

IN THE  
DISTRICT COURT OF APPEAL  
THIRD DISTRICT OF FLORIDA

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Case No. 3D23-941  
Consolidated with Case No. 3D23-1125  
L.T. Case No. 2021-014724-CA-01

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ARIA ON THE BAY CONDOMINIUM ASSOCIATION, INC.

Appellant/Plaintiff,

v.

BAYSHORE PLAZA I, LLC, and 1770 BAYSHORE DRIVE, LLC

Appellees/Defendants

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On Appeal from the  
Circuit Court of the Eleventh Judicial Circuit  
in and for Miami-Dade County, Florida

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**ANSWER BRIEF OF APPELLEES**

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## INTRODUCTION

Appellees/Defendants, Bayshore Plaza I, LLC, and 1770 Bayshore Drive, LLC (collectively, “Defendants”), hereby file this Answer Brief in these consolidated proceedings.

Plaintiff, Aria on the Bay Condominium Association, Inc. (“Plaintiff”) has appealed three separate Orders entered by the Honorable William Thomas (the “Trial Court”) in the lower court proceedings:

- The February 7, 2023, Summary Judgment Order in Plaintiff’s declaratory action, which partially granted Defendants’ Motion for Summary Judgment, and denied Plaintiff’s Motion for Partial Summary Judgment (the “Summary Judgment Order”). (R. 2373-78.)<sup>1</sup>
- The May 9, 2023, Amended Final Judgment, following a non-jury trial on Plaintiff’s remaining claims (the “Amended Final Judgment”). (R. 2379-80.)
- The June 21, 2023, Court Order and Default Judgment on 1770 Bayshore, LLC’s Counterclaim (the “Default Judgment”). (R. 2419-22.)

Plaintiff has not shown that reversal of any of these Orders is warranted, and Defendants thus request that this Court affirm all three rulings.

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<sup>1</sup> Plaintiff has specifically appealed the Summary Judgment Order by including it as a separate attachment to their Notice of Appeal. However, Defendants note that an Order merely granting or denying a motion for summary judgment is not appealable. See *Nolan’s Towing and Recovery v. Marino Trucking, Inc.*, 581 So. 2d 644, 644 (Fla. 3d DCA 1991) (holding order granting summary judgment was a nonfinal order that was not entitled to appellate review). Notwithstanding this, given that the Trial Court subsequently entered final judgment, Defendants will address the Summary Judgment Order accordingly.

With respect to the Summary Judgment Order, Plaintiff failed to meet its burden in showing the Trial Court—and now this Court—that there was a genuine dispute of material fact concerning the issues that were decided on summary judgment. The Trial Court thus correctly found that Bayshore Plaza I, LLC, made a valid transfer of certain parking and storage spaces to 1770 Bayshore Drive, LLC, a ruling which cited to Plaintiff’s own, uncontroverted testimony and discovery responses. There was likewise no error in the Trial Court’s entry of the Amended Final Judgment following the April 20, 2023, non-jury trial, particularly where Plaintiff elected not to present any evidence on Plaintiff’s remaining claims.

Plaintiff has also failed to show that the Trial Court abused its discretion in denying its request for a continuance of the hearing as to Defendants’ motion for summary judgment. The “incomplete discovery” Plaintiff now conveniently laments on appeal was not even requested until after Defendants filed their motion, and did not pertain to any materially significant facts in the case—specifically, when the Developer last owned a unit in the Condominium, and by extension, whether the Developer had authority to execute the Assignments at the time they were made. And in any event, Plaintiff did not follow the requirements of Rule 1.510(d) in requesting the continuance. Plaintiff’s remaining arguments concerning the Summary

Judgment Order similarly lack merit, including that only the City of Miami had authority to decide certain issues that were litigated, and that the Trial Court was restricted to Plaintiff's "wherefore clause" in fashioning its written Order.

Last, Plaintiff's argument that the Default Judgment was premised on erroneous rulings is incorrect and does not call for reversal. The Default Judgment was entered because Plaintiff decided not to file an Answer to, or to otherwise defend against, 1770 Bayshore, LLC's Counterclaim. Thus, a default was warranted pursuant to Fla. R. Civ. P. 1.500(b).

### **STATEMENT OF THE CASE AND FACTS<sup>2</sup>**

#### **A. Assignment of Parking and Storage Spaces at Aria on the Bay Condominium.**

Bayshore Plaza I, LLC (the "Developer") was the developer of the condominium property known as Aria on the Bay, a 53-story building in Miami-Dade County (the "Condominium") (R. 248, ¶ 5; R. 963, ¶ 2.) The Condominium is governed by the Declaration of Aria on the Bay Condominium, recorded on January 20, 2015 (the "Declaration"). (R. 1534-1888.)

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<sup>2</sup> In this Answer Brief, citations to the Record are designated with the prefix "R.", and citations to Plaintiff's Initial Brief are designated with the prefix "IB.".

Sections 3.3(c) & (d) of the Declaration govern the assignability of parking and storage spaces within the Condominium. Specifically, and with respect to parking spaces, Section 3.3(c) provides that:

**Until such time as Developer is no longer offering Units for sale in the ordinary course of business,** Developer hereby reserves and shall have . . . the right to assign, with or without consideration, the exclusive right to use any parking space located within the Common Elements of the Condominium, to one or more Units, whereupon the space so assigned shall be deemed a Limited Common Element of the Unit(s) to which it is assigned.

(R. 1546) (emphasis added). Similarly, Section 3.3(d) provides the following with respect to storage spaces:

**Until such time as Developer is no longer offering Units for sale in the ordinary course of business,** Developer hereby reserves and shall have . . . the right to assign, with or without consideration, the exclusive right to use any storage space, if any, now or hereafter located within the Common Elements of the Condominium, to one or more Units, whereupon the space so assigned shall be deemed a Limited Common Element of the Unit(s) to which it is assigned.

(R. 1547) (emphasis added).

On December 13, 2019, the Developer sold eight units at the Condominium (Units 1612, 3204, 2711, 215, 317, 2715, 4005, and 4205) to 1770 Bayshore, LLC (“1770 Bayshore”) for \$ 3,161,563.56. (R. 793-907.) Prior to this sale, the Developer had assigned to Unit 1612 the exclusive use of 34 parking spaces (the “Parking Spaces Assignment”), see R. 775-77, and

seven storage spaces (the “Storage Spaces Assignment”). (R. 778-86.) The specific parking spaces were listed by space number attached to the Parking Spaces Assignment (“the Parking Spaces”) (R. 777), while the specific storage spaces were depicted by shading in the floor plans attached to the Storage Spaces Assignment (the “Storage Spaces”). (R. 780-86.)

Under Sections 3.3(c) & (d) of the Declaration, after assignment to a unit by the Developer, a unit owner may further assign, convey, or otherwise transfer a storage or parking space to another unit. See R. 1546 (“A Unit Owner may assign, convey or otherwise transfer the Limited Common Element parking space assigned to his or her Unit to another Unit by written instrument delivered to (and to be held by) the Association.”); R. 1547 (“After assignment to a Unit by the Developer, a Unit Owner may assign, convey or otherwise transfer the Limited Common Element storage space to his or her Unit to another Unit . . . .”). Pursuant to these provisions, 1770 Bayshore assigned the Parking and Storage Spaces from Unit 1612 to 3204 on November 30, 2020 (R. 921-29), and then from Unit 3204 to 2711 on November 1, 2021 (R. 931-39.) 1770 Bayshore provided Plaintiff with a written copy of both assignments. (R. 260, 278-79.)

**B. Plaintiff Files a Declaratory Judgment Action, and the Parties Engage In Discovery.**

Plaintiff filed an action for declaratory judgment on June 23, 2021. (R. 33-37.) In the operative, Third Amended Complaint (R. 247-53), Plaintiff requested that the Trial Court enter a declaratory judgment, finding that (i) neither the Parking Spaces nor the Storage Spaces Assignments were valid, and (ii) the spaces identified in the exhibit to the Storage Spaces Assignments<sup>3</sup> were not assignable storage spaces. (R. 253.)

The parties engaged in extensive discovery in this case. This included the deposition of Katia Ettus, the corporate representative Plaintiff designated to testify on its behalf on specific areas of inquiry, including Plaintiff's position on when the Developer "ceased offering units for sale." (R. 1066, 14:17-19.) In its deposition, Plaintiff's corporate representative confirmed that Section 3.3(d) of the Declaration permitted the Developer could assign spaces so long as it owned a unit at the Condominium:

Q. The next sentence, "**Until such time as Developer is no longer offering units for sale in the ordinary course of business**, Developer hereby reserves and shall have"-- and then there's a parenthetical -- "(and after such period, the Association, acting for its Board, shall have) **the right to assign** with or without consideration **the exclusive right to use any storage space**, if any, now or hereafter located within the common elements of the condominium to one or more units, whereupon

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<sup>3</sup> Including the November 1, 2021, assignment. (R. 253, 269-76.)

the space so assigned shall be deemed a limited common element of the units to which it is assigned.” You see that?

