the fire, and bringing eviction proceedings against her. R.199-200, ¶¶96-101. To the extent that Count VI is titled "Wrongful Eviction," such label is conclusory and not dispositive to the nature of the claim alleged in the Amended Complaint. *See Shands Teaching Hosp. & Clinics, Inc.,* 175 So. 3d at 330 ("[S]imply labeling allegations … is not dispositive."). Based on the substance of its allegations, Count VI plainly asserts a claim for relief under the Florida Residential Landlord Tenant Act, Sections 83.40 through 83.683, Florida Statutes (the "Landlord Tenant Act" or "Act").

The determination of whether a statute creates a private cause of action for its violation is a question of statutory interpretation. *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So. 3d 541, 550 (Fla. 2012). Where the plain language of the statute does not provide for either a private cause of action or a penalty for violation of its

requirements, the court must determine whether either will be judicially implied. *Id.*

It is undisputed that Count VI asserts Menada engaged in retaliatory conduct under the Landlord Tenant Act by seeking to evict Gabriela Arevalo in alleged retaliation for the April 6, 2019 fire. R.2436:21-25. Nor could it be where Count VI expressly alleges the count is brought pursuant to the Landlord Tenant Act and specifically cites Section 83.64. R.198, ¶94; R.199, ¶98.

Section 83.64 addresses retaliatory conduct under the Landlord Tenant Act. In pertinent part, the section provides that it is "unlawful for a landlord … to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant." §83.64(1), Fla. Stat. Throughout Section 83.64, such retaliatory conduct is referred to only as a defense available to a tenant in an action brought by the landlord. *See* §83.64(1), Fla. Stat. ("In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith."); §83.64(2), Fla. Stat. ("Evidence of retaliatory conduct may be raised by the tenant as a defense in any action brought against him or her for possession."); *see also* §83.60(1)(a), Fla. Stat. (providing that tenant

may raise defenses, including "the defense of retaliatory conduct in accordance with s.83.64", in an action by the landlord for possession based on nonpayment of rent or seeking to recover unpaid rent). At the same time, Section 83.64 expressly provides that, "[i]n any event, this section does not apply if the landlord proves that the eviction is for good cause." §83.64(3), Fla. Stat.

The plain language of Section 83.64 does not provide for a private cause of action or penalty for its violation. Rather, Section 83.64 provides only that the tenant may raise retaliatory conduct pursuant to Section 83.64 as a defense in a landlord's action against the tenant. This is consistent with Section 83.60, which addresses defenses and provides that the tenant may raise retaliatory conduct under Section 83.64 as a defense in a landlord's action for possession or nonpayment of rent under the Act. Florida Courts have also interpreted the retaliation addressed in Section 83.64 as a defense. *See, e.g., Salmonte v. Eilertson,* 526 So. 2d 179, 180 (Fla. 1st DCA 1988) (finding that the retaliatory eviction defense could not be raised in eviction action where tenant admitted breaching the lease as "Section 83.64, Florida Statutes, provides that the defense does not apply when the landlord proves that the eviction is for good cause").

The Landlord Tenant Act contains no other provision referring to retaliation or retaliatory conduct.

Because the Landlord Tenant Act does not provide for an affirmative right of action or relief for retaliation, the next determination is whether a cause of action for retaliation will be judicially implied. *QBE Ins. Corp.,* 94 So. 3d at 550-51. "[W]hether a statutory cause of action should be judicially implied is a question of legislative intent." *Id.* at 551. In the absence of a specific expression of such intent, a private right of action may not be implied. *United Auto. Ins. Co. v. A 1st Choice Healthcare Sys.,* 21 So. 3d 124, 128-29 (Fla. 3d DCA 2009).

Legislative intent in this context refers to the ordinary tools for discerning statutory meaning: text, context, and purpose. *QBE Ins. Corp.*, 94 So. 3d at 551. In attempting to discern legislative intent, courts first look to the actual language used in the statute. *Daniels v. Fla. Dep't of Health,* 898 So. 2d 61, 64 (Fla. 2005). "In determining the meaning of the language used, the court must look not only to 'the words themselves but also to the context in which the language lies.'" *QBE Ins. Corp.*, 94 So. 3d at 551 (quoting *Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 472 (Fla. 1995)). "It is axiomatic

that all parts of a statute be read together in order to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). As such, "[w]here possible, courts must give effect to all statutory provisions and construe related provisions in harmony with one another." *Id.*

Looking to the language of the statute, the Landlord Tenant Act expressly provides that "[t]his part applies to the rental of a dwelling unit." §83.41, Fla. Stat. The statute further provides that "[t]his part" shall be known as the Florida Residential Landlord Tenant Act. §83.40, Fla. Stat. The Act authorizes rights of action by which a landlord may recover possession of a dwelling unit and damages caused by noncompliance with the rental agreement or Act. §83.59, Fla. Stat.; §83.55, Fla. Stat. By contrast, there is nothing in the text of Section 83.64 -- nor any other provision of the Act -- from which it could be deduced that the legislature intended to create an affirmative right of action or relief for retaliation. *C.f. QBE Ins. Corp.*, 94 So. 3d at 551; *United Auto. Ins. Co.,* 21 So. 3d at 129. Therefore, none of the statutory provisions upon which Count VI is predicated permit the affirmative relief sought therein. It should be noted that

Section 83.54, Florida Statutes, is inapposite as it does not create any affirmative right of action in and of itself. §83.54, Fla. Stat.

