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

CASE NOS.: 3D23-695 & 3D23-824
L.T. CASE NO: 2016-032842 CA-01

LEMANO INVESTMENTS, LLC,

Appellant,

v.

RGF ATHENA, LLC,

Appellee,

APPELLEE RGF ATHENA, LLC'S ANSWER BRIEF

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Rules

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PREFACE

RGF Athena, Llc ("RGF" or "Plaintiff") paid for and acquired two parcels of property, conveyed by warranty deeds, which were then recorded. The properties were thereafter fraudulently transferred by an unauthorized agent to Lemano Investments, LLC ("Lemano") by quit-claim deeds for no consideration. Because RGF was entitled to the properties as a matter of law, the partial final judgment quieting title in RGF and rescinding the fraudulent deeds was entirely proper under the **new** summary judgment rule. Fla.R.Civ.P. 1.510 (eff. May 1, 2021). Accordingly, the final partial summary judgment and attendant cost judgment should both be affirmed.

STATEMENT OF THE CASE AND FACTS

RGF disagrees with Lemano's "Statement of the Case and Facts," which is procedurally inaccurate, factually imprecise, and attempts to complicate an essentially simple case. RGF substitutes the following.[1]

On December 23, 2016, RGF sued Lemano to quiet title and rescind two fraudulent quit claim deeds by which RGF's property was

[1] All references are to Lemano's Initial Brief (I.B.p.), and the record (R.), as supplemented. (S.R.). All emphasis is added, unless stated otherwise.

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wrongfully conveyed to Lemano. (R.40-115). Lemano answered, counterclaimed and filed a "Third Party Complaint" against others, including Minvest USA, LLC ("Minvest") and Geoffroy Lecat ("Lecat"). (R.327-438).

Lemano's third party complaint made duplicative, overlapping claims it already advanced in prior suits against Minvest. Multiple suits were transferred to the circuit court complex business division (R.676-77), where five of these were consolidated for discovery. (T.682-83).[2]

RGF (and the third party defendants) moved to sever this case from the third party complaint (and related suits) for trial, citing judicial economy and the need for timely resolution **of title** to the properties at issue. (R.741-44). They urged that:

> RGF filed suit against Lemano**...** to recover two properties fraudulently conveyed to Lemano. Trial of the RGF action should not be delayed or cluttered with disputes between the Defendant and the Thid Party Defendants. **Those separate claims are unrelated to RGF's entitlement to ownership of the properties and are more appropriately addressed in a separate trial consolidated with Lemano Investments, LLC v. Minvest USA, Llc, Case No. 16-21844 CA**

[2] RGF v. Lemano, 16-32842 (this case), Lemano v. Minvest, 16-21844, Design Exchange v. Yokote, 16-318336, Lemano v. Minvest, 17-4973, and Centennial Bank v. Minvest, 18-17179. (R.682-83).

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02 ("Lemano 2016") and Lemano Investments, LLC v. Minvest USA, Llc, Case No. 17-4943 CA 02 ("Lemano 2017") (R.741).

The trial court granted the motion to sever, ordering that "The Complaint and Counterclaim shall proceed to trial as scheduled and the Court will entertain argument as to the consolidation for trial of the 'related cases' together with the Third Party complaint in this case in another trial setting." (R.781).

A. Facts Relating to RGF

RGF is a Florida Limited Liability company formed in furtherance of a joint venture agreement entered into by Pauliflo, LLC, Lecat and Fredric Henry ("F. Henry"). The joint venture agreement was executed and RGF, formed, on April 8, 2015. (R.1095-1103,1105-06).

Pursuant to the terms of the joint venture agreement, the purpose of RGF was to purchase real property with improvements for renovation and resale. (R.1095,¶1.3). Pauliflo was to provide capital to RGF (R.1095,1098,¶4.1), while Lecat and F. Henry were named initial managers. (R.1095,1096,¶3.1).

The joint venture agreement expressly provided that all decisions with respect to management and control of the joint

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venture "shall require approval by Pauliflo." (R.1096,¶2.2). Acts, expenditures, and obligations incurred by the joint venture or any venturer, individually, were **prohibited** unless "first approved by Pauliflo in writing." (R.1096,¶2.3). It was further agreed that "no Party shall have the right to legally bind the Joint Venture or the LLC to commitments or contractual arrangements with any third party**... without the express written consent and signature of Pauliflo**." (R.1096,¶2.2).

Acts and duties for which the initial managers were responsible were specifically listed, but required "the approval nevertheless of Pauliflo." (R.1096-97,¶3.2).

Pauliflo is a separate Florida limited liability company owned by Roland Germain and his wife Marie-Andree Verdier, who are French Nationals. (R.1683-87;S.R.666). It was created to manage their **personal** investments, particularly in real estate. (S.R.666). All of the funds in RGF were derived from the Germains, through Pauliflo. (S.R.671).

RGF adopted an "Operating Agreement" which defined it as a "multi-member company governed by the Florida Revised Limited Liability Act as a manager-managed entity**...**" (R.1105,¶2). RGF's

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initial members were Pauliflo (which owned 50%), F. Henry, and Lecat (who each owned 25%). (R.1114). As in the joint venture agreement, the powers of RGF's managers **were restricted to preclude any manager** from unilaterally undertaking, selling, transferring and/or encumbering RGF property (whether real or personal), without a vote of its members and Pauliflo's **prior** approval. (R.1107-08,¶7.3).

On March 29, 2016, RGF purchased real property located at 1842 N.W. 74th Street, Miami, FL 33147, more particularly described as:

> Lot 5, Block 3 of Bethune Homesites, according to the plat thereof, as recorded in Plat Book 43, Page 61 of the Public Records of Miami-Dade County, Florida (the "1842 property.").

RGF paid the closing agent the full purchase price of $105,992.60 for the property, and after closing, received a warranty deed, recorded on April 7, 2016. (R.1688-89).

On March 30, 2016 RGF purchased real property located at 5600 N.E. 1st Court, Miami, FL, more particularly described as:

> Lot 12, Book 20 of Dixie Highway Tract, a subdivision, according to Plat Book 5, page 24 of the Public Records of Miami-Dade County, Florida (the "1st Court property").

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RGF paid the full purchase price of $165,407.37 for the property to the title agent, and after closing, received a warranty deed, recorded on April 7, 2016. (R.1690-91).

