IN THE DISTRICT COURT OF APPEAL

THIRD DISTRICT

CASE NO: 3D23-952

L.T.: 21-19117-CA-01

MARIA MERUELO,

Appellant,

v.

REBUILD MIAMI EDGEWATER, LLC, et al.

Appellees.

_____/

MARIA MERUELO'S REPLY BRIEF

EHRENSTEIN|SAGER
Michael D. Ehrenstein
Mike@ehrensteinsager.com
Latasha N. Johnson
Latasha@ehrensteinsager.com
Brett D. Sager
Brett@ehrensteinsager.com

2800 Ponce De Leon Blvd., Suite 1400
Coral Gables, Florida 33134
Phone: (305) 503-5930

Counsel for Appellant
Maria Meruelo

Table of Authorities

Cases

Table of Contents

A. Appellees Misapprehend the Summary Judgment Standard and Misstate Their Burden.

In their Answer brief, the Appellees errantly contend that, "[t]he new [summary judgment] standard does not require the movants to disprove Maria Meruelo's affirmative defenses." See Ans. Brief, p. 12. The Appellees further argued that "… Maria Meruelo's opposition did not support her affirmative defenses or her counterclaim …." Id. The Appellees are wrong.

To support their flawed position, the Appellees rely heavily on G & G In-Between Bridge Club Corp. v. Palm Plaza Associates, Ltd., 356 So.3d 292 (Fla. 3d DCA 2023) to wrongly argue that the Appellees were not required to rebut Maria Meruelo's affirmative defenses. The Appellees' argument is based on a misguided view of Palm Plaza Associates, Ltd. In that case, the court found that a plaintiff was not required to rebut a defendant's affirmative defenses under the new summary judgment standard only because the defendant failed to carry its *initial* burden of showing that six of its affirmative defenses were applicable. See Palm Plaza Associates, Ltd., 356 So.3d at 299. The Palm Plaza Associates, Ltd. holding does not support Appellees failure to rebut affirmative defenses here. Rather, consistent with the

cases cited at pages 10 through 12 of Maria's Initial Brief, the court in Palm Plaza Associates, Ltd. held that a plaintiff must rebut a defendant's affirmative defenses on summary judgment once the defendant carries its *initial* burden of showing that "an affirmative defense is applicable." Id.

Here, unlike the defendant in Palm Plaza Associates, Ltd., Maria carried her initial burden and established that her affirmative defenses of fraud and unclean hands were applicable. As argued in pages 5–6 and 15–20 of Maria's Initial Brief, Maria's Response in Opposition to the Appellees' Motion for Summary Judgment presented the Court with more than 3,000 pages of supporting exhibits, affidavits, and testimony which established Maria's affirmative defenses of fraud and unclean hands. A bare fraction of Maria's evidence of fraud is set forth in the table below, including the specific element of the defense to which it relates:

EVIDENCE	**RELEVANCE TO FRAUD**	**REBUTTAL**
The Operating Agreement was unilaterally created by Richard during the marriage. [R4914-4915; 4935]	The Operating Agreement represents a false statement of specific material fact, and evidences Richard's intention that others rely on it. The material omission of Maria's capital contribution is evidence of fraud.	None

EVIDENCE	RELEVANCE TO FRAUD	REBUTTAL
The stated members of the company did not actually make the capital contributions set forth in the Operating Agreement. [R4915-4919]	Demonstrates the falsity of the statement of membership set forth in the Operating Agreement	None
The accounting records for the company disprove the stated equity allocations of the purported members. [R4915-4919; 4938-4941]	Demonstrates the falsity of the statement of membership set forth in the Operating Agreement	None
Maria and Richard's tax returns prove the money that was used to capitalize the company was funds owned by Richard and Maria. [R4925-4926; 4935-4941]	Demonstrates the falsity of the statement of membership set forth in the Operating Agreement	None
The only capital in the company is traced back to Richard and Maria. [R4915-4919; 4938-4941]	Demonstrates the falsity of the statement of membership set forth in the Operating Agreement	None
The primary asset of the company, the Seven Acres, was purchased with money drawn from an account which Maria owns with Richard and several million in the account were *admittedly* Maria's at the time of transfer to the company. [R4915-4919; 4925-4926; 4938-4941]	Demonstrates Maria's equitable interest in the Property itself, as an additional and separate matter from her interest in the company.	None