Remedies sought in a cause of action brought under a statute are generally limited to those specified in the statute. *Curtis v. W. Palm Beach,* 82 So. 2d 894, 895 (Fla. 4th DCA 2011). Where a plaintiff's claim is for relief that is not available under the statute, the complaint fails to set forth a legally cognizable cause of action and summary judgment is properly granted in favor of the defendant. *Id.* at 895-96. Applying these principles to the case at hand, the circuit court properly granted summary judgment in favor of Menada on Count VI as Gabriela Arevalo is requesting relief in the Wrongful Death Case that is not available to her under the Landlord Tenant Act pursuant to which Count VI is plead.

Moreover, Count VI was improperly plead as a cause of action in the Wrongful Death Case filed in December 2019 given that Menada had the Eviction Case against Gabriela Arevalo separately pending in county court.

It is undisputed that Menada filed its Eviction Case in county court in June 2019 seeking possession of Apartment 11E and unpaid rent under the Landlord Tenant Act, including Section 83.59.

R.1508-25. Because Menada sought possession under Section 83.59, the summary procedure set forth in Section 51.011, Florida Statutes, applied. *See* §83.59(1)-(2), Fla. Stat. (providing in relevant part that a landlord shall file a complaint for possession of the dwelling unit in county court and is entitled to the summary procedure provided in Section 51.011). As relevant here, the applicable summary procedure provides that "[a]ll defenses of law or fact shall be contained in defendant's answer which shall be filed within 5 days after service of process." §51.011(1), Fla. Stat.

As the Fifth District explained in *Crocker v. Diland Corp.,* 593 So. 2d 1096, 1099 (Fla. 5th DCA 1992), "[t]here is no option in the summary procedure to file certain defenses by motion as is authorized by [Florida Rule of Civil Procedure] 1.140; <u>all</u> defenses … <u>must</u> be filed within <u>five</u> days." Furthermore, as relevant here, the *Crocker* court went on to conclude that a motion to dismiss filed in an action for possession pursuant to the Landlord Tenant Act and subject to summary procedure does not toll the time for the defendant tenant to file its answer. *Id.* at 1100. In so doing, the court reiterated that the defendant tenant was obligated to file all of its defenses within five days. *Id.*

Here, according to her own Affidavit, Gabriela Arevalo was served with process of Menada's complaint in the Eviction Case on July 30, 2019. R.1970. Pursuant to *Crocker*, 593 So. 2d at 1099, 1100, and Section 51.011, Gabriela Arevalo was required to file all defenses to the Eviction Case within five days after service of process. It is undisputed that Gabriela Arevalo was served on July 30, 2019. Therefore, Gabriela Arevalo was required to file all defenses she had to Menada's action for possession and unpaid rent under the Landlord Tenant Act by no later than August 5, 2019. There is nothing in the record indicating that Gabriela Arevalo timely filed the defense of retaliatory conduct against Menada in an answer in the Eviction Case. As to her motion to dismiss filed August 19, 2019 in the Eviction Case, the motion is inapposite as Section 51.011 did not authorize Gabriela Arevalo to assert any of her defenses by motion. *Crocker,* 593 So. 2d at 1099. But even if she could have filed her defenses in a motion, her motion to dismiss is untimely anyway because it was filed more than 5 days after Gabriela Arevalo was served.

To the extent that Gabriela Arevalo relies upon *Pro-Art Dental Lab, Inc. v. Strategic Grp., LLC,* 986 So. 2d 1244 (Fla. 2008), to argue

that a tenant's defenses and counterclaims to a landlord's claim for damages are subject to the 20-day response time in Florida Rule of Civil Procedure 1.140(a)(1), it is inapplicable here to support that proposition. In *Pro-Art Dental Lab, Inc.,* 986 So at 1248, the commercial landlord filed a single-count complaint in county court seeking relief styled ejectment and Section 51.011's summary procedure does not apply to ejectment actions. Here, by contrast, Menada filed a two-count complaint for eviction in the Eviction Case seeking possession and damages for unpaid rent under the Landlord Tenant Act. Thus, because Menada did not seek the specific relief of ejectment in its complaint, the Eviction Case is subject to summary procedure in Section 51.011 and *Pro-Art Dental Lab, Inc.,* 986 So at 1248, is distinguishable to the extent that the underlying claim was for ejectment.