In each instance, RGF used a third party closing agent; the closing agent on the 1842 property was "Working Title Llc." (R.914-23); the closing agent on the 1st Court property was "C&C Title Agency." (R.924-27). Funds for each property were transferred directly from RGF to each title company (R.82,transferring $105,992.60 from RGF to "Working Title;" R.929; transferring $165,407.37 to "title" for "5600 [N.E. 1st Court]."

B. Facts Relating to Lemano

On April 5, 2013, Lemano Investments, LLC filed "Electronic articles of organization for Florida Limited Liability Company," with Florida's secretary of state. The name and address of managing members/managers were listed as:

> Title: MGR
> Fredric Henry
> 2550 South Bayshore Drive
> Coconut Grove, FL 33133

The company's street and mailing addresses were the same. Its articles of incorporation were electronically signed by Patrick Moyal, under "signature of member or authorized representative of a

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member." Mr. Moyal was listed as the company's registered agent, at a different address in Pembroke Pines, Florida. (R.1646-48).

On April 5, 2013, Lemano ("the company") entered into an "Operating Agreement" with Fredric Henry ("the member"). This operating agreement identified Fredric Henry as Lemano's sole member with a "100% membership interest." (R.1625,¶11). It listed F. Henry and Lecat as Lemano's "initial managers." (R.1625,¶14.1). This "operating agreement" further provided that:

> The day to day functions of the Company may be performed by a person or persons, appointed by the Manager as an officer of the Company. The name and titles of the officers of the company are as follows:
>
> | Name | Title |
> | --- | --- |
> | Fredric Henry | Manager |
>
> The Managers may remove any officer at any time with or without cause and may fill any vacancy upon the removal or resignation of an officer. (R.1626,¶15).

This operating agreement bore the same date that Lemano filed its articles of incorporation.

On July 19, 2016, Lemano notified Florida's secretary of state that Fredric Henry was its new registered agent. It changed its business office/registered office to 3678 William Ave., Miami, Florida,

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and a post office box for mailing. These documents were docketed with Florida's secretary of state on July 25, 2016. (R.1651-55).

During the pertinent time period in 2016, when F. Henry was **one** of the initial managers of RGF, expressly **prohibited** from taking specific management action without Pauliflo's prior approval, or binding RGF without Pauliflo's express written consent, F. Henry was also listed as Lemano's **sole** manager in articles of incorporation filed with Florida's secretary of state. (R.1646-47,1651-55). F. Henry was **also** listed as Lemano's 100% owner (sole member) in the 2013 "joint venture agreement." (R.1624-25).

C. The Fraudulent Transfers at Issue

On July 26, 2016, Fredric Henry created two quit-claim deeds purporting to transfer the 1842 and 1st Court properties to Lemano. (R.1692-93,1694-95). Both quit-claim deeds bore the following legend in the top left hand corner:

> Prepared by and return to:
> Attn: Mr. Fredric Henry
> **Lemano Investments LLC**
> 3678 Williams Avenue
> Miami, Florida 33133
> (R.1662;1664).

Both quit-claim deeds listed RGF as the putative Grantor, and Lemano, at the Williams Avenue address, as the putative Grantee.

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Both deeds were executed by F. Henry, as "Manager" of RGF. (R.1144,49).

Both quit-claim deeds bore the following language in bold, capitalized print:

> **NOTICE TO RECORDER: MINIMAL DOCUMENTARY STAMPS ARE BEING PAID UNDER THIS QUITCLAIM DEED BECAUSE MINIMAL CONSIDERATION IS BEING PAID BETWEEN GRANTEE AND GRANTOR FOR THE TRANSFER OF THE PROPERTY. DOCUMENTARY STAMPS WAS PAID UNDER THE WARRANTY DEED RECORDED IN OFFICIAL RECORDS BOOK 30028, AT PAGE 1426, IN THE PUBLIC RECORDS OF MIAMI DADE COUNTY, FLORIDA. THIS QUIT CLAIM DEED IS TRANFERRING SUBSTANTIALLY ALL OF THE GRANTORS ASSETS**. (R.1692,1694).

These transfers by quitclaim deed were unauthorized, and violated RGF's joint venture and operating agreements (which required Pauliflo's advance approval). They were also fraudulent.

Lemano had **no** dealings with RGF, and no proof it paid RGF anything for **either** property. (S.R.328,332-33,594-95). Payment appears nowhere on Lemano's books and records. (S.R.332). Thus, as between these parties, the fraudulent conduct of F. Henry in transferring these properties **solely** benefitted the purported "grantee," Lemano.

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On September 25, 2016, RGF's legal counsel advised F. Henry that the company's other members had removed him as manager, in light of actions that had adversely, and severely affected the company. He cited "the fraudulent and unauthorized transfer by you of two properties belonging to the Company without consideration" to Lemano "an entity wholly owned and controlled by yourself in which neither the Company nor its members have any interest" and "what appears to be theft or misappropriation by you of more than $700,000 of company funds." (R.1151-52).

Counsel also placed F. Henry on notice (at three addresses) of RGF's intent to take legal action based on his unauthorized conduct. He warned that "any attempt by you, directly **or through Lemano Investments LLC** to sell, transfer, divest, hypothecate, or otherwise encumber the real property you caused the Company surreptitiously and without authorization**...** to deed to Lemano**...** without the knowledge or consent of the other Members of the company, will be deemed a fraudulent conveyance" subject to being set aside as null and void. (R.1151-52).

Notwithstanding this notice, on October 27, 2016, Lemano notified tenants of the 1842 property that the property had been

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transferred to a new owner, attaching copies of the fraudulent deed. "Effective immediately," tenants were directed to make future rent payments to a different company (Henlet, LLC), at a P.O. Box. (R.1158).

D. Lemano Changes Its Membership and Management Post-Transfer, but Tries to Profit From the Fraudulent Transfers

On November 17, 2016, Lemano dismissed F. Henry. (S.R.202-03).

Lemano produced **no** operating agreement in effect from 2013 through November 30, 2016, which includes the time during which F. Henry fraudulently transferred the properties from RGF to Lemano. The only document that **either** side could point to during the pertinent period is dated April 5, 2013 and lists F. Henry as its sole member. (R.1624-25). RGF **agrees** this "operating agreement" was not authenticated below. This is of no moment since Lemano raises no point on appeal with respect to admission of this evidence. See City of Miami v. Steckloff, 111 So.2d 446, 447 (Fla.1959) (points not raised as error in initial brief are deemed abandoned); Cadillac Fairview of Fla., of Inc. v. Cespedes, 468 So.2d 417, 421-22 (Fla. 3d DCA 1985) (propriety of jury instruction would not be addressed

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where appellant failed to challenge this issue on appeal). We have further assumed, for purposes of this argument, that the document is fake, that F. Henry was Lemano's sole manager (as stated in its articles of incorporation) but had no ownership interest in the company.