The same evidence establishes Maria's unclean hands defense. Accordingly, Maria satisfied *her* burden that the defenses were applicable to the Plaintiffs' claims, at which point the burden shifted to Appellees, to rebut them. In their reply to Maria's Response in

Opposition to Appellees' Motion for Summary Judgment, however, the Appellees failed to controvert *any* of the evidence Maria presented to establish her affirmative defenses. See [R3950-3959]. In fact, the Appellees' reply in support of their summary judgment motion did not even contain the words "affirmative defense", "fraud", or "unclean hands". Id. Noting their omission, Maria's counsel below expressly highlighted the Appellees' failure to address the evidence of the defenses adduced by Maria, when counsel argued:

> [W]e have raised affirmative defenses of fraud and unclean hands. Those affirmative defenses have not been addressed, not at all. They didn't even deal with them in the response papers. And frankly, all of the facts that I just went through with you…none of that has been addressed by [Plaintiffs'] response.

See [R3985]. Nevertheless, the Appellees' counsel incorrectly insisted that the Appellees need not address Maria's affirmative defenses or the evidence supporting them. See [R3991]. Consequently, the Appellees did not rebut any of Maria's evidence. The Appellees' failure to rebut defenses is not only contrary to Palm Plaza Associates, Ltd.'s holding, it is contrary to this Court's express instruction on how trial courts should address summary judgment evidence. Under the new summary judgment standard, this Court holds that "[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." Chowdhury v. BankUnited, N.A., 366 So. 3d 1130, 1134 (Fla. 3d DCA 2023). Here, the lower court accepted the "story" that was wholly unsupported by evidence and ignored all facts and law to the contrary.

The Final Judgment, which was prepared by the Appellees' counsel, adopted the Appellees' fallacious view that the Appellees need not rebut Maria's applicable affirmative defenses and that the court need not consider Maria's evidence. Nonetheless, Maria's defenses were supported by relevant law and sufficient evidence raising questions of fact that require trial; accordingly, the lower court's entry of summary judgment must be reversed.

B. The Appellees' Contention that Maria Failed to Support Her Affirmative Defenses is False.

In their Response, the Appellees argue that Maria failed to present the lower court with facts or legal authority which support Maria's affirmative defenses. The Appellees support their argument with an injudicious denial of the substantial evidence Maria

presented in support of her opposition to the Appellees' motion for summary judgment. Appellees' willful ignorance of Maria's evidence is unavailing.

First, the Appellees argued that "Maria Meruelo has no factual or legal authority that would allow the court to ignore the operating agreement." See Ans. Brief at p. 15. Appellees' statement is plainly belied by pages 15–26 of Maria's Initial Brief and Maria's opposition to the Appellees' motion for summary judgment, both of which presented ample facts and law supporting her affirmative defenses of fraud and unclean hands. Maria also cited legal authority demonstrating that her defenses enabled the court to set aside the fraudulent operating agreement.

Specifically, Maria presented substantial evidence establishing that the purported operating agreement upon which the Appellees' motion for summary judgment was based is a fraudulent document created by Richard Meruelo to wrongfully deprive Maria of her interest in both Rebuild Miami Edgewater, LLC, and the Seven Acres. In response, the Appellees ignored the facts and law Maria presented in opposition to Appellees' motion for summary judgment. See [R3950–3959]. Instead, the Appellees claim only that the purported

operating agreement controls, despite the mountain of evidence casting doubt as to the operating agreement's validity. Id.

Similarly, the Appellees also misapprehend the law argued in Maria's Initial Brief that demonstrates how the trial court should have viewed Maria's evidence. Each case cited in support of a court reviewing the extrinsic evidence—tax returns, deposition transcripts, bank statements, etc.— to determine *true* corporate ownership, was overlooked by the Appellees. The evidence Maria raised in opposition to summary judgment is consistent with that which the courts in In re Celebrity Resorts, LLC, 6:10-AP-00178-ABB, 2010 WL 5289298, (Bankr. M.D. Fla. 2010), Hage v. Salkin, 11-CV-61863, 2012 WL 718644 (S.D. Fla. 2012), and others, relied on to ascertain ownership when such ownership was challenged or otherwise contested.

Second, the Appellees argue that "there was no evidence that Rebuild or the Seven Acres were owned by Richard Meruelo and Maria Meruelo as tenants by the entireties." See Ans. Brief at p. 19. The Appellees further wrongly allege that the marital funds which Richard used to purchase the Seven Acres "… came from a bank account that was a "Single-Party Account," with Richard Meruelo as

the account holder, and tenants by the entirety was expressly disclaimed." Id. The Appellees misstate the evidence.