A. Yes.

Q. Okay. Does the Association, do you, I’m asking you in your capacity as a corporate representative on behalf of the Association, **do you have an understanding as to what this means?**

A. **Yes.**

Q. What is your understanding?

A. **That the Developer has the rights to assign its storages for as long as it owns a unit.**

(R. 1145, 93:2-23) (emphasis added).

Q. So the same question that I asked with regard to storage spaces, but now applied to parking spaces. This says, “Until such time as Developer is no longer offering units for sale in the ordinary course of business.” Once again, you have no knowledge, and the Association has no knowledge and no position as to when the Developer stopped selling units for sale in the ordinary course of business; is that correct?

A. To my knowledge, yes.

(R. 1148, 96:19-97:3.) With respect to the assignability of individual Storage Spaces, Plaintiff stated in sworn, Interrogatory Responses, that any area designated as “Storage” was assignable:

8. Identify each of the areas depicted in Exhibit A attached to the Assignment that you contend **are assignable** storage spaces, governed by Section 3.3(d) of the Declaration. All spaces containing the designation "Storage".

**All spaces containing the designation "Storage".**

(R. 914) (emphasis added).

7. Identify each of the areas depicted in Exhibit A attached to the Assignment that You contend **are not assignable** storage spaces, governed by Section 3.3(d) of the Declaration. For each area so identified, indicate the section of the Declaration do You contend governs that area.

**The entire exhibit except those areas designated as "Storage".** Those sections of the Declaration set forth in Answer to Interrogatory number 6.

(R. 914) (emphasis added).

Plaintiff's testimony on this point is undisputed and unrebutted. There is no other evidence in the record which supports any other interpretation of Section 3.3(d).

**C. The Parties' Motions for Summary Judgment and the Trial Court's Ruling.**

1. Plaintiff's Motion for Partial Summary Judgment.

On November 4, 2022, Plaintiff moved for partial summary judgment, asking the Court to determine whether the areas identified in the Storage Spaces Assignments were assignable under Section 3.3(d) of the Declaration. (R. 684-720.) In support of its position that they were not assignable, Plaintiff submitted a Resolution executed by Plaintiff's own Board of Directors (the "Resolution"). (R. 718-20.) The Resolution, which was executed on June 30, 2022—more than one year after Plaintiff filed this

action—stated that Plaintiff’s Board of Directors had self-servingly interpreted the Declaration amongst themselves, and concluded that only one of the Storage Spaces was assignable. (R. 718-20.) Plaintiff also introduced a one paragraph letter dated August 2, 2022, from Roberto C. Blanch of Siegfried Rivera (“Blanch Letter”), which stated, without any elaboration, that the Resolution was a “reasonable interpretation” by Plaintiff’s Board of Directors. (R. 717.)<sup>4</sup>

Citing to the 2022 Resolution—which once again, was executed by itself—Plaintiff argued that any space designated on the floor plans with the words “Residential Limited Common Elements” (or “RLCE”) was not assignable, even if accompanied by the words “storage”, because Section 3.3(d) referred to the “Common Elements”. (R. 685-87.) Plaintiff argued that its interpretation controlled under Section 24.2 of the Declaration, which states that the Board of Directors is responsible for interpreting the Declaration and its exhibits, which will be “binding upon all Parties unless wholly unreasonable.” (R. 1611.) Plaintiff also argued that the one paragraph letter from its counsel established the validity of its Resolution, pursuant to

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<sup>4</sup> Plaintiff also submitted a three paragraph Affidavit from Marco Torres, a member of the Association’s Board of Directors. (R. 712-13.) However, it contained no factual information, other than to attach the Resolution and Blanch Letter.

the same section of the Declaration. See R. 687 (“An opinion of legal counsel that any interpretation adopted by the Association is not unreasonable shall conclusively establish the validity of such interpretation”); see *also* R. 1611.

Consistent with Plaintiff’s Interrogatory Answers, Defendants argued in their Response that any areas designated as “storage” were assignable, and that at minimum, partial summary judgment should be entered as to the five spaces with that designation. (R. 1269-70.) With respect to the other two spaces, which did not contain the label “storage” on the floor plans, Defendants cited to Plaintiff’s corporate representative’s testimony that they were actively used by Plaintiff for storage. (R. 1156-57, 104:18-23; 105:4-22.) Notwithstanding this, Defendants also acknowledged in their opposition that those two spaces would involve questions of fact, and thus may not be appropriate for summary judgment. (R. 1270.)

Defendants also highlighted that the Declaration expressly defined “Common Elements” as including all “Residential Limited Common Elements”. See R. 1536. Accordingly, even under Plaintiff’s logic, any storage spaces designated as RLCE would still fall under Section 3.3(d) of the Declaration. (R. 1269.) Defendants further submitted that the Resolution was manufactured for the purposes of undermining the very litigation Plaintiff had commenced. (R. 1266-69). Additionally, Defendants argued that, unlike

other provisions of the Declaration, Section 24.2 of the Declaration did not create a procedure for Plaintiff to review or approve the validity of any assignments—thus, it did not make Plaintiff the sole entity with authority to determine the validity of the Assignments. (R. 1268-69.)

2. Defendants' Motion for Summary Judgment.

Defendants filed their own motion for summary judgment on December 1, 2022. (R. 753-956.) Based on the Record, Defendants submitted that there was no dispute that the Developer was still offering units for sale in the ordinary course of business up until December 13, 2019, and thus, that the Assignments (which were executed before that date) were valid. (R. 759-61.) Among other evidence, Defendants submitted a Closed Unit Report, which showed that the Developer did not sell its last unit until December 13, 2019. (R. 918-19.) Additionally, Defendants submitted the Declaration of Martin Melo (R. 961-64), one of the founding principals of the Developer, who attested that the last day the Developer owned any units in the Condominium was December 13, 2019. (R. 963-64.) Defendants also cited to the deposition testimony of Nicholas Barbara, the Sales Manager for the Condominium, who testified that the Developer was still offering units for sale in the ordinary course of business through and including December 13, 2019. (R. 756; 339, 55:7-12.)

In its Response (R. 1,198-1,218; 1236-56; 1,893-95), Plaintiff did not submit any counter-evidence or rebuttal testimony that the Developer did not, in fact, still own units at the Condominium up until December 13, 2019. Instead, Plaintiff argued that the final sale could not have taken place “in the ordinary course of business”, because there were no longer any furnishings or on-site staff in the showroom by the end of November. (R. 1237-38.) In further support of that point, Plaintiff argued that all sales after July 15, 2019, had been made directly by the Developer, and that Cervera Real Estate, Inc. (“Cervera”), who had previously executed a brokerage agreement with the Developer, received no commission for those transactions. (R. 1238.)

Plaintiff argued that alternatively, the hearing on Defendants’ summary judgment motion should be continued based on “incomplete discover[y]”—specifically: (i) A request for production of documents Plaintiff had filed eight days after Defendants’ summary judgment motion (which meant that that the production was not yet due at the time of Plaintiff’s summary judgment response); (ii) A request for the depositions of several salespersons of Cervera; (iii) A request for the deposition of Carlos Melo, who Plaintiff had last emailed about in September 2022<sup>5</sup>; and (iv) A request for continued testimony from Martin Melo, who had already been deposed. (R. 1241-42.)

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<sup>5</sup> See R. 1253.

In its Reply (R. 1896-99), Defendants pointed out that Plaintiff's proposed, counter-interpretation of the term "ordinary course of business", which was tied to sales associates and furnishings, had absolutely no legal authority. (R. 1898.) Defendants also pointed out that it was inconsistent with rules such as Florida Administrative Law 61B-15.007(2), which defines "offering condominium parcels in the ordinary course of business" as where a person "offers more than 7 parcels, or for condominiums comprised of less than 70 parcels, where that person offers more than 5 parcels in the condominium within a period of 1 year." (R. 1898.)

Defendants pointed out that Plaintiff's corporate representative contradicted the interpretation that Plaintiff's counsel chose to argue on summary judgment. (R. 1896-97.) As discussed *supra* at 6-7, Plaintiff's corporate representative testified that Section 3.3 permitted the Developer to assign spaces "for as long as it owns a unit." (R. 1145, 93:2-23.) Defendants also pointed to the testimony of Plaintiff's own expert, who when asked about when the Developer "was or was not offering units for sale in the ordinary course," responded that "I may have been told at a certain point in time that the developer had sold all of the Developer Units." (R. 997-98, 31:23-32:4.)