Lemano **subsequently** executed an "Operating Agreement" with Sunny Stone, SCA, a Luxembourg Company ("Member"), effective December 1, 2016. (R.1639-45;S.R.39-44) (the "interim agreement"). Lemano also amended its articles of incorporation by removing F. Henry as manager, and replacing him with Patrick Chollet and **Richard** Henry (F. Henry's brother). (S.R.37). This document was docketed with Florida's secretary of state on December 5, 2016. (R.1658-60).

The "interim agreement" named the company's "Initial member" as Sunny Stone, at an address in Luxembourg, and permitted the admission of additional members with Sunny Stone's consent. It now vested "exclusive management" of Lemano's business affairs in Patrick Chollet and **Richard** Henry, named initial managers. (R.1639-49).

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The "interim" agreement was replaced by an "Amended & Restated Operating Agreement" between the same parties, effective February 2, 2017. (R.1632-38;S.R.47-50).

Both agreements recited that "the Company was formed as a limited liability company on April 5, 2013, when the company's Articles of Incorporation became effective upon filing with Florida's secretary of state**...** (R.1631,1639).

Lemano's "Amended and Restated Operating Agreement," added a "new management entity Ultio Management, Llc." formed by Sunny Stone to replace the "interim managers." However, Patrick Chollet and Richard Henry continued to operate Lemano, through their positions with Sunny Stone and Ultio Management. (R.1638).

Lemano "defended" this quiet title action on the basis of a separate arrangement it had with Minvest, a **different** company. RGF deposed Richard Henry, who served as Lemano's designated representative (pursuant to Fla.R.Civ.P. 1.310(b)(6)). Richard Henry was deposed both in that capacity and individually over the course of five days. (S.R.59-614). Richard Henry, as Lemano's designee, testified regarding the nature of this arrangement. Lemano collected funds from foreign investors. (S.R.84,104). It sent these funds to

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Minvest for generalized real estate investment in Florida. Payment "was not tied to any specific property, but properties in general." (S.R.104-05). As Richard Henry confirmed:

> Q. So is it correct that Lemano would send money to Minvest, **and the money was not designated except as a fund or money for Minvest to go out and purchase properties**, to which you would then issue an invoice to Lemano? Is that correct?
> A. **Yes. It was an account, a kind of account that will be used to purchase properties**?
> Q. Okay. So when Lemano sent money to Minvest, how did it determine whether it should send $100,000 or $1 million dollars or any other amount?
> A. Because we will receive also like some forms, some advices from Minvest, with some house addresses, **and the approximate Average amount necessary to purchase this property**.
> Q. So how was it determined how much money Lemano would send before getting an invoice? **Would Lemano just simply send a lump sum of money and say: Go find properties**?
> A. Minvest will say there is several properties available for purchase, and they needed to have the cash money to purchase the property. **And based on that**, **Lemano would send the money to Minvest**. (S.R.117-18).

Richard Henry was requested, in deposition, to "Identify the specific transfers of funds used for each of the acquisitions." (S.R.234). He responded that:

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> I would repeat, sir, I cannot – in the bank statements that I have, **I am not able to corollate the accuracy of the amounts, exact amount, the amounts corresponding to the invoice for each one of the houses. But I can identify general fund transfers made to Minvest...** (S.R.234).

Richard Henry **agreed** that his brother "was using Lemano for his own personal purposes, and had the ability to do so because he had full control over the bank accounts." (S.R.258). Richard didn't check Lemano's books and records because, in large part, he trusted his brother to act honestly. (S.R.259).

Lemano sent funds to Minvest, **without matching those funds to specific properties**. (S.R.104-05,117-18,223-24). Lemano paid Minvest's invoices, but received no "matching" documents in return. (S.R.226). F. Henry had sole authority to make these transfers and acted on behalf **of Lemano** in disbursing funds to Minvest. (S.R.102-03,107-08,124,233,243).

During the course of these proceedings, Minvest filed for bankruptcy under Chapter 11, subsequently converted to a Chapter 7 liquidation. (R.1383).

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E. Course of Proceedings Below

This case proceeded on RGF's multicount "Revised Amended Complaint" for quiet title, rescission, declaratory relief, an accounting, and (alternatively) for imposition of equitable liens or constructive trusts on the properties. (R.1076-81). RGF alleged that F. Henry fraudulently transferred the properties to Lemano, without authority or consideration, in violation of RGF's Operating and Joint Venture Agreements. (R.1079,¶15). F. Henry's knowledge of his fraud upon RGF was "imputed to Lemano, which knew and had notice that the Quit Claim conveyances were fraudulent, unauthorized**...** and for no consideration to Lemano." (Id at 108,¶16). Lemano was neither the properties' rightful owner, nor a bona fide purchaser. (R.1082,paras.31&32,R.1084,paras.44-45).

RGF also sought an accounting and disgorgement of rents and benefits Lemano received from these properties **after** they were fraudulently transferred. (R.1083,1085,1088,1089-90).

Lemano's answer generally denied the allegations, but admitted it "refus[ed] to return title of the Properties to RGF**...**" (R.1181-89,¶56,1190,¶67). Lemano claimed it "lawfully acquired and holds title" to the properties. (R.1189,¶56,1190,¶67).

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Lemano repeatedly claims it asserted "22 putative affirmative defenses" which "RGF never even mentioned**...**" much less addressed. (I.B.pp.17-18,22,30). Lemano ignores an order **striking** most of its affirmative defenses, as well as the pleadings it filed thereafter. (R.1297-1302,1310-11).

Lemano withdrew its first affirmative defense. (R.1314), its fourth was stricken with prejudice (R.1310), and its tenth was abandoned by failure to amend. (R.1310,1314-20). Lemano's 11th affirmative defense asserted that it was an "innocent purchaser" and RGF's recovery was barred by "unclean hands." (R.1315,¶101). Its 14th affirmative defense asserted that RGF's claims "were barred by the doctrine of unconscionability/equitable estoppel" citing Tollius v. Dutch Inns of Am., 244 So.2d 467 (Fla. 3d DCA 1970) for the proposition that "Where the purpose or the object of the suit is to accomplish something that will product an inequitable or unconscionable result, equity will not grant affirmative relief." (R.1316,¶104). Its 19th affirmative defense claimed that F. Henry was "acting adversely" to Lemano's interests when he transferred the properties. (R.1319-20,¶109). RGF replied to Lemano's amended affirmative defenses. (R.1347-48). Those that remained constituted

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some variation on the affirmative defenses just described, attempted to blame Minvest (a separate company) for Lemano's actions, or did **not** constitute affirmative defenses. (R.1347-50).