Indeed, the Appellees failed to rebut that Richard Meruelo, through his Financial Affidavit in the Divorce, *admitted* that the subject City National Bank account is a marital account, owned by both he and Maria. See [R8732]. Furthermore, as set forth at pages 15–20 of Maria's Initial Brief, Maria's response to the motion for summary judgment and supporting exhibits included a detailed tracing of funds which established that more than $48 million of Maria's funds were used by Richard to purchase the Seven Acres through and for the benefit of Rebuild Miami Edgewater, LLC. In response, the Appellees produced no evidence to rebut Maria's tracing of her funds into the purchase of the Seven Acres. See [R3950–3959; 3960–4008].

Third, the Appellees misrepresent Maria's evidence and arguments below to suggest that Maria advocated that the Seven Acres itself is "community property" pursuant to the terms of the Restatement of the Richard Meruelo Trust (the "Trust"). See Ans. Brief at p. 20. Maria made no such claim. Rather, Maria's response in opposition to Appellees' motion for summary judgment made clear

that the marital funds which Richard used to purchase the Seven Acres flowed from Richard's liquidation of Richard's and Maria's jointly-owned stock in the publicly traded company EVOQ, formerly MMPI. That stock was owned, in part, by the Trust. Contrary to the Appellees' misrepresentations, Maria does not contend the funds themselves represented community property. Rather, the significance of the Trust's ownership of the stock is that it represents unimpeached evidence that once the stocks were liquidated, Maria had an undisputed ownership interest in the proceeds. This fact was made clear during hearing on the Appellees' motion for summary judgment:

> Here there is this trust agreement. Now interestingly even Richard admits that under this trust agreement Maria had rights. He signed an affidavit in a prior bankruptcy proceeding which is also attached to our response in which he acknowledges that Maria had an interest, and that the trust had an interest in this property – not in the property, but in the stock sale that yielded the funds that went into the property.

See [R3980–3981]. Richard does not dispute that the Trust owned the stock, or that Maria held an ownership interest in Trust's assets. To the contrary Richard admits it, and the stock liquidation is reflected on his and Maria's 2015 joint tax return. [R5295–5319;

5301]. Accordingly, Richard cannot deny (and Appellees cannot rebut) that when Richard used the funds from the liquidated stock to purchase the Seven Acres, he did so with Maria's money.

Last, the Appellees wrongly contend that the evidence of Appellees' reclassification of USA Capital's loan to equity does not establish Maria's affirmative defenses or counterclaim. See Ans. Brief at p. 20. The Appellees are wrong. The Appellees' reclassification of USA Capital's loan is relevant because this case turns on whether Maria possesses an equitable or legal interest in Rebuild Miami Edgewater, LLC and in the Seven Acres, and Maria's legal and equitable interests arise in part through her ownership in the admittedly jointly-owned marital entity, USA Capital.

As argued in Maria's opposition to the Appellees' motion for summary judgment, the Appellees' own records establish that USA Capital contributed $12,500,000 to Rebuild Miami Edgewater, LLC in 2017. See [R4938]. Richard Meruelo, through his Financial Affidavit in the Divorce, admitted that USA Capital is a marital entity. See [R8732]. The affidavit of Philip Shechter, CPA, opines that the financial records produced by the Appellees establish that USA Capital's $12,500,000 loan to Rebuild Miami Edgewater, LLC was

converted to a 29% membership equity in Rebuild Miami Edgewater, LLC for the year ended 2017. See [R4939–4940; 4974–4983]. Accordingly, for years 2017, 2018, and 2020, USA Capital reported through tax returns filed with the Government of Puerto Rico's Department of Treasury that USA Capital holds an ownership interest in Rebuild Miami Edgewater, LLC. See [R4940; 5203–5271]. Thus, the foregoing facts establishing USA Capital's ownership in Rebuild Miami Edgewater, LLC are likewise evidence of *Maria's* ownership interest in the company.