The Reply also pointed out that Plaintiff had introduced nothing in their response to rebut the evidence that the Developer had owned its last unit in the Condominium through December 13, 2019, which, consistent with the testimony of their own corporate representative, was the relevant test for determining offering units in the ordinary course of business. (R. 1898.) Thus, Plaintiff had not met their burden of showing there was a genuine dispute of material fact as to whether the Developer had the authority to execute the Assignments. (R. 1898.)

### 3. The Summary Judgment Order.

Following a hearing (R. 2569-634), the Trial Court entered its written Summary Judgment Order, which denied Plaintiff's motion and granted Defendants' motion in part. (R. 2373-78.)

Consistent with Rule 1.150(a), the Summary Judgment Order stated the reasons for the Trial Court's ruling. Citing to the deposition testimony of Plaintiff's corporate representative, the Trial Court found that "[t]he Developer was selling Units in the ordinary course of business for as long as the Developer still owned Units for sale in the Aria Condominium." (R. 2376, ¶ 16.) Because it was undisputed in the record that the Developer still owned units up until December 13, 2019, the Trial Court found that it had the right to and did in fact assign the Parking Spaces, pursuant to Section 3.3(c) of

the Declaration. (R. 2376, ¶¶ 17-18.) The Trial Court also found that five of the seven Storage Spaces assigned by the Developer included a designation with the word “storage”, and thus, were likewise assigned in accordance with Section 3.3(d) of the Declaration . (R. 2375-76, ¶¶ 13-14.)

The Trial Court ruled that there remained a genuine dispute as to whether the remaining two areas in the Storage Spaces Assignment, which were not labeled with the word “storage” on the exhibit, were assignable under the Declaration, and thus denied summary judgment as to those particular areas. (R. 2377, ¶ 20.) Plaintiff moved for reconsideration of the Summary Judgment Order (R. 2307-12) which the Trial Court denied (R. 2329-39.)<sup>6</sup>

**D. The Trial Court Enters Final Judgment on the Remaining Claims in Plaintiff’s Declaratory Action.**

On April 20, 2023, the Trial Court conducted a non-jury trial on the remaining issues that had not been resolved by summary judgment—that is, the two areas in the Storage Spaces Assignment which did not contain the word “storage”. (R. 2334-35.)<sup>7</sup> Plaintiff chose not to put on any case. See R. 2352 (“At trial, Plaintiff elected not to present evidence or testimony in

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<sup>6</sup> Defendants had filed a response to the motion for reconsideration. (R. 2325-28.)

<sup>7</sup> There is no transcript of the April 20, 2023, non-jury trial.

support of its claim for declaratory relief.”); see *a/so* R. 2337, ¶ 4 (Plaintiff acknowledging in a subsequent motion that it did not put on any case). The Trial Court determined that Plaintiff had failed to meet its burden in proving its remaining claims, and thus entered final judgment in favor of Defendants and against Plaintiff. See R. 2352 (“As a consequence of Plaintiff declining to present any evidence or testimony at trial, this Court determined that Plaintiff failed to provide sufficient evidence in support of its claim.”). (R. 2352.) Plaintiff’s first Notice of Appeal followed. (R. 2354-55.)

**E. 1770 Bayshore’s Counterclaim and Default Judgment.**

Prior to the non-jury trial (specifically, on March 21, 2023), 1770 Bayshore moved for a Motion for Writ of Possession (“Motion for Writ”), citing to the Trial Court’s summary judgment ruling. (R. 2315-24.) Specifically, the Motion for Writ sought to enforce 1770 Bayshore’s possessory interests in the Parking Spaces and the five Storage Spaces that had already been determined. (R. 2316.)<sup>8</sup> Alternatively, 1770 Bayshore requested leave to assert a Counterclaim against Plaintiff for unlawful entry, detainer, and ejectment, pursuant to §§ 82.03 & 51.011, Fla. Stat. (R. 2317.) Among other

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<sup>8</sup> As was explained in the Motion for Writ, counsel for 1770 Bayshore had notified Plaintiff of its intention to access the Parking Spaces and five Storage Spaces adjudicated in the Trial Court’s Order; Plaintiff’s counsel responded that this would “result in an incident involving the police.” (R. 2316, ¶ 8.)

allegations, the proposed Counterclaim (R. 2322-24) alleged that 1770 Bayshore was “entitled by this lawsuit to have the Association removed from possession of the Storage Spaces and Parking Spaces.” (R. 2323, ¶ 10.)

The Trial Court denied the Motion for Writ, but granted the alternative Motion for Leave, and deemed the Counterclaim filed as of May 3, 2023. (R. 2340-41.) In its Order, the Trial Court provided Plaintiff with until May 18, 2023, to file its Response to the Counterclaim. (R. 2340.) However, Plaintiff did not file anything by this deadline, and on May 22, 2023, 1770 Bayshore moved for a default judgment. (R. 2344-47.)

It was not until May 25, 2023, that Plaintiff filed their motion to dismiss<sup>9</sup>, which raised only one argument—that the Trial Court lacked jurisdiction to permit the filing of the Counterclaim. (R. 2364-65.) Apart from this sole argument, Plaintiff did not respond to or otherwise challenge any of the individual allegations in the Counterclaim, nor did Plaintiff assert any affirmative defenses. (R. 2364-65.)

Following a hearing on June 7, 2023, the Trial Court entered a written Order denying Plaintiff’s Motion to Dismiss the Counterclaim. (R. 2419-22.)

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<sup>9</sup> Plaintiff had filed a motion for clarification or enlargement of time, requesting until May 25, 2023, to respond to the Complaint. (R. 2342-43.) However, the Motion was not ruled upon prior to the deadline set forth by the Court, nor did it acknowledge the summary procedure under § 51.011, Fla. Stat., which requires an answer within five days of service of the claim.

The Order stated that “[f]or the reasons stated on the record<sup>10</sup>, this Court did have jurisdiction to allow the counterclaim to proceed”, citing to Rule 1.190 and *RV-7 Property Inc. v. Stefani De La O, Inc.*, 187 So. 3d 915 (Fla. 3d DCA 2016). (R. 2419.)

In the same Order, the Trial Court also granted 1770 Bayshore’s Motion for Default. In its Order, the Trial Court found that Plaintiff had failed to plead or otherwise defend against the allegations in Counterclaim. (R. 2419-20.) Citing to Rule 1.500(b) and *Crocker v. Diland Corp.*, 592 So. 2d 1096 (Fla. 5th DCA 1992), the Trial Court found that 1770 Bayshore was entitled to a default judgment on its Counterclaim. (R. 2420.) The Trial Court thus entered a final judgment for ejectment as to the thirty-four Parking Spaces and seven Storage Spaces that were attached to the Assignments, which had also been incorporated by reference into the Counterclaim (the “Default Judgment”). (R. 2420-22.) Plaintiff filed its second Notice of Appeal. (R. 2406-07.)

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<sup>10</sup> There is no transcript of the June 7, 2023, hearing on Plaintiff’s Motion to Dismiss and 1770 Bayshore’s Motion for Default.

## STANDARDS OF REVIEW

### **A. Standard of Review for the Summary Judgment Order.**

The review of a Trial Court's ruling granting summary judgment is de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

“Summary judgment is appropriate when the evidence is such that a reasonable jury could not return a verdict for the nonmoving party.” *Romero v. Midland Funding, LLC*, 358 So. 3d 806, 808 (Fla. 3d DCA 2023) (cleaned up) (quoting *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021)). It is, thus, “no longer . . . plausible” for the non-moving party “to maintain that ‘the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the ‘slightest doubt’ is raised.” *Rich v. Narog*, 366 So. 3d 1111, 1117-18 (Fla. 3d DCA 2022) (emphasis in original) (quoting *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 76 (Fla. 2021)); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)) (explaining that summary judgment may be granted on an issue if the evidence submitted by the non-moving party “is not significantly probative”). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.”

*Rich*, 366 So. 3d at 1118 (internal quotation marks omitted); see also *Ibarra v. Ross Dress for Less, Inc.*, 350 So. 3d 465, 467-68 (Fla. 3d DCA 2022) (“[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

**B. Standard of Review for the Amended Final Judgment.**

In reviewing a final judgment rendered from a non-jury trial, this Court applies the standard of clear error to any findings of fact. See *La Ley Sports Complex at City of Homestead, LLC v. City of Homestead*, 255 So. 3d 468, 469 (Fla. 3d DCA 2018). “[A] finding will not be disturbed unless it is totally unsupported by competent and substantial evidence, it is clearly against the weight of the evidence, or it was induced by an erroneous view of the law.” *Id.*; *Fito v. Attorney's Title Ins. Fund, Inc.*, 83 So.3d 755, 757-58 (Fla. 3d DCA 2011) (“findings of fact come to us clothed with a presumption of correctness . . .”). Any conclusions of law and application of law to the facts are reviewed de novo. *La Ley Sports Complex*, 255 So. 3d at 469.