Lemano's "Amended Counterclaim" asserted a single count of tortious interference with a contract against RGF. It alleged that "Lemano and the tenants occupying the 1842 property had an agreement in the form of a month to month lease" (R.1212,¶72), that "RGF intentionally and unjustifiably interfered with Lemano Investments' rights under the leases by improperly informing the tenants that Lemano**...** was not the owner" and they should not be paying rent to Lemano. (R.1212,¶75). Lemano sought to recoup these allegedly "diverted" rents. (Id. at ¶76).

RGF's claims and Lemano's counterclaim thus turned on which entity was the rightful owner of the 1842 and 1st Court properties. Rent and other benefits followed ownership.

In a "joint case management report" and scheduling order, the parties agreed that Lemano's third party claims were severed from the main claim and counterclaim (R.1383,¶2) and that **no** additional discovery was anticipated. (R.1384,¶5).

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On August 4, 2022, RGF filed a partial summary judgment motion seeking a determination that it owned the properties at issue. (R.1715-23). Contrary to suggestion, it **expressly** cited Lemano's 11th, 14th and 19th affirmative defenses. (R.1716,1721-22). RGF asserted the following facts were **all** undisputed:

- F. Henry transferred title of the two properties owned by RGF to Lemano without RGF's knowledge and consent;
- RGF – and only RGF - paid money to acquire **these** specific properties;
- Lemano paid nothing to RGF for these properties "and is unable to demonstrate otherwise;"
- No consideration was paid to RGF by Lemano for the fraudulent quitclaim transfer;
- F. Henry's transfer of the properties to Lemano violated documents restricting his authority, and was adverse to RGF's interest;
- Lemano was not a bona fide purchaser of these properties; and
- F. Henry was left alone and in charge of Lemano and "was allowed to operate as its sole actor with no oversight, "the

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essence of the exception to the adverse interest [rule]." (R.1718,1722).

RGF's motion was filed 84 days before the summary judgment hearing (scheduled to take place on October 27, 2022), supported by an appendix which included Richard Henry's multi-volume deposition. (S.R.59-614).

Lemano relied on a new "Declaration of Richard Henry," in which Richard Henry disputed F. Henry's ownership interest in Lemano. It also asserted that Minvest promised to sell two **different** properties to Lemano, as follows:

On April 6, 2015, Minvest charged and Lemano paid Minvest $170,310 for a property located at 2539 N.W. 103 Street. (R.1748-1754, at 1751,¶11).

On April 6, 2015, Minvest charged and Lemano paid Minvest $343,000 for a property located at 1920 N.W. 151st Street (R.1753,¶19).

When Lemano became suspicious, and started questioning F. Henry about those properties, F. Henry asked Lemano to accept the 1842 and 1st Court properties as "replacements." (R.1752,¶15,1753,¶22). As previously attested to by Richard Henry in deposition, payments made by Lemano to Minvest "was not tied to

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any specific property, but to properties in general." (S.R.104-05,¶¶17-18). Richard Henry did not remember if Lemano and Minvest had a written contract, but believed that "the invoice [submitted by Minvest to Lemano] would be used as a sales contract." (S.R.231-32,240). However, Lemano paid Minvest **without** invoices. (R.1753, ¶19; S.R.116-17,121,124,127,267). Lemano **agreed** it appointed F. Henry as "its [only] Manager, giving him control over its funds and activities." (R.1730). Lemano had "no staff." (S.R.218). Richard Henry's new declaration referred **only** to Operating agreements executed on December 1, 2016, and amended (**after** F. Henry's fraud was committed). (R.1639-49,1729-49;S.R.47-50).

Lemano responded to RGF's summary judgment **conclusorily**, claiming it had "22 affirmative defenses" which RGF had ignored, but neither listed, nor explained how these precluded summary judgment. (R.1743-44).

Two days prior to the summary judgment hearing, Lemano submitted a "Supplement to notice of filing" (R.1915-50), which drew **immediate** objection. (R.1951-52). Such supplements are untimely and **cannot** be considered. Fla.R.Civ.P. 1.510(c)(5); State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc., 368 So.3d 1049 (Fla.

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3d DCA 2023). All of the testimony of Lecat cited in Lemano's "Statement of the Case and Facts" is located in this **untimely** supplement. (R.1917-50)(I.B.pp.4-7,9-11).[3]

The trial court heard argument, and peppered attorneys for both sides with questions. (S.R.632-50). Lemano's counsel **agreed** there was **no** evidence it paid RGF anything for the two transferred properties. (S.R.642). As the trial court further noted at the hearing, Lemano's ostensible affirmative defenses involved its dealings **with Minvest**, a separate company. (S.R.641-43).

The trial court also posed the following question to Lemano's counsel: "In this case is there any record evidence that**...** on the purchase of real estate, that RGF's money went to Minvest first?" Lemano's counsel answered "**No... that part is not disputed**. **We don't dispute that RGF paid for the properties**." (S.R.641).

Lemano's counsel further urged that:

> The evidence we've submitted in the record, it does clearly state that Lemano paid the money to Minvest **for these properties, as Your Honor acknowledges**. (S.R.642).

[3] RGF relied on a different excerpt of Lecat's deposition, which was timely filed. (S.R.619-31).

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The trial court **rejected** this argument outright, correcting Lemano's counsel on the facts, which the latter then conceded:

> The Court: **No, no, no. I don't think so. I think the evidence is that Lemano paid Minvest for other properties. And that after RGF acquired title with its own money, Minvest, through Fredric Henry, said to Lemano, no problem, we'll give you these properties – we'll transfer the deal to these properties**, or words to that effect.
> [Lemano's counsel]: **Yes, that's correct. Your Honor...** (S.R.643).

The trial court also **rejected** Lemano's argument that F. Henry had "full authority" to transfer the properties on behalf of RGF (S.R.643). This argument, reiterated in Lemano's "Statement of the Case and Facts" cites only the quitclaim deeds. (I.B.pp.14-16; citing R.1816-27,1846-47). These were proven to be fraudulent.