As to Gabriela Arevalo's Answer to the Eviction Complaint filed in the Wrongful Death Case on April 25, 2022, it is likewise untimely under Section 51.011 as it was filed over two years after she was served with the complaint in the Eviction Case. R.2549-61. Likewise, to the extent that Gabriela Arevalo argues that Count VI is somehow a defense to the eviction complaint, the Wrongful Death Case in

which she brought Count VI was not even initiated in circuit court until several months after the August 5, 2019 deadline to file her defenses in the Eviction Case.

Even assuming *arguendo* that the Landlord Tenant Act creates an affirmative right of action so as to authorize the claim set forth in Count VI, Gabriela Arevalo nonetheless would have been required to assert it as a counterclaim in an answer in the Eviction Case. Rule 1.170(a) provides that "a pleading must state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim…" Interpreting this rule, the Florida Supreme Court has explained that a compulsory counterclaim is "a defendant's cause of action arising out of the transaction or occurrence that formed the subject matter of the plaintiff's claim." *Londono v. Turk. Creek*, 609 So. 2d 14, 19 (Fla. 1992). The basic rationale is to avoid a multiplicity of suits. *Kinney v. Allied Home Builders*, 403 So. 2d 440, 442 (Fla. 2d DCA 1981). A party's failure to raise a compulsory counterclaim in the first suit will result in a waiver of that claim. *Londono*, 609 So. 2d at 19.

Again, there is no dispute that the claim set forth in Count VI is expressly brought under the Landlord Tenant Act and involves Menada's alleged actions with respect to Gabriela Arevalo's tenancy at Seacoast Suites and seeking to evict her. At the same time, the complaint in the Eviction Case asserts causes of action against Gabriela Arevalo under the Landlord Tenant Act for her eviction and damages for unpaid rent in connection with her tenancy at Seacoast Suites. Therefore, under Rule 1.170, the claim asserted in Count VI is a counterclaim because it arises out of the same transaction or occurrence that was the subject matter of Menada's claims in the previously filed Eviction Case. Because it is undisputed that Gabriela Arevalo did not raise her claim as set forth in Count VI as a compulsory counterclaim filed in an answer in the Eviction Case, it is waived. *Londono*, 609 So. 2d at 19. Such counterclaim is now untimely and barred. *See Crocker*, 593 So. 2d at 1099, 1100; *Cotton States Mut. Ins. Co. v. Hunt Truck Sales & Serv.*, 395 So. 2d 563, 563 (Fla. 5th DCA 1981) (finding that counterclaim seeking independent affirmative relief filed after applicable statute of limitations has run is barred even if original action instituted before it had run).

Similarly, any defenses or counterclaims that Gabriela Arevalo could have brought in the Eviction Case are deemed waived. *See* §83.60(2), Fla. Stat. (providing that if tenant interposes any defense other than payment, tenant shall pay into court registry accrued rent and that failure to do so or file motion to determine amount of rent to be paid into registry within 5 days constitutes absolute waiver of those defenses); *see Kaufman v. High Seas, LLC,* 49 Fla. L. Weekly D 684 (Fla. 4th DCA Mar. 27, 2024) (explaining that Section 83.60(2) is not discretionary). This includes any defense that Gabriela Arevalo may have had regarding timeliness and defective notice under the Landlord Tenant Act. *See* §83.60(2), Fla. Stat. Thus, Gabriela Arevalo's arguments on appeal concerning the purported deficiency of notices served by Menada under the Landlord Tenant Act are improper and immaterial at this juncture.

As to the county court's August 7, 2020 Order transferring the Eviction Case to the circuit court, the purported consolidation of the cases is inapposite to Gabriela Arevalo's failure to state a legally cognizable cause of action in Count VI and failure to timely assert the defense of retaliatory conduct against Menada in the Eviction Action. Indeed, "[c]onsolidation does not merge suits into a single cause or

change the rights of the parties, or make those who are parties in one suit parties in another[;] [r]ather, each suit maintains its independent status with respect to the rights of the parties involved." *Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752, 757 (Fla. 2016) (quoting *Shores Supply Co. v. Aetna Cas. & Sur. Co.*, 524 So. 2d 722, 725 (Fla. 3d DCA 1988)). Thus, where a court has consolidated cases, motions filed in each respective case must be determined solely by the examination of the related complaint and documents and not the documents in the consolidated case. *See Urribari v. 52 SW 5th Ct. WHSE, LLC*, 266 So. 3d 1257, 1261 (Fla. 4th DCA 2019).