**C. Standard of Review for the Default Judgment.**

This Court “review[s] the appeal of a trial court’s final default judgment under a gross abuse of discretion standard.” *Fla. Recovery Adjusters, LLC v. Pretium Homes, LLC*, 261 So. 3d 664, 667 (Fla. 3d DCA 2018) (finding that a “default final judgment was correctly entered due to appellants’ failure to timely respond to Pretium’s complaint.”).

**SUMMARY OF ARGUMENT**

The Summary Judgment Order, Amended Final Judgment, and Default Judgment should all be affirmed by this Court. Plaintiff did not show that there was a genuine dispute of material fact precluding summary judgment as to (i) whether the Developer was still offering units for sale “in the ordinary course of business” at the time of the Assignments, and (ii) the assignability of the five Storage Spaces that were designated with the word “storage”. Plaintiff cannot create an issue of fact by asserting legal arguments and offering affidavits from other witnesses that contradict its *own* testimony and discovery responses. There is also no evidence in the Record to suggest that the Trial Court improperly evaluated the credibility of any witness or evidence in reaching its determination.

Plaintiff’s argument that Defendants should also have cited to Fla. Admin. Code. R. 61B-15.007(3) during the summary judgment briefing also

lacks merit because that subsection does not apply to Defendants. And in any event, Plaintiff did not raise this issue during the summary judgment hearing, in its motion for reconsideration, or at any other point in the lower court proceedings. Thus, it is considered waived for the purposes of this appeal.

The Trial Court also did not abuse its discretion in denying Plaintiff's request to postpone the summary judgment hearing as to Defendants' motion. Not only did Plaintiff fail to comply with the requirements of Rule 1.510(d) in requesting the continuance, but the "incomplete discover[y]" (R. 1241) that Plaintiff raised was not significantly probative to a material issue, nor was it timely and diligently sought.

Plaintiff's arguments that the Trial Court usurped the City of Miami's authority in determining the assignability of the Parking Spaces, including those designated as handicap, is also meritless. Not only has Plaintiff failed to cite to a single piece of record evidence or legal authority in support of this position, but the argument fails because Plaintiff was the one to invoke the jurisdiction of the Trial Court by filing this action.

The Trial Court also did not err in the scope of relief that was awarded in the three Orders. Contrary to Plaintiff's arguments, the Trial Court was not strictly limited to the "wherefore" clause in determining the scope of relief that

may awarded. Rather, courts consider numerous factors, including the issues that were litigated, and whether the other party was on notice of the relief that was at issue. Given that this entire litigation surrounded the validity of the Assignments and the assignability of the Parking and Storage Spaces, there can be no question that the Trial Court was within its right to “affirmatively rule[]” on these issues.

Last, Plaintiff’s argument that the Default Judgment was premised on the “erroneous findings” of the Summary Judgment and Amended Final Judgment is incorrect. The Default Judgment was entered because Plaintiff chose not to defend or otherwise plead against the Counterclaim, which asserted claims for unlawful entry, detainer, and ejectment, pursuant to §§ 82.03 & 51.011, Fla. Stat. (R. 2317). Thus, a default judgment was warranted under Rule 1.500(b).

## ARGUMENT

### **A. There Was No Genuine Dispute of Material Fact As to Any of The Issues Decided In The Summary Judgment Order.**

#### **1. There was no genuine dispute of material fact as to whether the Developer was still selling units in the ordinary course of business on December 13, 2019.**

- a. Plaintiff did not meet its burden in showing that there were issues of fact as to when the Developer was offering units for sale “in the ordinary course of business”.

Florida’s summary judgment standards are clear. The non-moving party does not meet their burden of showing a genuine dispute of material fact when they fail to come forward with relevant evidence related to the actual issues on their claims. See *Rich*, 366 So. 3d at 1117-18 (explaining the higher burden for summary judgment under Florida’s amended rule).

Plaintiff did not introduce any rebuttal or counter-evidence demonstrating that the Developer did not, in fact, own units at the Condominium up until December 13, 2019. Thus, Plaintiff did not show that there was an issue of fact on an essential element of their declaratory relief claim—*i.e.*, Plaintiff’s claim that the Developer did not have authority to transfer the Parking and Storage Spaces prior to that date. (R. 251-53.) See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (holding that there can be “no genuine issue as to any material fact” to be resolved at trial where there is “a complete failure of proof concerning an essential element of the

nonmoving party's case.”). Because Plaintiff did not show that there was any genuine dispute as to that issue, the Trial Court correctly entered summary judgment in favor of Defendants and against Plaintiff.

Plaintiff argues that it did create an issue of fact, because it argued in the lower court that there was a contrary definition for the Developer selling units in the “ordinary course of business”. But that argument asks this Court to overlook the fact that over the course of discovery, every witness—including *Plaintiff's own corporate representative*—testified consistent with the definition found by the Trial Court<sup>11</sup>, *i.e.* that “[t]he Developer was selling Units in the ordinary course of business for as long as the Developer still owned Units for sale in the Aria Condominium.” (R. 2361, ¶ 16.) Indeed, in making this determination, the Trial Court specifically cited to the deposition testimony of Plaintiff's corporate representative. (R. 2361, ¶ 16.) Plaintiff cannot argue on appeal that the Trial Court improperly “accepted [Defendants'] meaning of in the ordinary course of business” (IB. 30), when

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<sup>11</sup> To the extent Plaintiff relies upon the Affidavit of Lizzie Giuffra, Chief Operations Officer at Cervera (R. 1244-45), then this argument lacks merit because (i) the Affidavit of Ms. Giuffra was executed more than two weeks *after* Defendant's motion for summary judgment was filed, and (ii) this Affidavit discussed when the last sale was made by a salesperson at Cervera, not the Developer.

it was also the interpretation given by the witness they designated to testify on this subject, pursuant to Fla. R. Civ. P. 1.310(b)(6).

Nor could Plaintiff contradict the testimony of its own corporate testimony by attaching an Affidavit from another, non-party witness (see *supra* at 12, 25 n. 11; R. 1244-45)—which, notably, was executed more than two weeks after Defendants’ summary judgment motion was filed. See *Ellison v. Anderson*, 74 So. 2d 580, 681 (Fla. 1954) (“[A] party when met by a Motion for Summary Judgment should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue, especially when no attempt is made to excuse or explain the discrepancy.”) (emphasis added).

Indeed, courts have consistently held that a plaintiff “cannot attempt to create a genuine dispute as to a material fact by introducing the testimony of non-parties when that testimony contradicts [their] own.” See *Gomez v. Lozano*, 839 F. Supp. 2d 1309, 1318 (S.D. Fla. 2012); see also *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, No. 07-20199-CIV, 2008 WL 11333085, at \*8 (S.D. Fla. Dec. 10, 2008) (“When the nonmovant has testified to events, we do not (as urged by Plaintiffs’ counsel) pick and choose bits from other witnesses’ essentially incompatible accounts (in effect, declining to credit some of the nonmovant’s own testimony) and then string

together those portions of the record to form the story that we deem most helpful to the nonmovant.”); *Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995) (extending the principle that a party cannot avoid summary judgment by contradicting his own earlier testimony to situations where plaintiff attempts to avoid summary judgment “by proffering testimony from another person that contradicts the plaintiff’s own testimony.”).<sup>12</sup>

As courts have explained, the “duty to read the record in the light most favorable to [the non-moving party] does not include a duty to disbelieve [the non-moving party’s] sworn testimony.” *First Mercury Ins. Co. v. Sudderth*, 620 F. App’x 826, 827 (11th Cir. 2015) (“Because [plaintiff] is the nonmoving party, we must accept her testimony *even if other evidence in the record is more favorable on a factual issue than [her] own testimony.*”) (internal quotations omitted) (emphasis added). Accordingly, the Trial Court properly cited to the testimony of Plaintiff’s corporate representative in reaching its determination that the Developer was offering for sale “in the ordinary course of business” for so long as it owned a unit in the Condominium.

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<sup>12</sup> Because Fla. R. Civ. P. 1.510 now follows the text of Fed. R. Civ. P. 56, Florida courts “are guided and bound by the large body of case law interpreting and applying the federal summary judgment rule.” *Fision Corp. v. Frueh*, 369 So. 3d 1211, 1215 (Fla. 2d DCA 2023) (internal quotations and brackets omitted).

b. Plaintiff's argument that the Trial Court improperly weighed the credibility of witnesses and evidence lacks merit.