The trial court found (and the record reflects) there was no evidence that F. Henry "at any time intended to benefit RGF on this sale," and that he conveyed both properties to Lemano "for no consideration." (S.R.649). It also found that F. Henry acted **adversely** to RGF's interest (S.R. 651), and that the "sole actor" exception to the adverse interest rule (which applied **to Lemano**) was inapplicable to RGF. (S.R.651-52). It reasoned that RGF placed restrictions on F. Henry's authority and **other** control personnel and was unaware of

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the quitclaim deeds transferring the properties to Lemano without consideration. (S.R.647). In contrast, Lemano placed F. Henry in a position where he had sole authority to act with impunity. (S.R.647).

The trial court specifically questioned RGF about Lemano's affirmative defenses. (S.R.647). RGF's counsel responded that "not one of them stands. It is essentially their argument that whatever bad conduct is attributable to Minvest should be forced on RGF." RGF "stood alone" – and no money for these properties flowed to RGF. (S.R.648).

After extensive questioning, the trial court made oral pronouncements, and granted RGF's motion for partial summary judgment (S.R.641-51). It directed RGF's counsel to prepare "a detailed order with the record citations," with the "whole thing laid out, including the evidence with regard to the Minvest and Lemano transaction." (S.R.652). This ruling mooted remaining motions (and cancelled the trial). (S.R.652).

On February 14, 2023, the trial court entered a **detailed** "Order granting Plaintiff's motion for summary judgment declaring rescission of quitclaim deeds and quieting title and Final Summary Judgment upon recission, declaratory relief and quiet title claims,

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granting petition for accounting, reserving jurisdiction to determine accounting and costs." (R.2056-2071).

Lemano sought "reconsideration" of the trial court's order and – for the first time – listed specific affirmative defenses that the trial court ostensibly "overlooked." (R.1955-2019, at 1956-57). By this time, Judge Fine had retired from the bench, and was succeeded by the Hon. Lisa Walsh. Judge Walsh requested briefs on her authority, as a successor judge, to entertain the motion. (R.2020-21).

Lemano responded that reconsideration "was based on the existence of fraud or mistake," invoking Fla.R.Civ.P. 1.540(b). (R.2022-25). RGF disagreed procedurally and substantively. (R.2026-33). On April 06, 2023, Judge Walsh denied the motion. (R.2072-73).

Lemano appealed the partial summary judgment order, and order denying reconsideration on April 13, 2023. (R.2034-53). That appeal was assigned case number 3D23-695.

Lemano also appealed an agreed order taxing costs which appeal was assigned case number 3D23-824. (R.2292-95,2297). The appeals were consolidated under 3D23-695.

JURISDICTION

Lemano has not addressed jurisdiction, because it describes this appeal as one taken from a "final summary judgment." (I.B.p.1).

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The order appealed enters a **partial** summary final judgment on all issues, except the amount due and owing from Lemano to RGF after an accounting.

This Court has jurisdiction to review partial final judgments. A partial final judgment is defined as "one that disposes of a separate and distinct cause of action that is not interdependent with other pleaded claims." Fla.R.App.P. 9.110(k).

It is unclear whether the present order falls into this category. This Court has applied a tripartite test, which questions whether (1) the partial summary judgment can be maintained independently of the remaining causes of action; (2) one or more parties were removed from the action when the partial summary judgment was entered; and (3) the counts separately disposed of were based on the same or different facts as those that remain. Here, no parties were removed by the partial summary judgment, and the counts disposed of by partial summary judgment can be maintained independently of the remaining accounting claim. However, all counts are based on at least **some** of the same underlying facts. (R.1081,¶¶21-22;1082-83,¶36,1085,¶49,1088,1089-90). See e.g. Homeowners Choice Prop. & Cas. Ins. Co. v. Patrick Fraser, 346 So.2d 228, 229 (Fla. 3d DCA

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2022); Northcutt v. Pathway Financial Hemlock Federal Savings, 555 So.2d 368 (Fla. 3d DCA 1989); Young v. New Residential Inv. Corp., 2023 WL 3749371 (Fla. 4th DCA 2023). We have nevertheless assumed that this order is final and appealable by analogy to Westgate Miami Beach, Ltd. v. Newport Operating Corp., 55 So.3d 567, 577 (Fla.2010) (reserving jurisdiction to award prejudgment interest). The trial court reserved jurisdiction to determine the **amount** due RGF after an accounting.

STANDARD OF REVIEW

A partial summary judgment is reviewed *de novo*. Volusia County v. Aberdeen, 760 So.2d 126, 130 (Fla.2000).

Orders denying motions for rehearing, reconsideration or to vacate are all reviewed for abuse of discretion. See Beacon Hill Homeowners Ass'n, Inc. v. Colfin Ah-Florida 7, LLC, 221 So.3d 710, 712 (Fla. 3d DCA 2017) (denying motion for rehearing and reconsideration in a quiet title action decided on summary judgment); Tikhomirov v. Bank of N.Y Mellon, 223 So.3d 1112, 1116 (Fla. 3d DCA 2017) (denying motion for relief from judgment under Fla.R.Civ.P. 1.540(b)).

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Lemano's premise that summary judgment is precluded "if the slightest doubt exists," is erroneous, based on **old** case law. (I.B.pp.21-22). That law was abrogated when Rule 1.510, Fla.R.Civ.P. was amended to adopt the federal standard governing summary judgment (eff. May 1, 2021). In re Amendments to Fla.R.Civ.Proc. 1.510, 309 So.3d 192, 194 (Fla.2020); See In re Amendments to Fla.R.Civ.Proc. 1.510, 317 So.3d 72, 76 (Fla.2021); Rich v. Narog, 366 So.3d 1111, 1117-18 (Fla. 3d DCA 2022).

The amended rule applies to the present partial summary judgment entered February 14, 2023. Further changes wrought by amendment will be addressed in the argument section of this brief.

SUMMARY OF THE ARGUMENT

RGF paid for and acquired two properties by special warranty deed. It is undisputed that those properties were fraudulently transferred to Lemano by a faithless agent who (1) had no authority to bind RGF without the express written consent and signature of Pauliflo (which was not given); and (2) who unbeknownst to RGF, simultaneously and solely, managed Lemano (without restriction). Lemano paid RGF nothing for the properties. RGF received no benefit, and fraud was committed on, not by RGF.

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The third party action was severed, and the parties stipulated that no further discovery was anticipated.