Applying these principles, the Amended Complaint filed in the Wrongful Death Case is not a pleading asserting defenses and/or counterclaims in Menada's Eviction Case. But even assuming that complaints filed in the Wrongful Death Case functioned as pleadings in the Eviction Case, they would nonetheless be untimely. *See Crocker,* 593 So. 2d at 1099-1100; §51.011, Fla. Stat. Likewise, the April 25, 2022 Answer filed in the Wrongful Death Case purporting to address the June 2019 complaint in the Eviction Case is untimely even if it could be considered.

Gabriela Arevalo's reliance upon *Orix Capital Markets, LLC v. Park Ave. Assocs., Ltd.,* 881 So.2d 646, 650-51 (Fla. 1st DCA 2004), to argue that a compulsory counterclaim could become permissive is misplaced. In *Orix Capital Markets, LLC,* the parties to the underlying action dismissed a prior action on their stipulation that the subject claim, which otherwise would have been a compulsory counterclaim, could still be pursued. *Id.* Here, the record is devoid of evidence that Gabriela Arevalo and Menada entered any such stipulation or settlement agreement or agreement of any kind under which Gabriela Arevalo could assert Count VI as a permissive counterclaim or defense to the complaint in the Eviction Case.

Nor does *Landry v. Hornstein,* 462 So. 2d 844 (Fla. 3d DCA 1985), support Gabriela Arevalo's argument that the Court implicitly treats claims as compulsory counterclaims after cases are consolidated. Indeed, it appears that Gabriela Arevalo relies solely on a footnote in *Landry*, 462 So. 2d at 846 n.*, stating only that two cases were consolidated and a claim was treated as a compulsory counterclaim without any further detail or analysis whatsoever on the issue.

Additionally, assuming solely *arguendo* that any claim for retaliatory conduct under Section 83.64 could properly be asserted in the Wrongful Death Case, Gabriela Arevalo has not alleged and cannot establish that she engaged in statutorily protected activity under the Landlord Tenant Act. *See* §83.64(1)(a)-(f), Fla. Stat. Contrary to her arguments, the record is devoid of any allegation or evidence that Menada retaliated against Gabriela Arevalo for any of the conduct listed in Subsection 83.64(1). Nor is there any evidence that she even engaged in any such conduct in the first instance. According to her own allegations under Count VI, "Menada sought to evict Gabriela in retaliation for the fire…" R.199 at ¶98. There is no specific statutory provision under the Act identifying "fire" as a protected activity giving rise to a claim of retaliation. *See* §83.64(1)(a)-(f), Fla. Stat. Furthermore, Gabriela Arevalo has conceded in her Notice of Appeal that Count VI is separate and distinct from her Wrongful Death Act claims. Yet, she fails to identify any other alleged protected activity under the Act that could give rise to a statutory retaliation claim.

Nor does Gabriela Arevalo point to any evidence or allegation in the record indicating that she has otherwise engaged in any of the

protected activities set forth in the statute or that would otherwise be considered protected pursuant to the Landlord Tenant Act. Her mere retention of an attorney and the attorney sending a letter demanding to enter Apartment 15K that was destroyed in the fire is insufficient to assert a cognizable statutory claim or defense under the Act. Likewise, none of Menada's alleged actions fall under any of the "prohibited practices" outlined in Section 83.67, Florida Statutes. *See* §83.67(1)-(5), Fla. Stat. In any event, the undisputed record establishes that Gabriela Arevalo was permitted to access Apartment 15K on multiple days to collect personal items after the fire and resided in Apartment 11E at Seacoast Suites until she moved out of the building.

While it is patently clear that Gabriela Arevalo brings her claim in Count VI under the Landlord Tenant Act, the record also fails to support a claim for constructive eviction against Menada. In Florida, constructive eviction has been defined as "an act by the landlord 'which although not amounting to an actual eviction, is done with express or implied intention, and has the effect, of essentially interfering with the tenant's beneficial enjoyment of the leased premises.'" *Sentry Water Sys., Inc. v. ADCA Corp.,* 355 So. 2d 1255,

1257 (Fla. 2d DCA 1978) (quoting *Hankins v. Smith,* 138 So. 494, 495 (Fla. 1931)). A claim for constructive eviction arises out of any wrongful act or default or neglect of the landlord rendering the leased premises unsafe, unfit or unsuitable for occupancy in whole, or in substantial part, for the purposes for which they were leased. *Id.*

"An eviction, whether actual or constructive, must be wrongful in order to be actionable." *Walsh v. CAS, Inc.*, 633 So. 2d 561, 562 (Fla. 4th DCA 1994). In *Walsh*, the issue was whether a tenant's counterclaim entitled "wrongful eviction" was properly dismissed because of the res judicata effect of a prior judgment of eviction against the tenant in a county court eviction proceeding. *Id.* To the extent that the counterclaim attacked the propriety of the county court eviction proceeding, the lawful judgment of eviction barred the claim of wrongful eviction arising from the actual eviction of the tenant. *Id.*