Plaintiff suggests that the only explanation for why it lost on summary judgment was that the Trial Court improperly gave more weight to the evidence submitted by Defendants as opposed to Plaintiff's submissions and arguments. (IB. 29) (arguing that "the trial court improperly weighed the deposition testimony of Ms. Ettus [*i.e.*, Plaintiff's corporate representative], Mr. Barbara, and Mr. Melo, along with other record evidence and arguments of counsel, and accepted [Defendants'] argument . . . ."). But this argument is entirely presumptive, and completely unsupported by the Record.

It is true that on summary judgment, trial courts "may neither adjudge the credibility of the witnesses nor weigh the evidence." *Hernandez v. United Auto Ins. Co.*, 730 So. 2d 344, 345 (Fla. 3d DCA 1999). Thus, a trial court cannot resolve conflicting testimony or evidence by deciding which is entitled to more (or less) weight. See *e.g.*, *Hernandez*, 730 So. 2d at 345 (because the plaintiff and defendant introduced directly contradicting testimony concerning who was driving a vehicle at the time of a loss, the issue "turn[ed] squarely" upon their respective credibility and had to go to a jury); *Pita v. State Street Bank & Trust Co.*, 666 So. 2d 268 (Fla. 3d DCA 1996) (finding that the trial court made a credibility judgment when it criticized the plaintiff's expert and certain misrepresentations plaintiff had made); *Desvarieux v.*

*Bridgestone Retail Operations, LLC*, 300 So. 3d 723, 726 (Fla. 3d DCA 2020) (where plaintiff could not remember the specific details regarding his visit to the store that he alleged repaired his tire, trial court could not make a credibility determination).

As shown by the cases discussed above, reversal is appropriate where the record demonstrates that the trial court was either critical of certain witnesses and the basis for their testimony, or found another witness to be more credible than the other. Here, however, nothing in the Summary Judgment Order (nor the Record at large) suggests that the Trial Court ventured into such an analysis. As discussed above, the Trial Court was obligated to treat the testimony of Plaintiff's corporate representative as fact, regardless of what contradictory arguments Plaintiff decided to advance after Defendants filed their motion. Plaintiff cannot logically argue that the Trial Court improperly considered *its own representative's testimony* over contradictory testimony given by another, non-party witness (which again, was procured *after* Defendants' summary judgment motion was filed).

The remaining "credibility" issues that Plaintiff raises are without merit. Plaintiff argues that Mr. Melo "had no personal knowledge about the advertising of the units that was allegedly still ongoing as of December 13, 2019." (IB. 31.) But this argument is belied by the remainder of the Affidavit,

which explains his role with the Developer, and the knowledge he has on this matter. See R. 964, ¶ 5 (“I do know for certain, however, that the Developer was offering condominium units for sale in the Aria on the Bay, in the ordinary course of business, until the last unit was sold in the building on December 13, 2019. The Developer was actively advertising units, engaged with real estate brokers to show the units, and offering units for sale up through December 13, 2019.”); R. 963, ¶¶ 2-3 (discussing Mr. Melo’s role as an executive officer and founding principal of the Developer, and that he is “familiar with the development and sales for the [Condominium]”).

In any event, Plaintiff never sought to strike or otherwise objected to the admission of Mr. Melo’s testimony in the lower court. Thus, Plaintiff cannot raise issues concerning his credibility on appeal. See *W. Town Plaza Assocs., Ltd. v. Pines Properties, Inc.*, 600 So. 2d 477, 478–79 (Fla. 4th DCA 1992) (“[R]uling on the admission or consideration of affidavits is a matter within the trial court’s sound discretion and error may not be based on such admission without having made a motion to strike the affidavit pre-hearing or timely objecting.”); *Scott v. NCNB Nat. Bank of Fla.*, 489 So. 2d 221, 223 (Fla. 2d DCA 1986) (rejecting appellant’s arguments that summary judgment should be reversed because the movant’s affidavit was not based on personal knowledge—appellant never moved to strike the affidavit prior to

the hearing, nor did he file any counter-affidavits disputing the points raised therein). The reality is that there has never been a plausible challenge to Mr. Melo's personal knowledge, as the only argument Plaintiff has made on that front was his inability to recall the precise name of the place where the Developer advertised the remaining units. (IB. 31) (citing to R. 2511-12, 88:10-13, 89:2-23.)

Last, Plaintiff's argument that Mr. Barbara's "motives and bias . . . were never subject to cross examination" is baseless. (IB. 30.) There is no "indefeasible right to cross-examine any witness before the trier of facts." See *Burkett v. Panama City Coca-Cola Bottling Co.*, 93 So. 2d 580, 582 (Fla. 1957). If there was, then "there could be no summary judgment upon affidavits." *Id.* Moreover, Plaintiff was not only present at Mr. Barbara's deposition, but re-directed his examination *after* he provided this testimony.<sup>13</sup> Thus, Plaintiff had the opportunity to elicit any additional testimony that it felt was relevant to his credibility. *Id.* (where plaintiff claimed it should have had the right to cross-examine a witness who had testified by affidavit, noting that the plaintiff could have taken their deposition).

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<sup>13</sup> It is also worth noting that Plaintiff did not assert any objection to the subject question when asked by counsel. (R. 339, 55:7-12.)

c. Plaintiff's Arguments Concerning the Florida Administrative Code Lack Merit and Do Not Warrant Reversal of the Summary Judgment Order.

As discussed *supra* at 13, Defendants pointed out on reply that Plaintiff's counsel's argument concerning the definition of "ordinary course of business" was (i) accompanied by no legal authority, and (ii) inconsistent with rules such as Florida Administrative Code 61B-15.007(2), which defines "offering condominium parcels in the ordinary course of business" as where a person "offers more than 7 parcels, or for condominiums comprised of less than 70 parcels, where that person offers more than 5 parcels in the condominium within a period of 1 year." (R. 1898.)

On appeal, Plaintiff argues—for the first time ever—that this was an "incomplete definition", and that Defendants should also have cited to Rule 61B-17.007(3), which is the following (and a completely different) subsection. Plaintiff never raised this argument at either the summary judgment hearing or in their motion for reconsideration (which was filed more than one month after the argument). (R. 2307-312.) Not only does this this render Plaintiff's argument waived<sup>14</sup>, but it also begs the question why *Plaintiff* did not cite this

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<sup>14</sup> See *Herrera*, 840 So. 2d at 273 ("issues not presented in the trial court cannot be raised for the first time on appeal.").

subsection to the Trial Court, and why it is being raised for the first time ten months after the summary judgment hearing.

The reality is that this additional subsection does not apply to the facts of this case. Rule 61B-15.007(3) states that:

**Notwithstanding the above, one is not offering condominium units in the ordinary course of business for filing purposes, as defined by subsection 61B-15.0011(4), F.A.C., where all of the units are offered and conveyed to a single purchaser in a single transaction. An example of such a transaction would be a financial lending institution receiving title to a number of condominium units through foreclosure or deed in lieu of foreclosure and then conveying all of such units to another person. In such circumstances, the lending institution would not be deemed to be a developer for filing purposes.** However, such entity shall, upon the conveyance to a single purchaser, notify the division in writing of the identity and business address of the purchaser, the name of the condominium involved, the date of the conveyance and the number of units conveyed.

Fla. Admin. Code. R. 61B-15.007(3) (emphasis added). Unlike a financial institution, who may choose to sell all of the units it acquired from a mortgagor in a single bulk transaction, the Developer in this case had sold more than 600 units in multiple transactions over a four year period, ranging from pre-construction sales through the final sale in December 2019. (R. 963, ¶ 3; 919.) Thus, there is no substantive merit to Plaintiff's (untimely, and now waived) argument that subsection (3) "negates" the relevance of Rule 61B-15.007(2).

In any event, the Summary Judgment Order does not cite to or rely upon this Administrative Rule in determining the definition of “ordinary course of business”. Rather, the Trial Court expressly cited to the testimony of Plaintiff’s corporate representative as the basis for its determination. (R. 2361, ¶ 16.) Accordingly, and consistent with the purpose of Florida’s current summary judgment rule, this Court should focus its appellate review on the actual reasoning provided by the Trial Court. *See In re Amends.*, 317 So. 3d at 76 (noting that the new summary judgment rule requires the Trial Court to state the specific reason for its decision “to provide useful guidance to the parties and, if necessary, *to allow for appellate review.*”) (emphasis added).