RGF's motion for summary judgment was submitted 84 days prior to the hearing. Lemano's response was based, in substantial part, on a "supplement" submitted just two days before the hearing. Its "Statement of the Case and Facts" quotes extensively from this untimely supplement, which prompted immediate objection and cannot be considered. State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc., 368 So.3d 1039 (Fla. 3d DCA 2023).

Contrary to suggestion, (I.B.pp.21-22) summary judgment is no longer precluded "if the slightest doubt exists." Nor did RGF bear the "initial burden" of negating Lemano's affirmative defenses. Florida's summary judgment rule was amended to adopt the federal standard to cure these among other deficiencies.

The amended rule mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish **essential to that party's case on which that party will bear the burden of proof at trial**." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23; In re Amendments to Fla.R.Civ.Proc. 1.510., 317 So.3d 72, 75 (Fla.2021). The burden was on the plaintiff to support its claims;

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the burden of proof is on the defendant to establish its affirmative defenses, including that a particular affirmative defense is **applicable**.

Lemano did **not** have "22 affirmative defenses," as claimed. (I.B.pp.17-18,22,30). Some were stricken by court order, others withdrawn, and some did not legal constitute affirmative defenses. Nor did RGF's summary judgment ignore them. It cited and addressed Lemano's 11th, 14th and 19th affirmative defenses (which included adverse interest, sole actor and innocent purchaser rules).

These are exceptions to the "defenses of in pari delicto" and "unclean hands." When these defenses are asserted against a corporation based on the misconduct of an agent, they work in the following way. Generally, a principal is liable for the acts of an agent taken in the course and scope of his employment. However, where a corporate agent acts adversely to the corporation's interest, the agent's knowledge and misconduct are **not** imputed to the corporation. The agent is deemed to have forsaken the corporation's interests, and acted as an agent for himself.

The "adverse interest exception" is itself subject to the "sole actor exception" and precludes its application where transactions on

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behalf of a principal are entrusted to a single agent, without restrictions or supervision. A corporation bears the risk that such an unaccountable agent will act adversely to its interests.

The original trial judge was well acquainted with the facts, having handled this case (and related cases) for years. He recited undisputed facts with which Lemano's counsel **agreed**. The trial court applied these doctrines correctly based on the parties' disparate positions. F. Henry's misconduct and knowledge of his own acts could not be imputed to RGF because they were adverse to RGF and Pauliflo (a 50% member of RGF) was an innocent decisionmaker.

The "adverse interest exception" was inapplicable to Lemano because Lemano had **no** innocent decisionmakers. F. Henry was its **sole** manager, permitted to act by Lemano without restriction, or supervision.

Lemano fails to disclose that its "motion for reconsideration" was addressed to a successor judge, after the original judge retired. It only invoked "fraud" after the successor judge observed no "extraordinary circumstances or grounds" in the motion and questioned her authority to act. (R.2020-21). The successor judge did not abuse her discretion in denying the motion after receiving

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Lemano's response. Moreover, treating Lemano's "motion for reconsideration" as a Rule 1.540 motion to vacate, in this instance, would require the dismissal of Lemano's appeal as untimely. A motion for reconsideration (*i.e.* rehearing) is an "authorized" motion which tolls rendition of a final order, while a Rule 1.540 motion to vacate does not. Fla.R.App.P. 9.020(h)(1)(B).

For all of these reasons the summary judgment order and ensuing cost judgment should both be affirmed.

ARGUMENT

I. PARTIAL SUMMARY JUDGMENT WAS APPROPRIATE WHERE THE QUITCLAIM DEEDS WERE FALSE AND FRAUDULENT, AND MADE WITHOUT CONSIDERATION (Lemano points I-III, rephrased)

Florida's rules of civil procedure are meant "to serve the just, speedy and inexpensive determination of every action." Fla.R.Civ.P. 1.010. Rule 1.510, Fla.R.Civ.P. governing summary judgment, was amended to adopt the Federal standard **precisely** because its predecessor "unnecessarily failed to contribute to that objective." In re Amendments to Fla.R.Civ.Proc. 1.510, 309 So.3d at 194; In re Amendments to Fla.R.Civ. Proc. 1.510, 317 So.3d 72, 75 (Fla.2021) ("embracing the Celotex trilogy means abandoning certain factors of

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Florida jurisprudence that have unduly hindered the use of summary judgment in our state.").

The plain language of the rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); In re Amendments, 317 So.3d at 72 (adopting the text of the federal rule almost verbatim, to be guided "by the overall body of case law" interpreting it).

The burden of proving the essential elements of its claims lies with the plaintiff. Conversely, the burden of proving each and every element of an affirmative defense rests with the defendant. See Custer Med. Center v. United Auto. Ins. Co., 62 So.3d 1086, 1097 (Fla.2010); Rauch v. AJP Pine Island Warehouses, Inc., 313 So.3d 625, 629 (Fla. 4th DCA 2021).

The amended rule "mirrors" the standard for directed verdict. It focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or**... is so one-sided** that one party must prevail as a matter of law. In re Amendments, 309 So.3d at 192.

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A. Lemano Misconceived the Burden of Proof

Lemano first faults RGF's failure "to meet its burden to demonstrate the absence of record evidence supporting [its] twenty-two affirmative defenses," (I.B.p.22). RGF had no such burden under the amended rule.

As the Eleventh Circuit Court of Appeals recently noted, in response to a motion for summary judgment, the opposing party generally "cannot rest on its pleadings" and must present evidence and formulate arguments demonstrating material facts which must be presented to a jury for resolution. When a defendant raises an affirmative defense in opposition to summary judgment, the defendant has the initial burden of showing that the affirmative defense **is applicable**. Great Am. Ins. Co. v. Mueller, 2022 U.S.App. Lexis 18154 *11-12 (11th Cir. 2022).

The burden is on the defendant to adduce evidence supporting an affirmative defense, **not upon the movant to negate its existence**. Id; see also Blue Cross & Blue Shield v. Weitz, 913 F.2d 1544, 1552 (11th Cir. 1990) (rejecting defendant's claim that summary judgment was barred by statute of limitations defense, where he bore "the initial burden of making a showing that the

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statute of limitations defense was applicable"); United States v. Tubbs, 2019 U.S.Dist. Lexis 204494 *4 (S.D. Fla.2019) ("Because a defendant bears the burden of proof of any affirmative defenses at trial**...** on a plaintiff's motion for summary judgment, the defendant bears the initial burden of showing that the affirmative defense is applicable**... Upon such showing**, the burden shifts to the plaintiff regarding that affirmative defense.") (internal citations omitted).[4]

It is "no longer**...** plausible 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." In re Amendments, 317 So.3d at 76. Those applying the new rule "must recognize that a moving party that does **not** bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case." In re Amendments, 317 So.3d at 75.

