IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

MARIA LIMA,

Appellant,

v.

THE GARDENS OF KENDALL SOUTH CONDOMINIUM NO. 4 ASSOCIATION, INC., THE GARDENS OF KENDALL SOUTH PROPERTY OWNERS ASSOCIATION, INC.,

Appellees.
_____/

CASE NO.: 3D23-1915

L.T. No.: 2016-005582-CA-01

ANSWER BRIEF

Submitted on behalf of the Appellees,
THE GARDENS OF KENDALL SOUTH CONDOMINIUM NO. 4 ASSOCIATION, INC. and THE GARDENS OF KENDALL SOUTH PROPERTY OWNERS ASSOCIATION, INC.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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STATEMENT OF THE CASE

Maria Lima, the Plaintiff in this nuisance lawsuit, appeals final summary judgment granted in favor of Defendants The Gardens of Kendall South Condominium No. 4 Association, Inc. ("Condominium No. 4") and The Gardens of Kendall South Property Owners Association, Inc. ("POA"). (R.2632-33). At issue is whether Plaintiff raised a genuine issue of material fact, precluding summary judgment, and whether the lower court erred in allegedly failing to explain its rationale for entering summary judgment.

We respectfully submit that the lower court correctly entered final summary judgment in favor of Defendants and that the lower court procedurally complied with Florida Rule of Civil Procedure 1.510, as will be explained in greater detail below.

STATEMENT OF FACTS

Plaintiff owned and resided in unit 302 of the subject condominium building. (R.1539). She claims she lived peacefully in her unit from 2002 to in or around May 2014, when her neighbor in the unit directly below her, Christopher Gargano,[1] installed a new air conditioning system. (R.1539, 1542-43). From that point forward, until she later vacated her unit, she claims to have experienced noises and vibrations (R.1543-1544, 2090).

In her Sixth Amended Complaint, Plaintiff alleged the following theories against Defendants:

- Count V (Condominium No. 4): Breach of Declaration of Condominium.
- Count VI (Condominium No. 4): Nuisance.
- Count VII (Condominium No. 4): Violation of Florida Statute § 718.113.
- Count VIII (Condominium No. 4): Injunction.
- Count IX (POA): Violation of Florida Statute § 718.113.
- Count X (POA): Injunction.

[1] A named Defendant below, but not part of this appeal, as the summary judgment motion was only brought by Defendants The Gardens of Kendall South Condominium No. 4 Association, Inc. and The Gardens of Kendall South Property Owners Association, Inc. (R.1970-2116).

(R.1554-1567). The gravamen of her complaints sounds in nuisance. (R.1537-1567). She essentially complains that certain noises and vibrations disturbed her and she faults Condominium No. 4 and the POA for not making them stop. *Id.*

In deposition, Plaintiff testified that of all the noises, the only one that bothers her is the one from Christopher Gargano's air conditioning unit. (R.2062). If the noise from his air conditioning unit went away, the other noises would not bother her. (R.2081). Because maintenance of Mr. Gargano's air conditioning unit is his unit owner responsibility, not association responsibility, Plaintiff's testimony exculpated Condominium No. 4 and the POA and formed the basis for summary judgment. (R.1578-79).

At the hearing on Defendants' Motion for Summary Judgment, after presenting this very position, Plaintiff was given an opportunity to argue why she believes there is a genuine issue of material fact. (R.2952-57). At the bottom of page 8 of the hearing transcript, line 23, Plaintiff began presenting her arguments. (R.2957). By the middle of page 12 of the transcript, the lower court intervened, stating, "Today is really just about the summary judgment position that [Defendants are] taking. This isn't evidentiary in nature unless

it's summary judgment evidence, but I want to give you a chance to [rebut] what Mr. Kashi said about the depo and [his clients] and all that." (R.2961). Plaintiff then complained about videos she wanted to show but was having difficulty showing before the lower court intervened again, asking Plaintiff, "Okay, anything else?" (R.2961-62). Plaintiff did not speak again until after Defendants' rebuttal. (R.2965).