Last, there is no merit to Plaintiff’s argument that Defendants’ citation to this authority was untimely. It was Plaintiff who, in its Amended and Supplemental Response to Defendants’ Motion for Summary Judgment (R. 1236-56; 1893-95), argued that there was a contrary definition for the “ordinary course of business” in the context of the Developer offering units for sale. In pointing out that Plaintiff had only raised a legal argument that was unsupported by any Florida law, Defendants cited to the Administrative Rule as an example of relevant authority. (R. 1898.) It is nonsensical to suggest that Defendants cannot cite to authority in its reply to rebut a completely unsupported argument raised in Plaintiff’s response.

Nonetheless, Plaintiff argues that “this . . . warrants reversal” under Rule 1.510, because Defendants should have served their “supporting positions at least forty days before the hearing.” (IB. 33.) But Plaintiff misquotes the requirements of this Rule. Rule 1.510 requires a movant to serve their “supporting factual positions” at least forty days prior to the hearing. See Fla. R. Civ. P. 1.510(c).<sup>15</sup> “Supporting factual positions” are defined as evidentiary materials in the record, such as “depositions”, “documents”, “affidavits”, and discovery materials. Fla. R. Civ. P. 1.510(c)(1). The Rule does not preclude parties from citing to any legal authority (such as administrative rules) in order to rebut the opposing party’s arguments as a part of their reply. Accordingly, Plaintiff’s arguments concerning Fla. Admin. Code. R. 61B-15.007(3) lack any merit and do not warrant reversal.

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<sup>15</sup> It is ironic that Plaintiff suggests that Defendants violated the Rules of Professional Conduct by allegedly providing an “incomplete” quotation of the Administrative Rule in the lower court (IB. 35)—which Defendants did not—yet misquote Rule 1.510 in the very same argument.

## **2. The Trial Court Did Not Err In Denying the Request for a Continuance.**

“The granting or denying of a motion for continuance is within the discretion of the trial judge and a gross or flagrant abuse of this discretion must be demonstrated by the complaining party before this court will substitute its judgment for that of the trial judge.” *Trust Real Est. Ventures, LLC v. Desnick*, 278 So. 3d 242 (Fla. 3d DCA 2019) (quoting *Stern v. Four Freedoms Nat’l Med. Servs., Co.*, 417 So. 2d 1085, 1086 (Fla. 3d DCA 1982)). Here, there is nothing in the Record to indicate that the Trial Court committed a gross or flagrant abuse of discretion in denying Plaintiff’s request for a continuance. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (describing an abuse of discretion as an “arbitrary, fanciful, or unreasonable” action taken by the trial court, which “no reasonable man” would have taken).

As an initial matter, Florida’s amended summary judgment rule clearly outlines the procedure for requesting a continuance of a hearing. Under the Rule 1.510(d), titled “When Facts Are Unavailable to the Nonmovant”, the party requesting the continuance must “show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition”. Fla. R. Civ. P. 1.510(d) (emphasis added). If a party meets this burden, then “the court may defer considering the motion or deny it; allow time to obtain

affidavits or declarations or to take discovery; or issue any other appropriate order.” *Full Pro Restoration v. Citizens Prop. Ins. Corp.*, No. 3D21-2312, 2023 WL 2506157, at \*3 (Fla. 3d DCA Mar. 15, 2023) (emphasis in original) (quoting Fla. R. Civ. P. 1.510(d)).

Here, Plaintiff did not submit any affidavit or declaration outlining specific reasons why it was unable to present facts essential to justify its summary judgment opposition, and by extension, that a continuance was warranted. On that basis alone, the Trial Court was within its discretion to deny Plaintiff’s request. See *Vella v. Salves*, 290 So. 3d 946, 950 (Fla. 3d DCA 2019) (finding no abuse of discretion of the trial court’s denial of a continuance request where the plaintiff failed to show by affidavit “the existence and availability of other evidence, its relevance, the efforts taken to produce it, and that any failure to do so is not the result of the movant’s inexcusable delay.”).

Additionally, the Record is clear that Plaintiff only pursued this additional discovery after Defendants filed their summary judgment motion on December 1, 2022. See *supra* at 12. Accordingly, Plaintiff cannot meet its burden of showing that the additional discovery was “sought diligently” and “in good faith”. *Freire v. Citizens Property Ins. Co.*, 2023 WL 5730081 at \*1 (Fla. 3d DCA Sept. 6, 2023). Indeed, Plaintiff acknowledged in their summary

judgment opposition that the pending request for production was not even due yet. (R. 1241) (noting that the response to Plaintiff's request for production, which was served more than one week after Defendant's motion, would not be due until two days before the hearing). Thus, there can be "no abuse of discretion in the trial court's denial of the motion to postpone since the responses could not have been used in opposition to [Defendants'] motion." See *White v. Discovery Commc'ns, LLC*, 365 So. 3d 379, 386 (Fla. 1st DCA 2023) (explaining that the discovery at issue was submitted by [plaintiff] too late for the responses to be used in opposition to summary judgment per rule 1.510(c)(5)—thus, even if plaintiff had "been satisfied with all discovery responses . . . they could not have been filed at least 20 days before the summary judgment hearing as required by rule 1.510(c)(5).").

Moreover, the unsworn arguments made by counsel in Plaintiff's briefs did not demonstrate that a continuance was necessary for the purposes of meeting Plaintiff's burden on opposition. Florida courts have consistently held that "[a] trial court has the discretion to deny a continuance of a summary judgment hearing where the outstanding discovery items are immaterial to the dispositive issues in the case." *Crespo v. Fla. Ent. Direct Support Org., Inc.*, 674 So. 2d 154, 155 (Fla. 3d DCA 1996); *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 151 (Fla. 4th DCA 1994) (finding no

abuse of discretion in denying a motion for continuance of a summary judgment hearing where the movant simply failed to demonstrate how the pending discovery would be relevant); *Herrera v. Berlo Industries, Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA 2003) (“Summary judgment may be granted even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact.”).

Here, the additional discovery that Plaintiff sought would not have gone to any material issue in the case. Consistent with the testimony of Plaintiff’s own corporate representative, the only discovery that would be relevant to when the Developer stopped offering units for sale “in the ordinary course of business” would be information regarding when the Developer last owned a unit in the Condominium. None of the late-filed discovery pertained to this issue. (R. 1196-97.) Discovery regarding the last date and place that the Developer advertised units for sale are irrelevant. Thus, even if Plaintiff had completed this additional discovery, it would not have affected the outcome of summary judgment. Thus, the Trial Court was well within its discretionary rights to deny Plaintiff’s motion. *See Full Pro Restoration*, 2023 WL 2506157 at \*3 (finding that the trial court did not abuse its discretion in denying a motion for continuance where the additional discovery described was “not

significantly probative” and “would not lead to any new evidence that would create a genuine issue of material fact precluding summary judgment”).

**B. The Trial Court Correctly Found That The Five Parking Spaces Designated as “Storage” Were Assignable, and That All Parking Spaces Were Assignable.**

1. There Was No Dispute of Material Fact As to Whether the Five Spaces Containing the Designation “Storage” Were Assignable Under the Declaration.

During discovery, Defendants asked Plaintiff point-blank what areas attached to the Storage Spaces Assignment they contended were assignable under Section 3.3(d) of the Declaration. Plaintiff’s answer was unequivocal: “All spaces containing the designation ‘Storage’”. See R. 914; *supra* at 7-8.

By the time of the summary judgment hearing, there was no ambiguity on this issue, much less a genuine dispute of material fact. Plaintiff had already agreed that, at minimum, any area designated as “storage” on the Exhibit to the Storage Spaces Assignment was assignable. Citing to Plaintiff’s sworn discovery responses, the Trial Court correctly stated in the Summary Judgment Order that “it is undisputed that all space containing the designation “storage” are assignable areas under the Declaration Section 3.3(d).” (R. 2360) (citing R. 914, Interrogatory No. 8.)

Notwithstanding this, Plaintiff criticizes the Trial Court for “look[ing] only at the designation of the spaces as ‘storage’” (IB. 41), despite the fact that this is exactly what Plaintiff (in its own, sworn discovery responses) indicated one should do. Plaintiff attempts to address this discrepancy in a footnote, arguing that its answer is contradicted by the language of the entire Declaration. (IB. 41, n. 11.) But considering that this language has been in the Declaration since it was recorded in 2015, there is no reason why Plaintiff could not have considered it in July 2022 when it provided these sworn discovery responses. As the governing documents for the Condominium and an exhibit to their own Complaint, it was certainly available to Plaintiff at the time. Thus, Plaintiff should have fully expected the Trial Court to consider its sworn discovery responses in deciding Defendant’s motion. See *Blue Star Restoration, Inc. v. First Protective Ins. Co.*, 321 So. 3d 240, 242 (Fla. 4th DCA 2021) (“The court may consider . . . answers to interrogatories . . . on which the parties rely.”) (quoting Fla. R. Civ. P. 1.510(c)).