[4] Lemano cites Bartlett v. State Farm Fire & Casualty Co., 676 F.Supp. 242 (S.D. Fla.1987), as its sole authority on the application of Celotex to affirmative defenses. Bartlett is merely a court order in which a district court chose to reconsider an earlier ruling on **one** of two affirmative defenses. It is a 36 year old case, which has never been cited since.

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Here, RGF established all of the elements of its claims for quiet title and rescission. A fraudulent deed is voidable in equity. McCoy v. Love, 382 So.2d 647 (Fla.1979); Barberio v. Smith, 641 So.2d 965 (Fla. 3d DCA 1994); Harrell v. Branson, 344 So.2d 604 (Fla. 1st DCA 1977). The evidence supporting RGF's claims was undisputed. RGF established that it paid the purchase price for both properties directly to closing agents in return for warranty deeds. No part of these funds went through Minvest. Transfer of the two properties to Lemano by quitclaim deeds was made by a faithless agent, in violation of restrictions on his management, without consideration, or RGF's knowledge and consent.

Lemano's response that "RGF wholly neglected to address or refute [its] affirmative defenses" consisted of two cursory paragraphs, citing old case law preceding the Rule's amendment. (R.1743-44). This misallocated Lemano's [unmet] burden of proof to RGF, and did not preclude summary judgment. See Perez Pellerano v. Alvarez Renta, 2023 Fla.App. Lexis 7698 (Fla. 3d DCA 2023) (affirming summary judgment quieting title based on analysis of the amended rule).

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B. Lemano's Affirmative Defenses Did Not Preclude Summary Judgment

Contrary to suggestion, RGF did not ignore Lemano's affirmative defenses. It cited and addressed Lemano's 11th, 14th, and 19th affirmative defenses (which included "adverse interest," "sole actor" and "innocent purchaser" rules). (R.1716,1721).

"In pari delicto" means "equal fault" and refers to a plaintiff's participation in the same wrongdoing as the defendant. This defense generally "prohibits plaintiffs from recovering damages from their own wrongdoing." It is a corollary of the doctrine of "unclean hands." O'Halloran v. PricewaterhouseCoopers LLP., 969 So.2d 1039, 1044 *n.3 (Fla. 2d DCA 2007). "Where the defense is asserted against a corporate entity based on the misconduct of the corporation's agent, it must be determined whether the misconduct of the agent is properly imputed to the corporation." Id. at 1045.

Generally, a principal is liable for the acts of an agent taken in the course and scope of his employment. However, where a corporate agent acts adversely to the corporation's interest, the agent's knowledge and misconduct are **not** imputed to the corporation. Id. at 1045; see also Dept. of Ins. v. Blackburn, 633 So.2d 521, 524 (Fla. 2d DCA 1994) (where agents were acting adversely to the

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corporation's interests, "the knowledge and misconduct of the agents are **not** imputed to the corporation"); Seidman & Seidman v. Gee, 625 So.2d 1, 2-3 (Fla. 3d DCA 1992) (noting exception that applies "where an individual is acting adversely to the corporation. In that situation, the officer's knowledge and conduct are not imputed to the corporation."); Strickland Enters., Inc. v. Atlantic Discount Co., 137 So.2d 627, 629 (Fla 1st DCA 1962) (noting the "well established exception" to the general rule "where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, as where an agent is acting for his own interest and adversely to the principal.")

Under the "adverse interest exception" the agent may formally act as the corporation's agent, but "in reality has forsaken the corporation and acts as an agent for himself." O'Halloran, 969 So.2d at 1045.

The "adverse interest exception" is itself subject to "the sole actor exception," which precludes its application "where the transaction on behalf of the principal is entrusted solely to the officer or agent having the knowledge." Nerbonne, N.V. v. Lake Bryan Int'l Props., 685 So.2d 1029, 1031 (Fla. 5th DCA 1997). A corporation

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bears the risk that such an unaccountable agent will act adversely to its interests. O'Halloran, 969 So.2d at 1044-45 *n.5.

Here, the trial court applied these doctrines correctly based on parties' disparate positions. First, F. Henry transferred the 1842 and 1st Court properties to Lemano by false and fraudulent quitclaim deeds, in violation of RGF's joint venture and operating agreements, which **restricted** his authority to act without prior approval by Pauliflo. Under the "adverse interest doctrine," F. Henry's misconduct and knowledge of his own fraudulent acts could not be imputed to RGF because his actions were adverse to RGF's interests, and Pauliflo (a 50% member of RFG) was an **innocent decisionmaker**. O'Halloran, 969 So.2d 1045 ("the presence of any innocent decision-maker in the management of the corporation can provide the basis for invoking the adverse interest exception, preventing the imputation of wrongdoing and **defeating** use of the **in pari delicto** defense.") F. Henry's knowledge of his own fraudulent acts therefore could **not** be imputed to RGF.

The converse is true with respect to Lemano. The adverse interest exception was inapplicable to Lemano because of the "sole actor exception" to this exception. Lemano had **no** "innocent

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decisionmakers." Its articles of incorporation (filed with Florida's secretary of state) confirmed that F. Henry was its sole manager, permitted to act by Lemano **without restriction**. Lemano's corporate designee, F. Henry's brother Richard, confirmed this was the case.

In addition, "[f]raud on behalf of the corporation is not the same thing as fraud against it." Seidman & Seidman v. Gee, 625 So.2d at 2. Here, the fraudulent deeds **benefitted Lemano**. F. Henry's knowledge (that the quitclaim deeds were false and fraudulent), **was imputed** to Lemano, and precluded its "adverse interest" defense, based on the "sole actor" exception. The same imputation principals precluded the defense of "unclean hands" (11th affirmative defense) because Lemano was **not** an "innocent purchaser." O'Halloran, 969 So.2d at 1044 n.3. Lemano's remaining "affirmative defenses" were duplicative of those already addressed, or as, in the case of "proximate cause" (affirmative Defense 15) was not a true affirmative defense. See Vila v. Philip Morris USA, Inc., 215 So.3d 82, 86 (Fla. 3d DCA 2016) (and cases collected).