Notably, USA Capital's $12,500,000 remained classified as "Member 1 Equity" in Rebuild Miami Edgewater, LLC's accounting software, Quickbooks, at the inception of this lawsuit. See [R4939; 4974–4983]. Moreover, the audit trail for Rebuild Miami Edgewater, LLC's Quickbooks establishes that, *during the pendency* of this case, the Appellees altered the accounting treatment of USA Capital's $12,500,000 to fraudulently eliminate Maria's interest. See [R4941; 4974–4983]. Specifically, on March 17, 2022, for the year ended December 31, 2020, Rebuild Miami Edgewater, LLC's Quickbooks were altered to change the classification of USA Capital's $12,500,000 from "Member 1 Equity" to a loan payable. By

reclassifying USA Capital's $12,500,000 from "Member 1 Equity" to a loan payable, the Appellees eliminated USA Capital's ownership interest in Rebuild Miami Edgewater, LLC and treated USA Capital as merely a creditor. See [R4941; 4974–4983]. Importantly, the membership equity change demonstrates that the Operating Agreement which the lower court accepted at face value was demonstrably false when presented and impeached by the company's own records.

These facts, taken in the light most favorable to Maria, establish Maria's affirmative defenses of fraud and unclean hands. They also demonstrate her entitlement to relief on her counterclaim for declaratory judgment which sought a finding that Maria holds a legal or equitable interest in Rebuild Miami Edgewater, LLC. See [R55–68]. At a minimum, these facts raise a genuine issue of material fact concerning the Appellees' request that the Court declare "MARIA C. MERUELO has no interest in REBUILD MIAMI EDGEWATER, LLC" [R49], and controverts the Appellees' argument that Rebuild Miami Edgewater, LLC's purported operating agreement establishes dispositive ownership of the company.

C. The Appellees Misconstrue Legal Authority Concerning The Exercise of Independent Judgment.

In their Response, the Appellees falsely contend that Maria "failed to raise an objection to the proposed final judgment based upon the 'verbatim' theory, [and she] cannot now complain [of] error for the first time in this appeal." See Ans. Brief at pp. 22–3. The Appellees apparently failed to review Maria's Motion for Rehearing which argued, in pertinent part:

> Though Maria submitted volumes of binders containing evidence and case law for the Court's consideration. Instead, **the Final Judgment is a verbatim recitation of Plaintiffs' counsel's proposed order and improperly dismisses all of Maria's claims and defenses without proper analysis of the record evidence submitted by Maria**. Trump Endeavor 12, LLC v. Florida Pritikin Ctr., LLC, 208 So.3d 311, 312 (Fla. 3d DCA 2016) ("Reversal is warranted because the trial court failed to provide sufficient findings of fact and conclusions of law, … Findings of fact and conclusions of law are required to review declaratory judgments.") (internal citations omitted). Accordingly, the Court should immediately vacate its Final Judgment.

See [R4080] (emphasis added). Accordingly, the issue was in fact raised in the court below but the lower court nonetheless denied Maria's motion for rehearing without oral argument. See [R4459–4460; 4272–4284]. Furthermore, the Appellees' contention that the lower court exercised independent judgment is based on a misguided

view of two cases: Tercier v. University of Miami, Inc., No. 3D22-1334, 2023 WL 4916043, at *1 (Fla. 3d DCA Aug. 2, 2023), and Cabrera v. Cabrera, 987 So.2d 755 (Fla. 3d DCA 2008).

First, Appellees reliance on Tercier is misplaced. In that case, this Court affirmed a trial court's order adopting, verbatim, a defendant's proposed order *granting a motion to dismiss a complaint*. In that case, unlike here, there was no evidence for the trial court to consider as the case was in a wholly different posture. Recognizing the distinction, this Court noted:

> The instant case involves a non-evidentiary hearing lasting 22 minutes, consisting solely of legal argument addressing whether the operative complaint (whose well-pled allegations must be accepted as true) stated a cause of action.
> …
> By contrast, the final judgment in the instant case was five and a half pages long; was the result of a non-evidentiary [hearing] limited to a review of the four corners of the complaint and attachments; required no findings of fact and no weighing of testimony or determinations of credibility; and required a threshold legal determination of whether the allegations were sufficient to state a cause of action.

Tercier, 2023 WL 4916043, at *6.

Here, in contrast to Tercier, the below proceeding was a hearing on a motion for summary judgment. The litigants in this case

engaged in several months of discovery and motion practice before reaching the summary judgment stage, and the summary judgment briefing necessarily involved complex legal and factual issues. Consistent therewith, Maria's supporting evidence comprised of 3000+ pages of testimony, affidavits, and financial documents–-all of which were admitted without objection but ignored by the lower court. The Tercier holding is therefore inapplicable.

