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

CASE NO. 3D23-1945

LT Case No. 23-020584-CA-01

***transferred from* 23-048049-CA-05**

SUPERLIFE PARTNERS, LLC d/b/a NO LIMIT SUPER GYM

Appellant,

-vs-

TIXE DESIGNS, INC.

Appellee.

ON APPEAL FROM CIRCUIT COURT OF THE ELEVENTH CIRCUIT

MIAMI-DADE COUNTY, FLORIDA (Civil Division)

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Because No Limit Super Gym operates deeply in the red, Appellant's owner, Akop Torosian, seeks to prolong the inevitable eviction to recoup as much money as possible.[1] March 2023 was the last time Appellant paid the Appellee the full monthly rent. Throughout this eviction proceeding the gym, near Wynwood, has remained fully open for business without any areas off-limit; the membership fees paid monthly incentivizing the Appellant to maintain possession as long as possible through various legal stratagems.

Appellant's appeal of the trial court's October 10, 2023 Order on Plaintiff's Emergency Motion for Disbursement of Rent ("Order"), as amended on October 24, 2023 [App. 158-161], neglects to mention that the issue of disbursement is moot. The Clerk of the Court disbursed the $46,454.31 from the court registry to Appellee before Appellant filed its October 30, 2023 Notice of Appeal. The Appellee used those funds for the purpose for which it sought disbursement, to pay the 2023 property taxes.

On the other issue appealed, that of requiring Appellant to deposit the accrued rent owed ($91,454.31) into the court registry, the Order comports with the parameters set by Florida law. The trial court acted within its discretion, especially since Appellant did not contest — when the

[1] Owner Torosian filed for personal bankruptcy protection (Chapter 13) on October 25, 2023. *See In re Torosian*, Case No. 23-18753-RAM (Bankr. S.D. Fla. 2023).

$46,454.31 was ordered to be paid — that the amounts demanded as due for monthly rent, sales tax, late charge, and interest deviated from the payment terms found in the parties' Commercial Lease ("Lease") or that the Appellant was entitled to rent payment credits.

I. BACKGROUND AND CASE PROCEEDINGS

A. Factual Background

Rent Payment Terms. As Appellant correctly states in the Initial Brief's opening section, the parties agreed to an "AS IS," "WHERE IS," Lease on February 15, 2022 for the Premises. [App. 6-36.] The Lease's rent payment terms are clear. From Delivery Date (April 1, 2022) through March 31, 2023 the monthly Base Rent is $20,000. From April 1, 2023 through March 31, 2024, the monthly Base Rent increases to $20,600. [App. 9-10.]

In addition to the Base Rent, the Lease requires the Appellant to pay sales tax at the current rate (6.5%). If Appellant is more than four days overdue on the rental payment, the Lease provides for a $500 late charge to be assessed as of the fifth day, regardless of what day of the week that happens to be or whether it is a legal holiday. In addition, the Lease entitles the landlord to charge 18% per annum for the entire period that the rent

payment is overdue. Sales tax, late charges, and interest are clearly included in the Lease's definition of "Rent." [App. 9-10.]

Tenant Acceptance Letter. Contrary to Appellant's other contentions, however, the Appellant signed on April 7, 2022 the Tenant Acceptance Letter (Exhibit B to the Lease) which confirmed, in relevant part, that —

- The Delivery Date, as defined in the Lease, is April 1, 2022;
- The Commencement Date, as defined in the Lease, is April 1, 2022;
- The Rent Commencement Date, as defined in the Lease, is August 1, 2022;
- The Rent Concession Period, as defined in the Lease, ends on June 30, 2022;
- As of the date of signing the Tenant Acceptance Letter (April 7, 2022), the Landlord [Appellee] has fulfilled all of its obligations under the Lease required up to this date;
- There are no offsets or credits against Base Rent, nor has any Base Rent been prepaid except as provided pursuant to the Terms of the Lease; and,
- All alterations and improvements required to be performed by Landlord [Appellee] pursuant to the terms of the Lease to prepare the entire Premises for Tenant's initial occupancy have been satisfactorily completed, with the exception of Landlord's Work which is to be completed in accordance with Section 15 of the Lease. [Appellee's App. 49-50.]

As further clarified in the Lease, the first month's rent (paid in advance) would be applied to the first month after the termination of the Rent Concession Period. As the Rent Concession Period ended on June 30, 2022, the first month's rent (paid in advance) was applied to the July 2022 rent payment. [App. 9-10.]

Appellant Initially Paid Rent As Agreed Without Protest. The Appellant obtained the full benefit of the Rent Concession Period. The Premises are not, as alleged, "unfit" or "untenantable"; Appellant's owner's signature to the Tenant Acceptance Letter belies that argument, as does the fact that the previous tenant used the Premises as a full-service gym for 14 years. [Appellee's App. 49-50.] Nor has Appellant been constructively evicted as it alleges in its Counterclaim. [App. 112-114.] The gym remains fully operational. It is making some money. As noted above, Appellant has continuously, without any interruption or restriction, used the Premises for business purposes since Lease signing. [App. 58; 126-133.]