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II. THE SUCCESSOR JUDGE DID NOT ABUSE HER DISCRETION IN DENYING REHEARING/ RECONSIDERATION (Lemano points IV & V, rephrased)

"A successor judge cannot review, modify or reverse, upon the merits on the same acts, the final orders of his [or her] predecessor in the absence of fraud or mistake." O'Neal v. Darling, 321 So.3d 309, 312 (Fla. 3d DCA 2021) (and cases collected); Balfe v. Gulf Oil Co. – Latin Am., 279 So.2d 94, 95 (Fla. 3d DCA 1973). The only cognizable exception is "where there is **a showing** of fraud, mistake or exceptional changed circumstances." O'Neal, 321 So.3d at 312, n.6.

Here, Lemano's motion for reconsideration simply regurgitated prior arguments. (R.1955-2019). Lemano added the accusation that RGF's counsel misrepresented Minvest's involvement at the summary judgment hearing. (R.1961). Lemano mischaracterizes the offending argument, which appears here, **in context**:

> Plaintiff moved for summary judgment in a rather succinct motion. Notes that the two properties at issue, the 5600 Northeast 1st Court property and the 1842 Northeast 74th Street property, **were purchased by RGF with funds exclusively provided by Roland Germain and his wife. That's undisputed**.
>
> **Those funds from RGF went to an independent closing agent, and it was funded, closed, and title was taken in the**

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> **name of RGF**. That occurred March 29th and March 30th of 2016. It had nothing at all to do with Minvest, no matter how much Lemano would like to conflate the two.
>
> No Minvest money is in RGF. No financial transfer from Minvest to Minvest regarding these properties occurred. **This is solely RGF purchasing two pieces of property with moneys provided solely by Mr. Germain and his wife. And the moneys flow directly to the closing agent**. (S.R.634-35).

Lemano was requested by Judge Fine to red-line its proposed changes to the final judgment. Its counsel deleted the arguments that RGF's funds were paid directly to the closing agents, and the properties were paid for by Roland Germain and his wife. (R.2032).

RGF responded to Lemano's motion for reconsideration that there was "neither fraud nor misrepresentation made by it or its counsel," highlighting this tactical maneuver, in which Lemano sought to capitalize on its selective editing of the proposed judgment. (R.2026-33,at 2027,2031-32).

Lemano's counsel **admitted** there was no evidence that Lemano paid RGF for the two transferred properties (S.R.642) and that Lemano paid Minvest for **different** properties. (S.R.643). As Judge Fine correctly observed, all that Lemano had was "bare naked title" plus representations from F. Henry that money previously forwarded

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from Lemano to Minvest would be used for this purpose. (S.R.649-50). There was simply no evidence that F Henry intended to benefit **RGF** – which received no consideration when its faithless agent transferred these properties by quitclaim deed to Lemano. (S.R.648).

Lemano filed a motion for reconsideration, not a Rule 1.540(b) motion to vacate. (R.1955-2019). See Balmoral Condo. Ass'n. v. Grimaldi, 107 So.3d 1149 (Fla. 3d DCA 2013) (distinguishing between these type of motions). It urged that (1) the final order ignored evidence of record; and (2) failed to dispose of some affirmative defenses. (R.2020).

Successor Judge Walsh did not "observe any extraordinary circumstances or grounds" stated in the motion and ordered Lemano "to respond" to whether she had authority to consider its motion. (R.2020-21). Lemano then attempted to recharacterize its motion as a 1.540 motion to vacate based on "fraud or mistake." (R.2022-25).

The nature of a motion is determined by **context**, not the label used by the moving party to describe it. See Fire & Casualty Ins. Co. v. Sealey, 810 So.2d 988, 992 (Fla. 1st DCA 2002); Magnum Towing, Inc. v. Sunbeam Television Corp., 781 So.2d 379 (Fla. 3d DCA 1998) (treating a motion styled as one for "reconsideration" as a motion for

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rehearing which tolled "rendition" for purposes of appealing a final order); Rossi v. Rossi, 169 So.3d 1233 (Fla. 5th DCA 2015) (appellate court considers substance over form).

Here, the argument made by RGF's counsel, considered in full and in context, belied Lemano's fraud claims. Moreover, the implication of treating Lemano's "motion for reconsideration" as a Rule 1.540 motion to vacate is to place Lemano's appeal entirely **beyond** the jurisdiction of this court.

A motion for reconsideration/rehearing is "authorized" and tolls the time of "rendition" to appeal a final order, while a Rule 1.540(b) motion to vacate does not. Fla.R.App.P. 9.020(h)(1)(B). If Lemano's "authorized" rehearing motion is treated as an **unauthorized** motion to vacate, Lemano's notice of appeal was due for filing no later than March 16, 2023. This would require the appeal's dismissal as untimely, since Lemano's notice of appeal wasn't filed until April 13, 2023. (R.2034).

Lemano's reliance on Hernandez v. Cacciamani Dev. Corp., 698 So.2d 927 (Fla. 3d DCA 1997) and National Enters. v. Martin, 679 So.2d 331 (Fla. 4th DCA 1996) is equally misplaced. Both cases involve the **re-opening** of evidence after a non-jury trial resulted in

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an involuntary dismissal because the plaintiff failed to introduce a document, and the defendant was not prejudiced by its admission. Fla.R.Civ.P. 1.530(a), which both cases cited, is discretionary in other contexts – **not** mandatory.[5]

In sum, no abuse of discretion has been or could be established by the motion's denial whether because the successor judge determined that she was bound by O'Neal v. Darling, supra, or because of the absence of demonstrable "fraud, mistake or exceptional circumstances."

III. THE COST JUDGMENT SHOULD FOLLOW THE MAIN JUDGMENT (Lemano point VI, rephrased)

Where, as here, Lemano raises no separate arguments with respect to the cost judgment, RGF agrees that the fate of the cost judgment should follow the partial summary judgment.

[5] This rule provides, in pertinent part, that "[O]n a motion for rehearing of matters heard without a jury, including summary judgment, the court **may** open the judgment if one has been entered, take additional testimony and enter a new judgment."

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CONCLUSION

For all of the foregoing reasons, the partial final summary judgment, and ensuing cost judgment, should respectfully be affirmed. Alternatively, Lemano's appeal of the partial final summary judgment should be dismissed as untimely, and the cost judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Court of the Court using the Florida Courts E-Filing Portal and served upon all interested parties via electronic service generated by the e-Portal system on this 13th day of November, 2023 to:

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I hereby certify that the Type Size and Font used in this brief is Bookman Old Style, 14 pt. and the word count is 8,123, in compliance with Fla.R.App.P.9.210(a)(2)(B).

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