As discussed above, a party cannot disavow prior sworn testimony with a contradictory affidavit in order to avoid summary judgment. See *supra* at 25-27. Likewise, Plaintiff cannot make a legal argument that contradicts its own sworn, discovery responses. See *Sartori v. Schrodt*, 424 F. Supp. 3d 1121, 1130 (N.D. Fla. 2019) (rejecting an attorney’s argument on a point

where it was “directly inconsistent” with its client’s own testimony) *aff’d*, No. 19-15114, 2021 WL 6060975 (11th Cir. Dec. 20, 2021).

Moreover, and as was pointed out in the lower court, Plaintiff’s argument lacks substantive merit. While it is true that Sections 3.3(c) & (d) describe the Developer’s right to assign parking or storage space common elements, Section 2.13 of the Declaration specifically defines “common elements” as including residential limited common elements. (R. 1536) (“References here to Common Elements also shall include the Residential Limited Common Elements unless the context would prohibit or it is otherwise expressly provided.”). Given this definition, Plaintiff’s argument that the references in Sections 3.3(c) & (d) to “Common Elements” could not include “Residential Limited Common Elements” (IB. 40-42) would “violate the clear meaning of the [Declaration] in order to create an ambiguity.” *Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass’n, Inc.*, 195 So. 3d 579, 581-82 (Fla. 3d DCA 2012).

Nor is there any logic to Plaintiff’s argument that “Residential Limited Common Element cannot be assigned to any specific unit because they are appurtenances to *all* Residential Units (R. 1544-45 § 3.3(a)). (IB. 40.) Section 3.3(a) of the Declaration, which Plaintiff relies upon for this argument, pertains to the costs associated with the Residential Limited Common

Elements, and that they shall be borne by residential unit owners. (R. 1544-45.)

In contrast, Sections 3.3(c) & (d) of the Declaration specifically governs the issues in the case—namely, the assignability of parking and storage spaces by the Developer. And these sections specifically state that upon any assignment, “the space so assigned shall be deemed a Limited Common Element of the Unit(s) to which it is assigned.” (R 1546-47). Given that Sections 3.3(c) & (d) “specifically address” the Assignments at issue, the language in Section 3.3(a) cannot be reasonably read as negating or invalidating the Developer’s rights under that section. *Id.* (declining to interpret the language of a different subsection as negating the developer’s right to assign certain limited common element parking and storage spaces).

In light of the above, there was no genuine dispute that any area designated as “storage”—whether marked as a “common element”, “residential limited common element”, or otherwise—fell within the scope of Section 3.3 of the Declaration.

2. There Is No Merit to Plaintiff’s Argument That The Trial Court Lacked Authority to Determine the Assignability of Any Handicap Parking Spaces.

For the first time ever in this case, Plaintiff argues that because fourteen of the thirty-four Parking Spaces were designated for persons with

disabilities, the Trial Court “usurped the City’s authority” in determining the validity of the Parking Spaces Assignments (and by extension, whether they validly assigned the handicap parking spaces). (IB. 44-45.)

Over the course of two pages—and without a single factual or legal citation—Plaintiff argues that the Developer submitted plans for the Condominium to the City of Miami, which specified “the minimum number of handicap parking spaces needed”. (IB. 44.) Plaintiff argues that this “made the issue of the handicap spaces and who is entitled to use them an administrative issue, within the jurisdiction of the City of Miami zoning and building departments.” (IB. 45.)

To the extent that Plaintiff is characterizing this argument as one of subject-matter jurisdiction, Defendants acknowledge that this issue may be raised at any time, including for the first time on appeal. See Fla. R. Civ. P. 1.140(b). However, the argument still lacks merit because it is *Plaintiff* who commenced this action before the Trial Court, and requested “a Judgment declaring that none of the ‘ASSIGNMENTS’ described herein [including the Parking Spaces Assignment] constitute a valid transfer of any interest in the parking spaces or storage spaces depicted therein.”) (R. 253) (emphasis added); see *also* R. 251, ¶ 13 (“Plaintiff, contends . . . that all of the ASSIGNMENTS described herein and in Exhibit 7 are not valid and do not

assign any of the parking spaces and/or storage spaces depicted in these documents to anyone.”) (emphasis added).<sup>16</sup>

Make no mistake—the Complaint specifically requests that “This Court [*i.e.*, the Trial Court] take jurisdiction of the parties hereto and the subject matter hereof.” (R. 253, ¶ 12(A) (emphasis added)). Given that Plaintiff specifically invoked the jurisdiction of the Trial Court to determine the validity of the Parking Spaces Assignment, including the transfer of the handicap spaces, Plaintiff is estopped from arguing on appeal that the Trial Court lacked such authority in the first place. *See Ripple v. CBS Corp.*, 337 So. 3d 45, 59 (Fla. 4th DCA 2022) (applying judicial estoppel principles where parties took inconsistent positions within a single action or proceeding); *see New Hampshire v. Maine*, 532 U.S. 742, 749, (2001) (explaining that judicial estoppel “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”). As stated by the *Ripple* court, “a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” *Ripple*, 337

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<sup>16</sup> Plaintiff’s request for a judgment in connection with the Parking Spaces Assignment was maintained consistently up until and through the summary judgment hearing. *See* R. 2571, 3:18-21 (Plaintiff’s counsel stating: “Your Honor, the Plaintiff seeks a declaratory judgment to determine whether or not certain assignments of parking spaces . . .”).

So. 3d at 59 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 786). Just as a plaintiff does not file a motion to dismiss criticizing its own complaint, Rule 1.140(b) does not provide an avenue for disappointed litigants to disavow the very jurisdiction they already invoked.

Finally, to the extent that this is not a challenge based on subject-matter jurisdiction, but instead premised on another, unspecified ground, then Plaintiff waived this argument by not raising it in the lower court.<sup>17</sup> See *Herrera*, 840 So. 2d at 273.

**C. The Trial Court Did Not Err In The Scope of Relief Awarded in the Orders.**

Plaintiff argues that the Trial Court erroneously granted relief beyond what was pled in the Complaint and Counterclaim. Both arguments are incorrect.

1. The Trial Court Was Not Strictly Limited to the “Wherefore” Clause in Entering the Summary Judgment Order and Final Judgment on Plaintiff’s Claims.

Plaintiff cites to the “Wherefore” clause of the Complaint, and specifically, its request that the Trial Court determine that: (i) the Parking and

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<sup>17</sup> It is also worth noting that, unlike with the Storage Spaces, Plaintiff specifically chose not to challenge the assignability of certain parking spaces over another. See R. 2578, 10:24-25 (Plaintiff’s counsel stating: “Now, it’s easy, if I look at a parking space, it’s a parking space.”).

Storage Spaces Assignments did not constitute a valid interest in the Parking and Storage Spaces, and (ii) the areas identified in Exhibit A to the Storage Spaces Assignment were not assignable. (IB. 46.) Plaintiff argues that the Trial Court was restricted to this “limited request for relief”, and thus, that it could not “affirmatively rule[]” that the Parking and Storage Spaces were assignable, and that the transfer of the Parking Spaces and at least five Storage Spaces was valid. (IB. 46.)

Plaintiff is incorrect in suggesting that the prayer for relief, or “Wherefore” clause, dictates the precise declaratory relief that the Trial Court could issue. (IB. 46.) On the contrary, courts are “required to look to the facts alleged, the issues and proof, and not the form of the prayer for relief to determine the nature of the relief which should be granted.” *Circle Finance Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st DCA 1981); see also *Jones v. Roberts*, 559 So. 2d 429, 430 (Fla. 4th DCA 1990) (finding no error where the trial court granted relief on an issue that had been “adequately pled and litigated”); *Ellisen v. Ellisen*, 150 So. 3d 1270, 1271 (Fla. 5th DCA 2014) (finding that the trial court erred in concluding that an omission from the prayer for relief controlled over the other portions of the pleading which requested said remedies); *Golden v. Woodward*, 15 So. 3d 664, 668 (Fla. 1st DCA 2009) (finding that the trial court did not improperly “rule in

Appellee's favor on an issue that had not been adequately pled and litigated.”).

Instead, “the trial court must be guided by whether the pleadings provided the parties with sufficient notice that matters related to such relief would be at issue, and by the breadth and context of the hearing which grows out of those pleadings.” *Cruz v. Domenech*, 905 So. 2d 938, 940 (Fla. 3d DCA 2005) (finding that “the trial court was authorized to require the father to take anger management classes, even though such relief was not specifically requested . . . given the breadth and context of the evidentiary hearing” that followed the pleadings, and because the father “unquestionably had notice that the parties would be relitigating the issue of parental responsibility”).