Consistent with the principle later reiterated in *Walsh,* the Second District in *Sentry Water Sys., Inc.,* 355 So. 2d at 1257, explained that implicit in constructive eviction decisions is that the act of the landlord constituting the constructive eviction be "wrongful, unwarranted or unlawful." Critically, the court pointed out

that "[i]t is essential that there be a wrongdoing on the part of the landlord, and a constructive eviction does not arise from an attempt by the landlord to hold the tenant to the terms of the lease." *Id.*

Here, the undisputed record, including Gabriela Arevalo's own allegations, establishes that Menada's complained of conduct arose from Gabriela Arevalo not paying her monthly rent on time and Menada's actions in seeking to evict her and damages for her past due unpaid rent. R.198-99, ¶¶95,98-100. As set forth in more detail in Section I(ii) below, which is incorporated herein by reference, Menada had a legal right under the Landlord Tenant Act to terminate Gabriela Arevalo's tenancy and initiate the Eviction Case in County Court where there is no evidence that she had any written lease agreement with Menada after May 2017 and she admittedly did not pay her rent on time in April 2019. On this record, Gabriela Arevalo has no actionable claim for constructive eviction as it is undisputed that she did not timely pay rent and Menada was within its legal rights to seek possession of Apartment 11E and damages for unpaid rent under the Landlord Tenant Act. *Sentry Water Sys., Inc.,* 355 So. 2d at 1257 (finding that landlord's alleged conduct could not form the basis of a wrongful eviction as it was based on tenant's material

breach of lease covenants and reversing and remanding for judgment in favor of landlord). Furthermore, the eviction proceeding itself is not wrongful, unwarranted or unlawful as there is no evidence that Gabriela Arevalo was actually evicted pursuant to same. To the contrary, Gabriela Arevalo's testimony establishes that she voluntarily vacated Seacoast Suites to move into a new apartment before she was even served with the eviction complaint.

For the foregoing reasons, Count VI brought under the Landlord Tenant Act fails to assert a legally cognizable affirmative right of action for which relief can be granted and thus summary judgment was properly granted to Menada.

ii. Menada's alleged conduct under Count VII is privileged and insufficient to support a claim of IIED as a matter of law.

To set forth a claim of IIED, a plaintiff must establish that:

(1) the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;

(2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;

(3) the conduct caused emotional distress; and

(4) the emotional distress was severe.

Legrande v. Emmanuel, 889 So. 2d 991, 994-95 (Fla. 3d DCA 2004). The question of what constitutes outrageous conduct is determined by the trial court as a matter of law. *De La Campa v. Grifols Am.*, 819 So. 2d 940, 943 (Fla. 3d DCA 2002). Summary judgment is properly granted to the defendant on an IIED claim when the undisputed facts are insufficient to meet the outrageous standard required to state a cause of action for the tort. *Horizons Rehab., Inc. v. Health Care & Ret. Corp.,* 810 So. 2d 958, 964 (Fla. 5th DCA 2002).

In *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278-79 (Fla. 1985), the Florida Supreme Court approved Restatement (Second) of Torts §46 (1965) as the appropriate definition of the tort of IIED. Section 46 of the Restatement (Second) of Torts (1965) provides in relevant part that, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." As explained in the restatement's comment on extreme and outrageous conduct, liability has only been found where the conduct at issue "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and

utterly intolerable in a civilized community." *McCarson*, 467 So. 2d at 278-79 (quoting Restatement (Second) of Torts, §46 cmt. d (1965)).

The *McCarson* Court also cited the restatement's comment providing that conduct, which would otherwise be extreme and outrageous, may be privileged under the circumstances. *Id.* at 279 (quoting Restatement (Second) of Torts, §46 cmt. g (1965)). That comment further explains that "[t]he actor is never liable, for example, where he has done no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Id.* The authors of the restatement additionally provided the following illustration:

> A and her children are destitute, ill, and unable to pay their rent. B, their landlord, calls on A and threatens to evict her if the rent is not paid. Although B's conduct is heartless, he has done no more than the law permits him to do, and he is not liable to A for her emotional distress.

Restatement (Second) of Torts, §46, cmt. g, illus. 14 (1965).

Here, Gabriela Arevalo has not alleged and cannot establish the outrageous conduct required to set forth a claim for IIED against Menada. In Count VII of the Amended Complaint, Gabriela Arevalo asserts a claim of IIED against Menada. R.200-02. Thereunder, she identified the outrageous conduct as Menada allegedly refusing to

accept rent payments, instructing her to leave, and pursuing eviction proceedings against her. R.200-02, ¶¶106-110, 113. The balance of Count VII consists of conclusions and speculation. *See, e.g.*, R.200, ¶105 (alleging Menada's "ulterior motive"); R.201, ¶110 (alleging possession of the unit "did not satisfy Menada"), ¶111 (alleging Menada "intentionally plotted to evict a vulnerable tenant"). These conclusory allegations cannot be considered on her IIED claim. *Eastern Airlines v. King,* 557 So. 2d 574, 576 (Fla. 1990) (finding plaintiff in underlying case failed to state IIED claim based on fact allegations where remainder of the count contained mere conclusions there are insufficient to support the cause of action). Further, they lack any support in the record.