After Defendants' rebuttal, Plaintiff made a myriad of comments having nothing to do with the summary judgment proceedings. (R.2965-67). From page 16, line 18 of the hearing transcript to page 18, line 19, Plaintiff accused Non-Appellee Christopher Gargano of hiding evidence and manipulating the noise, talked about her noise videos, claimed she was the subject of a death threat, complained about flying satellites over her roof, and then blamed Condominium No. 4 and the POA for her plight. *Id.*

Instead of commenting on Plaintiff's comments post-rebuttal, Defendants stood on their arguments. (R.2967-68).

Following the close of the arguments, the lower court said it would rule after looking at the competing summary judgment evidence, stating, "Okay, all right, and like I said, this dates back to,

from memory, end of April, so I'll have to – you know, and obviously, [Plaintiff] filed some stuff this month, I'll sort of reconcile that in conjunction with the MSJ, the pleading of reliance as far as summary judgment evidence that I think [the Defendants] had also filed, so I'll sort of take it all at one time, and then again, I have to limit my analysis under 1.510, and I will do that." (R.2968). The lower court, at a later date, after reviewing the competing submissions post-hearing, concluded that there was not a genuine issue of material fact and entered summary judgment in favor of Condominium No. 4 and the POA, leading to the instant appeal. (R.2355-57).

SUMMARY OF THE ARGUMENT

There is no genuine issue of material fact because Plaintiff failed to present any competent summary judgment evidence to substantiate any of the counts in her Sixth Amended Complaint pertaining to Condominium No. 4 or the POA, nor could she have in light of her damning testimony in which she testified that the only noise that bothered her pertained to Defendant Christopher Gargano, not Condominium No. 4 or the POA. (R.2062).

To the extent Plaintiff argues that the order granting summary judgment is defective for failure to comply with Rule 1.510, the lower court is permitted to explain its reasons in either its order or orally at the hearing. Although the order, in isolation, does not provide reasons, when read in context with the lower court's commentary at the hearing, it is clear that the lower court did not consider what Plaintiff presented at the hearing to constitute summary judgment evidence. (R.2355-57, 2952-68). The lower court then said it would look, post-hearing, at the filings in coming to a ruling. (R.2968). After reviewing Plaintiff's filings in comparison to Defendants', the lower court granted summary judgment for lack of a genuine issue of material fact, leading to the inescapable conclusion that the lower

court was not convinced after reviewing the filings that Plaintiff had presented competent summary judgment evidence to defeat Defendants' motion. (R.2355-57). In fact, just judging from the lower court's commentary at the hearing, one could tell the eventual outcome was trending in the direction that it ultimately did. Although it would have been better form to include more detail in the order, to require the lower court to state the obvious promotes form over substance.

Should this Court take umbrage with the lack of detail in the order, Defendants request that this Court relinquish jurisdiction so the lower court can revise it to state the obvious and then to allow the appeal to continue on the merits concerning Plaintiff's lack of summary judgment evidence.

ARGUMENT

I. The Lower Court Correctly Granted Summary Judgment in Favor of Defendants Because Plaintiff Failed to Present Any Competent Countervailing Summary Judgment Evidence to Create a Triable Issue of Fact.

On December 31, 2020, the Florida Supreme Court adopted the federal summary judgment standard as embodied in the *Celotex* trilogy, with the rule change to take effect on May 1, 2021. *In Re. Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020). Under the new standard, "there is no express or implied requirement … that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. [citations omitted] "Rather, … the burden on the moving party may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 193. In fact, Plaintiff's case is even weaker than contemplated by this language. Not only did Defendants shift the burden by pointing to an absence of evidence, Defendants pointed to Plaintiff's own testimony, which in its own right, negates any issue of fact. To the extent Plaintiff has buyer's remorse over her testimony

and wishes to change it after Defendants' summary judgment motion, which was filed in reliance on her testimony, she is precluded from doing so by law. *See Baker v. Airguide Mfg., LLC*, 151 So. 3d 38, 40 (Fla. 3d DCA 2014) ("[I]t is well-established Florida law that a party may not rely on an affidavit that contradicts or repudiates prior deposition testimony simply to defeat a motion for summary judgment."); *Ellison v. Anderson*, 74 So. 2d 680, 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….")