Second, the Appellees cite Cabrera, and selectively include a quote regarding a judge's active participation in a hearing as a component of an appellate court's analysis of whether the lower court exercised independent judgment. Cabrera is inapposite.

The Appellees failed to mention that, unlike here, the lower court in Cabrera *modified* the litigant's proposed order to include the lower court's own analysis. Specifically, this Court highlighted:

> First, whereas the trial court in *Perlow* adopted the wife's proposed final judgment without making any changes, additions, or deletions, **in the instant case, the final judgment entered by the trial court was not a verbatim adoption of the Wife's proposed final judgment**.

Cabrera, 987 So.2d at 754 (emphasis added).

Here, as established in pages 31–35 of Maria's Initial Brief, the lower court adopted, verbatim, the Appellees' proposed order and

final judgment without modification, and without any independent analysis of the facts, issues, or applicable law. The lower court's adoption, verbatim, of the Appellees' proposed order and final judgment, resulted in the lower court failing to consider or address Maria's affirmative defenses, counterclaim, or the 3000+ pages of testimony, affidavits, and financial documents Maria submitted in support of her opposition to the Appellees' motion for summary judgment. Thus, by rubber stamping Appellees' plainly erroneous statement that Maria "submitted no evidence" to support her claims, the lower court revealed that it did not perform its own analysis of the evidence or facts. See [R4452, 4454]. Accordingly, the Court should reverse the lower court's Order and Final Judgment.

D. The Appellees Mischaracterize Marital Dissipation.

The Appellees' Answer Brief continues to misstate the law and mischaracterize the claims in the parties' pleadings. The Appellees' argument that Maria's sole remedy is a claim for dissipation in the Divorce is simply untrue. Indeed, the argument is nonsensical. This Court defines dissipation as an act "where one spouse uses marital funds ***for his or her own benefit*** and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable

breakdown." Weininger v. Weininger, 290 So. 3d 928, 933–34 (Fla. 3d DCA 2019) (emphasis added).

To credit the Appellees' argument that Maria's properly raised defenses and counterclaims against *them* are raised in the wrong court defies logic when Maria's arguments are directly addressing the relief the Appellees, as plaintiffs below, asked the lower court to provide. This is particularly true because if the Appellees' version of the facts is to be believed, Richard—the ex-spouse—is not an owner, member or equity holder in Rebuild Miami Edgewater, LLC, meaning the marital asset was not dissipated for Richard's own benefit. Such would only be true if Richard was holding the benefit, ie. asset, in his name.

Rather, Maria's below counterclaim and defenses turn on the fact that something which belongs to her was tortiously and illegally taken by Rebuild Miami Edgewater, LLC, Belinda Meruelo, Stephen Meruelo, and Anthony Meruelo[1] for their own benefit. That her ex-husband orchestrated the fraud, and shares in the unclean hands is irrelevant to the fact that the relief is sought against third parties

[1] The lower court entered defaults against both Stephen Meruelo and Anthony Meruelo. See [R439–442].

outside of the marriage and against whom no "dissipation" claim applies. The relief Maria seeks is to take back that which is held in the names of the third-party Appellees who brought the claim below for ***their own benefit***. The dissipation statute does not apply, and none of the cases raised by the Appellees rebut this fact. For the foregoing reasons, the Final Judgment must be reversed.

Respectfully submitted,

Counsel for Appellant, Maria Meruelo
2800 Ponce De Leon Blvd.
Suite 1400
Coral Gables, Florida 33134
Phone: (305) 503-5930

By: */s/ Latasha N. Johnson*
Michael D. Ehrenstein
Florida Bar No.: 857378
mike@ehrensteinsager.com
Latasha N. Johnson
Florida Bar No.: 81970
latasha@ehrensteinsager.com
Brett D. Sager
Florida Bar No.: 91636
brett@ehrensteinsager.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2023, a copy of the foregoing was electronically filed and served through Florida's e-filing portal on all counsel of record.

By: */s/ Latasha N. Johnson*
Latasha N. Johnson

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is prepared in Bookman Old Style 14-point font, in compliance with Fla. R. App. P. 9.045(b), and does not exceed 4,000 words in compliance with Fla. R. Civ. P. 9.210(a)(2)(B).

By: */s/ Latasha N. Johnson*
Latasha N. Johnson