On their face, the non-conclusory allegations of the Amended Complaint supporting the IIED claim describe Menada's conduct with respect to Gabriela Arevalo's month-to-month tenancy at Seacoast Suites. An actor's conduct is privileged and the actor is never liable for IIED "where he does no more than insist upon his legal rights in a permissible way, even though the actor is well aware that such insistence is sure to cause emotional distress." *Southland Corp. v. Bartsch*, 522 So. 2d 1054, 1054-56 (Fla. 5th DCA 1988)

(finding that conduct of corporation's store manager in reporting a 6-year-old child to police for stealing gum, leading to child's arrest, was privileged as a matter of law); *see also McCarson*, 467 So. 2d at 278-79 (accepting Restatement (Second) of Torts, §46 (1965) as appropriate definition for IIED); Restatement (Second) of Torts, §46 cmt. g (1965)). Similarly, an actor's conduct, even if it could be considered "heartless" under the circumstances, does not subject the actor to liability if he has done no more than the law permits him to do. *See* Restatement (Second) of Torts, §46, cmt. g, illus. 14 (1965). In sum, the tort of IIED is not created when a company pursues a course of action to which it has a legal right. *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1212 (Fla. 5th DCA 1995).

Here, based on the undisputed record, Menada had the legal right to terminate Gabriela Arevalo's tenancy and initiate eviction proceedings. There is no record evidence that Gabriela Arevalo had a written lease with Menada in 2019. The last written lease agreement she had with Menada expired on May 31, 2017. According to her own allegations and testimony, Gabriela Arevalo went to pay her past-due monthly rent for April 2019 on April 29 and May 1, 2019, at which times the office did not accept her check.

Where not provided for in a rental agreement, the duration of the tenancy is determined by periods for which rent is payable. §83.46(2), Fla. Stat. If payable monthly, the tenancy is from month-to-month. *Id.* Gabriela Arevalo was a month-to-month tenant without a written lease agreement in 2019. By statute, periodic rent is payable at the beginning of each rental payment period. §83.46(1), Fla. Stat Thus, under Florida law, Gabriela Arevalo's monthly rent for April 2019 was payable at the beginning of that month.

According to her deposition testimony, Gabriela Arevalo did not pay the monthly April 2019 rent to Menada when due. Gabriela Arevalo also testified that she made no attempt to pay Menada any monthly rent for May or June 2019. Florida Statutes provide that if a tenant fails to pay rent when due and the default continues for three days (excluding Saturday, Sunday and legal holidays), after delivery of written demand by the landlord for payment or possession of the premises, the landlord may terminate the rental agreement. §83.56(3), Fla. Stat.; *see* §83.43(12), Fla. Stat. ("'Rental agreement' means any written agreement … or oral agreement for a duration of less than 1 year, providing for use and occupancy of premises."). Therefore, even if there was a rental agreement, Menada had the legal

right to give a three-day written demand to Gabriela Arevalo on June 6, 2019 for payment of past-due rent or possession of Apartment 11E. It is undisputed that Gabriela Arevalo did not thereafter pay any past-due rent. It follows that Menada then had the statutory right to terminate any rental agreement for non-payment of rent. *See* §83.56(3), Fla. Stat.

Moreover, if a rental agreement is terminated and the tenant does not vacate the premises, the landlord may, by statute, recover possession of the dwelling unit by filing a complaint in county court. §83.59(1),(2), Fla. Stat. The landlord may recover possession of a dwelling unit in this same manner where a tenant that holds over and continues in possession of the unit after the expiration of the rental agreement. §83.58, Fla. Stat.

Here, the last written lease between Gabriela Arevalo and Menada expired in May 2017. Thereafter, Gabriela Arevalo continued to live on the premises of Seacoast Suites with no written lease. As such, Menada had the legal right to demand and seek possession of the dwelling unit she occupied at Seacoast Suites without a written lease. Moreover, Menada had the legal right to take action to terminate Gabriela Arevalo's tenancy. *See Ralo, Inc. v. Jack Graham,*

362 So. 2d 310, 311 (Fla. 2d DCA 1978) ("A landlord is entitled to terminate a tenancy at will upon proper notice without having to justify his action through the showing of appropriate cause."); §83.56(3), Fla. Stat.; §83.57(3), Fla. Stat. (2019) (providing that a month-to-month tenancy without a specific duration may be terminated by giving written notice as set forth therein).