First and foremost, Plaintiff’s argument that the Trial Court could not “affirmatively find[] that the assignments were valid” is nonsensical from a practical standpoint. (IB. 3, 46.) Plaintiff filed this action requesting a judgment that the Assignments were invalid and that the Storage Spaces were not assignable. (R. 253.) However, it was never guaranteed that Plaintiff would prevail. A party who files a declaratory action must understand that, should they lose, the judgment will declare precisely the opposite relief than what they requested.

Indeed, Rule 1.510(a) *requires* the Trial Court to state the specific reasons why summary judgment had been entered against Plaintiff. Thus, the Trial Court correctly stated its written Order that the Plaintiff's motion was denied, and Defendants' motion granted in part, because it found that the transfer under the Assignments was valid, and because the Parking Spaces and at least five Storage Spaces were assignable.

Moreover, Plaintiff was on full notice that Defendants intended to seek a judgment that the Assignments were valid (and that the Parking and Storage Spaces were assignable). Defendants vigorously defended this action, including filing Rule 1.140 motions and affirmative defenses that Plaintiff had failed to state a cause of action.<sup>18</sup> Defendants also engaged in extensive discovery, including written discovery requests and multiple depositions on issues related to their defense. Last, Defendants moved for summary judgment, which specifically argued that (i) the Assignments were in fact valid, and (ii) the Parking Spaces, and at least five of the Storage Spaces, were assignable areas.

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<sup>18</sup> Indeed, more than one year prior to filing its motion for summary judgment, Defendants filed a motion to dismiss raising one of the exact issues that was addressed by the Trial Court—that Section 3.3(d) of the Declaration vested the Developer with the authority to execute the Storage Spaces Assignment at the time it was made. (R. 137-39.)

Clearly, by the time of the summary judgment hearing, Plaintiff was on clear notice of the full scope of the issues, and by extension, what rulings could potentially be made. Thus, the Trial Court had full authority to make these “affirmative[] rulings” in the Summary Judgment Order.

2. Likewise, the Trial Court Was Not Strictly Limited to the “Wherefore” Clause of 1770 Bayshore’s Counterclaim, and Had Authority to Enter a Default Judgment Concerning the Parking Spaces.

As discussed above, the “wherefore” clause of a pleading does not strictly set the bounds of the relief that may be awarded by a trial court in a judgment. *Ellisen*, 150 So. 3d at 1271; *Cruz*, 905 So. 2d at 940. Thus, there is no merit to Plaintiff’s argument that 1770 Bayshore did not request relief in its Counterclaim in connection with the Parking Spaces.

Make no mistake—the Counterclaim expressly raised the issue of the Parking Spaces, and 1770 Bayshore’s request that Plaintiff be ejected from same. Specific allegations include:

- “On or about June 23, 2021, the Association entered or took possession of portions of the Property depicted in the areas indicated in Exhibit A(1)-(5) (the “Storage Spaces”), **as well as numerous Parking Spaces identified in Defendants’ motion for summary judgment [Dkt.177].**” (R. 2322, ¶ 6) (emphasis added).
- “In accordance with § 82.03(1), Florida Statutes, 1770 Bayshore is entitled by this lawsuit to have the Association removed from possession of the Storage Spaces and **Parking Spaces.**” (R. 2323, ¶ 10) (emphasis added).

- “The Association refuses to deliver possession of the Storage Spaces and **Parking Spaces** identified herein. Association has no valid legal claim to the Storage Spaces or **Parking Spaces.**” (R. 2324, ¶ 17) (emphasis added).<sup>19</sup>

The fact that the term “Parking Spaces” was not specifically used in the Counterclaim’s prayer for relief does not change the fact that they were clearly raised throughout the pleading. Indeed, the entire theory of the Counterclaim was that the Trial Court had recently determined that the Parking Spaces were validly transferred to 1770 Bayshore. Thus, Plaintiff was clearly on notice that the Parking Spaces were the subject of the Counterclaim and 1770 Bayshore’s Motion for a Default Judgment. See R. 2344, ¶ 1 (stating in the motion for default that “[t]he counterclaim is based upon the fact that [1770 Bayshore] has been determined by this Court to be the rightful owner of various parking spaces and storage spaces in the Aria on the Bay Condominium, but that [Plaintiff] nevertheless refused to give [1770 Bayshore] access to these parking spaces and storage spaces.”) (emphasis added). Accordingly, there is no merit to Plaintiff’s argument that the Trial Court exceeded its authority in connection with the Default Judgment on the Counterclaim.

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<sup>19</sup> Given these clear allegations, it is unclear why Plaintiff argues that “the Counterclaim is devoid of any allegation that the Association took possession of the Parking Spaces.” (IB. 48.)

**D. Plaintiff Failed to Plead or Otherwise Defend Against the Counterclaim, and Thus, The Trial Court Correctly Entered a Default Judgment.**

At the end of the Initial Brief, Plaintiff offers a mere two-sentence argument that “[t]he Default Judgment is premised on the erroneous findings in the [Summary Judgment Order] and [Amended Final Judgment]” (IB. 49.) However, Plaintiff is incorrect. As an initial matter, and as discussed extensively above, there was no error in the Trial Court’s entry of the Summary Judgment Order and the Amended Final Judgment.

But more importantly, the Default Judgment was entered because Plaintiff failed to timely file an Answer to the Counterclaim, which invoked the summary procedure set forth under § 51.011, Fla. Stat. (R. 2322.) While Plaintiff did file an untimely motion to dismiss (R. 2364-67), § 51.011, Fla. Stat. requires that “all defenses of law and fact” be filed in an answer. See *Crocker*, 593 So. 2d at 1099 (explaining that all defenses of law and fact must be filed within an answer, and that “[t]here is no option in the summary procedure to file certain defenses by motion as is authorized by rule 1.140).

Moreover, Plaintiff’s motion to dismiss only asserted one argument—the threshold matter of subject matter-jurisdiction. Plaintiff did not argue that 1770 Bayshore had also failed to state a cause of action, nor did Plaintiff assert any other challenge to the merits of the Counterclaim. Thus, even if

this Court chose to consider Plaintiff's untimely motion to dismiss as a "defective answer", *id.*, it still contained no defense, denial, or argument regarding any of the allegations in the Counterclaim. Thus, once the Trial Court had resolved the threshold challenge subject-matter jurisdiction, it correctly found that Plaintiff had "failed to plead or otherwise defend" against the Counterclaim. See Fla. R. Civ. P. 1.500(b); *cf. Crocker*, 593 So. 2d at 1100 (finding that the counter-defendant was able to "barely meet the requirement of rule 1.500(c)" and avoid default because he had included a "single statement of defenses" in his motion to dismiss for failure to state a claim).

To be clear, at no point prior to the hearing or entry of the Default Judgment did Plaintiff file an Answer or any other pleading defending against the merits of the Counterclaim. Thus, Rule 1.500(c) does not apply. See Fla. R. Civ. P. 1.500(c) ("A party may plead or otherwise defend at any time *before* default is entered.") (emphasis added).

In light of the above, Plaintiff has failed to show that the Trial Court committed a gross abuse of discretion in entering the Default Judgment. See *Fla. Recovery Adjusters, LLC*, 261 So. 3d at 667; *Robles v. Fed. Nat'l Mortg. Assoc.*, 255 So. 3d 986, 988 (Fla. 3d DCA 2018) ("judgments based on an order of default are reviewed for abuse of discretion"). To do so, Plaintiff

would have to show that the Trial Court’s action was “arbitrary, fanciful, or unreasonable” and that “no reasonable man would” have taken the same action. *Canarkis*, 382 So. 2d at 1203 (explaining that “the appellate court must fully recognize the superior vantage point of the trial judge” and that “[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion”); see also *In re Doe 13-A*, 136 So. 3d 723, 740 (Fla. 1st DCA 2014) (“The abuse of discretion standard of review, by itself, is exceptionally deferential to trial court judgment calls; it is close to the weakest form of judicial scrutiny in the appellate toolbox—exceeded only by the much-maligned ‘gross abuse of discretion’ standard”). Those circumstances are clearly not met here.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that this Court affirm the Trial Court’s rulings on appeal in these proceedings, including the February 7, 2023, Summary Judgment Order, the May 9, 2023, Amended Final Judgment, and the June 21, 2023, Default Judgment.

Dated: January 16, 2024

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2024, a copy of the foregoing was furnished to the following Parties via e-mail transmission:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this computer-generated Initial Brief complies with the typeface requirements of Fla. R. App. P. 9.045(b), and was prepared using Arial 14-point font. I FURTHER CERTIFY that this brief complies with the word limits required by Fla. R. App. P. 9.210(a)(2)(B).

/s/ Jonathan R. Weiss  
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