II. The Lower Court Did Not Deviate From the Procedural Requirements of Rule 1.510.

Rule 1.510(a) requires the lower court to "state on the record the reasons for granting or denying the motion." This requirement is satisfied either by stating the reasons in the order or by oral pronouncement. *Tucker v. LNV Corp.*, 363 So. 3d 1095, 1097 (Fla. 4th DCA 2023). Silence in the order concerning the reasons is not fatal. *Id.* at 1098. Furthermore, the lower court's oral reasoning does not need to be explicit, but can be implied from an examination of

the record. *See Congleton v. Sansom*, 664 So. 2d 276, 282 (Fla. 1st DCA 1995) (the lower court implicitly found that the weight of the evidence supported that the widower was not legally insane when he killed his wife based on the court's finding that the widower acted unlawfully); *Cave v. State*, 661 So. 2d 1213, 1214 (Fla. 1995) (reviewing court "correct in examining the record to determine if the requisite [facts] existed notwithstanding the failure of the trial court to make the precise finding.")

It is a well-known principle that there is a presumption in favor of the lower court's ruling. *See Smith Barney Inc. v. Potter*, 725 So. 2d 1223, 1224-1225 (Fla. 4th DCA 1999) ("The hoariest principle of appellate review is that every presumption is in favor of the ruling of the trial court. [citations omitted] In the absence of explicitly stated reasoning by the trial judge, an appellate court presumes that all intermediate conclusions in the chain of logic were resolved in favor of the ultimate conclusion of the trial court."); *Odom v. Barrett*, 67 So. 2d 200 (Fla. 1953) (every presumption is in favor of the order appealed and the trial judge's ruling); *Seaboard Coast Line R. Co. v. Brummitt*, 390 So.2d 170 (Fla. 5th DCA 1980) (when an order does not state the grounds on which it was based, the reviewing court is

required to determine if any grounds would support the order and assume all necessary facts as true); *Winn Dixie Stores, Inc. v. Benton*, 576 So. 2d 359 (Fla. 4th DCA 1991) (on appeal, all evidence and conflicts and all reasonable conclusions must be resolved in favor of the prevailing party). It is exactly because of this principle that the appellate court in *Smith Barney* declined to remand over the lack of detail in the order, stating, "We think no purpose would be served by a remand for the trial judge to write out in an order exactly what he had decided at each step." *Id.* at 1225.

For the reasons expressed previously, it is obvious why the lower court granted Defendants' motion. Defendants request this Court to presume the implied finding of the lower court that Plaintiff failed to present any competent summary judgment evidence to defeat Defendants' motion, which was premised on Plaintiff's own testimony, which had the effect of nullifying her own case.

Should this Court, however, deem a more detailed order to be necessary, Defendants request that this Court relinquish jurisdiction to the lower court to revise the order and, thereafter, for this Court to resume the appeal on the merits.

CONCLUSION

WHEREFORE, Defendants/Appellees Condominium No. 4 and the POA respectfully request that this Court affirm the order and judgment under review or, if necessary, relinquish jurisdiction to the lower court to remedy any perceived defect in the order and to allow the appeal to proceed on the merits thereafter.

CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing was printed in Bookman Old Style 14-point font and contains 2,480 words excluding the sections exempt under Rule 9.045(e).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished via Electronic Service via the Florida Courts E-filing Eportal pursuant to the Supreme Court Administrative Order AOSC13-490 this date, April 29, 2024, to: Maria Lima, Pro Se, 10845 S.W. 112th Ave., #302, Miami, FL 33176, akwanland@gmail.com.

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