Even assuming *arguendo* that Menada issued "procedurally deficient" notice(s), Gabriela Arevalo nonetheless cannot base her IIED claim on the fact that Menada sought possession of her dwelling unit or to terminate her tenancy, as she was a month-to-month tenant with no written lease. *C.f. Food Lion v. Clifford*, 629 So. 2d 201, 203 (Fla. 5th DCA 1993) (finding that plaintiff former employee could not base his IIED claim on fact that his employment was terminated, as he was an at-will employee, even if his employer's investigation of theft accusation against him was insufficient). Indeed, "[c]ompliance with the statutory notice requirement is merely a condition precedent to an eviction action under part II of Chapter 83." *Bell v. Kornblatt*, 705 So. 2d 113, 114 (Fla. 4th DCA 1998). The failure of a landlord to deliver *any* notice under the statute would not deprive the county court of jurisdiction to adjudicate the case. *Id.*

And, again, Gabriela Arevalo would have had to raise the defense of an allegedly defective notice in Eviction Case in County Court and required by statute to post the accrued rent into the court registry. §83.60(2), Fla. Stat. The statute further provides that the landlord must be given an opportunity to cure a deficiency in a notice before dismissal of the eviction action. §83.60(1), Fla. Stat. As plainly evident from the statutes, this defense is immaterial to the underlying Wrongful Death Case brought by the Amended Complaint at issue under the Wrongful Death Act.

As to the fact that Menada filed an eviction complaint against Gabriela Arevalo in County Court on June 19, 2019, it certainly had a legal right to pursue such action after its Three Day Notice served June 6, 2019 and May 10, 2019 Notice. Section 83.59 provided that "[i]f the rental agreement is terminated and the tenant does not vacate the premises, the landlord may recover possession of the dwelling unit" and shall file a complaint in county court describing the dwelling unit and facts that authorize its recovery. §83.59(1),(2), Fla. Stat. Florida Statutes also authorize judgment with costs in favor of the landlord for the amount of money found due, owing, and unpaid by the tenant and reasonable attorney fees. §83.625, Fla.

Stat. (2019); §83.48, Fla. Stat. (2019); *see also* §83.59(4), Fla. Stat. Therefore, Menada had a legal right to request damages for past due rent, attorney fees and costs in its Eviction Case. *See* R.201 at ¶110.

Notwithstanding that Menada had a legal right to take the actions at issue, the undisputed record otherwise establishes that Menada's conduct falls far short of the level of outrageous conduct required to establish a claim of IIED in Florida as a matter of law.

Menada's conduct regarding access to Apartment 15K after the fire and otherwise with respect to Gabriela Arevalo's past due rent payment and tenancy is not sufficiently outrageous and extreme to give rise to an IIED claim. *See Novotny*, 657 So. 2d at 1212 (finding, after first noting that defendant had legal right to terminate plaintiff's employment, that its conduct otherwise was not sufficiently egregious to give rise to tort of IIED). According to her own deposition testimony, Gabriela Arevalo did access Apartment 15K after the fire to obtain her documents and was later told not to go in because it was under investigation. Gabriela Arevalo testified that the building permitted her to access Apartment 15K again on multiple occasions with her attorney in June and July 2019 to remove her possessions. To the extent that Gabriela Arevalo argues that Menada "blocked" her

access to the fire damaged Apartment 15K, her own testimony establishes that she and her attorney were in fact permitted access to Apartment 15K on multiple occasions in the months after the fire to collect personal items. Gabriela Arevalo points to no facts that demonstrate Menada's conduct with regard to her access to Apartment 15K was outrageous, particularly where she testified she was told not to access it because it was under investigation. *See Novotny*, 657 So. 2d at 1212-13 ("To be sufficient, the recitation of facts must arouse resentment in an average member of the community, and cause him to exclaim 'outrageous.'").

Likewise, based on the undisputed record, Menada's conduct in not accepting Gabriela Arevalo's past due rent and telling her to leave the building on one or two occasions is insufficient to establish the level of extreme and outrageous conduct required for a claim of IIED. Temporally, Menada's alleged conduct at issue occurred at least three weeks after the April 6, 2019 fire and death of Gabriela Arevalo's son. Gabriela Arevalo testified to only two occasions, the earliest being April 29, when the office did not accept her past due monthly rent for April 2019 and she also spoke to the owner on April 29.

Regarding the statement made by the building owner, even if true, it was made on one occasion at the end of April 2019. According to Gabriela Arevalo's testimony, the statement was made during a conversation that Gabriela Arevalo requested to have with the owner after the office would not accept her past-due rent check. To the extent that the statement could be considered accusatory or harsh, liability for IIED "does not extend to mere insults, indignities, threats, or false accusations." *Williams v. Worldwide Flight Servs.*, 877 So. 2d 869, 870 (Fla. 3d DCA 2004). Moreover, in evaluating an IIED claim, "courts do not focus on the alleged victim's subjective response to, or description of, the actor's conduct." *Glegg v. Hurk*, 379 So. 3d 1171, 1174 (Fla. 4th DCA January 10, 2024). But in any event, Gabriela Arevalo testified at deposition that she has not received any treatment for emotional distress or mental health issues at any time since April 2019. S.R.3422:10-13, 3463:11-14. Thus, the record is devoid of sufficient evidence to support that severe emotional distress as required by the third and fourth prongs of the test. Conclusory arguments about the subjective feelings of Gabriela are insufficient standing alone.

At bottom, the undisputed record establishes that the conduct at issue here, nearly all of which relates to Menada seeking possession of the dwelling unit and pursuing its Eviction Case under the Landlord Tenant Act, is insufficient as a matter of law to satisfy the standard required for liability of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *McCarson*, 467 So. 2d at 278-79. Indeed, far more egregious conduct has been found insufficient to rise to the level of extreme and outrageous required for an IIED claim. *See, e.g., Legrande*, 889 So. 2d at 994-95 (finding allegations that defendants spoke false and defamatory words about plaintiff pastor, including referring to plaintiff as "Satan," to a congregation of 250 people were insufficient to state claim for IIED); *Worldwide Flight Servs.*, 877 So. 2d at 870 (finding allegations that former supervisors repeatedly made racially discriminatory remarks to and about plaintiff, threatened plaintiff with job termination, falsely accused plaintiff of stealing, and directed plaintiff to work in dangerous conditions, among other things, were insufficient to state claim for IIED). As Gabriela Arevalo has not and cannot point to record

evidence that would establish that Menada's conduct rises to the level of extreme and outrageous conduct required to satisfy the second element to prove IIED, the circuit court properly entered summary judgment in favor of Menada on Count VII. *See Legrande,* 889 So. 2d at 994-95 (affirming dismissal of IIED claim where alleged conduct did not rise to level of extreme and outrageous conduct necessary to satisfy element two to support claim of IIED).

Gabriela Arevalo fails to identify any Florida case addressing a plaintiff's ability to bring an IIED claim following the death of a family member for conduct unrelated to the treatment of the decedent's body. *See* Int. Br. at p.60, fn.7 (acknowledging that Florida cases focus on improper treatment of decedent's body and citing federal case); *Williams v. Minneola,* 575 So. 2d 683, 691 (Fla. 5th DCA 1991) ("As for what is outrageous or reckless and what is not, we emphasize that our society … shows a particular solicitude for the emotional survivors regarding improper behavior toward the dead body of a loved one, and the special deference paid by courts to family feelings where rights involving dead bodies are concerned is central to our decision."). Furthermore, contrary to her suggestion, *Dependable Life Ins. Co. v. Harris*, 510 So. 2d 985 (Fla. 5th DCA 1987), does not

involve any determination regarding outrageous conduct given a plaintiff's sensitivity following the death of a plaintiff's family member. Rather, the underlying case in *Harris* involved an insurer's conduct in rejecting the plaintiff's claim for disability benefits. Gabriela Arevalo's vague and conclusory speculation about Menada's awareness of her grief over her son's death lack support in the record. *See, e.g.,* Int. Br. at p.60, fn.7 (arguing in footnote that Menada "knew of Arevalo's suffering and waged its eviction campaign despite its knowledge").

As to her argument that the prospect of eviction leaving her without a home should be considered, Gabriela Arevalo testified that she moved out of Seacoast Suites by the end of June 2019 and the lease for her new apartment began on July 1, 2019. While Menada filed an eviction complaint in county court on June 19, 2019, Gabriela Arevalo testimony establishes that she already had a new home and was no longer living at Seacoast Suites by July 1. Thus, on the undisputed record, there was no prospect of the eviction action leaving her without a home. But even if there was, which there clearly was <u>not</u>, alleged anxiety and stress associated with being constructively evicted from one's residence without having

alternative housing available is not the type of conduct that is so outrageous in character and extreme in degree so as to go beyond the bounds of decency and be deemed utterly intolerable in a civilized community. *Clemente v. Horne,* 707 So. 2d 865, 867 (Fla. 3d DCA 1998) (affirming dismissal of former tenants' IIED claim against landlords for emotional distress of being constructively evicted from premises and not having alternative housing).

Because the undisputed record establishes that Menada had a legal right to take the alleged actions, and further that the alleged conduct is insufficiently extreme and outrageous to create a claim for IIED, summary judgment was properly granted in favor of Menada on Count VII.

CONCLUSION

Based on the foregoing reasons and authorities, Menada, Inc., a Florida corporation d/b/a Seacoast Suites, respectfully requests that this Court affirm the circuit court's May 10, 2022 Order granting its Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed through the eDCA portal and served via e-mail this **7th** day of June, 2024 to all counsel of record, including those listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rules of Appellate Procedure 9.045 and 9.210 by using Bookman Old Style 14-point font and that it contains approximately 10,967 words.

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