Per the Lease's terms, regular rental payments began on August 1, 2022. From that date through the end of March 2023, the Appellant paid as agreed, not once contesting the monthly rental charge owed or seeking to extend either the Rent Concession Period or the Rent Commencement Date as provided in Section 15 of the Lease. The Appellee performed <u>all</u>

the work which Section 15 ("Landlord's Work) required it to do — mainly, work listed in the pre-Lease Inspection Report and Roof Inspection Report — as Appellant well knows. [App. 17-19.]

Beyond that, Section 15 of the Lease specifically states:

> Any delay in performance of Landlord's Work shall serve [to] extend Tenant [Appellant's] Rent Concession Period on a day-for-day basis wherein Tenant's Rent obligation to pay Base Rent to Landlord shall commence following the end of Tenant's Rent Concession Period. [App. 19.]

By commencing regular rental payments on August 1, 2022 without alerting the Appellee of any supposedly unfinished work (brought up for the first time in Appellant's Answer and Counterclaim filed in response to the Appellee's Amended Complaint), Appellant essentially abandoned or waived any contractual right to extend the Rent Concession Period or to delay by an unspecified number of days the Rent Commencement Date. The Rent Commencement Date began on August 1, 2022. Appellant paid timely. It continued to pay on time and in full until April 1, 2023, the same date that the Base Rent increased as the Lease permits. [App. 9-10.]

B. Procedural Background

1. Hearing on Appellant's Motion to Determine Rent

Summary Proceeding for Possession. Appellant's April 2023 rent payment arrived short; it did not pay any rent in May or June. On June 6,

2023, Appellee filed its summary proceeding action under section 51.011, Florida Statues (2022), as authorized in section 83.21 for possession of the premises in county court. It did not include a demand for actual damages. [App. 1-4.]

The initial Complaint tracks the Lease's rent payment terms in its demands: (1) unpaid Base Rent at the rate of $20,600 per month; (2) 6.5% Florida Sales Tax on the monthly Base Rent; (3) a $500 late fee for each month the Base Rent is not paid on time; and (4) interest calculated at 18% per annum on all rental amounts in arrears. [App. 3.]

Total that Appellee demanded as of June 6, 2023: $46,454.31.

In a combined June 30th filing entitled, "Motion to Determine Rent and/or Motion To Dismiss/Answer and Affirmative Defenses," [App. 40-43] — noticeably not including a counterclaim or request for affirmative relief — Appellant included two very short paragraphs that cursorily addressed the issue of determining the amount of rent to be deposited into the court registry:

> Defendants [*sic*] intend to deposit all such undisputed monthly payments into the Court Registry as payment becomes due during the pendency of this action upon proper determination should the Court deem dismissal to be inappropriate. . . . But, the Defendants [*sic*] dispute the amount of the rent allegedly owed and are entitled to an evidentiary hearing on this issue.

> Pursuant to Florida Statute § 83.232(1), and the Summons attached to the Plaintiff's Complaint, the Defendants are entitled to an evidentiary hearing to determine the rent owed, if any, prior to the trial in this matter. [App. 41.]

The July 13, 2023 Hearing. By the time the parties appeared before county court Judge Miesha Darrough on July 13, 2023, the amount owed for past due rent and other charges had increased to $71,422.74. After first hearing and finding in Appellant's favor that the Clerk's default entered on June 26, 2023 should be set aside, the Court heard argument regarding the amount of rent to be paid into the registry:

> The Court: Okay. And then the other issue then that's come up is the amount of rent. Is that still in dispute between the parties as far as the amount of rent? [Appellee's App. 33-34.]

After some discussion regarding the amount of rent the Court could require to be deposited into the registry because of the $50,000 jurisdictional limitation, the Court noted that,

> The Court: Okay, so let me see here. So in here, I'm seeing numbers [*sic*] paragraph 17 of the complaint says "Total amount . . . Tenant owes the landlord is $46,454.31. Is that the amount you are talking about in the complaint?
>
> Mr. Lian: Yes, that's right. At the time we filed the complaint, that's what was due. Yes, Your Honor.

***

The Court: Okay, let me do another inquiry. The money that's here that's owed in rent, is there going to be at some point a fight over that money that's in there or is it the rent money that is due? Does that make sense?

Mr. Lian: Our position is the rent money that's due is due. There is no – they have no – no legal basis for contesting the amount of rent. In their answer, they have not asserted anything.

The Court: And the reason I say that too, is because if you all want to, because as I'm dealing with two lawyers, stipulate to the amount that's in the complaint and just say, okay, we will pay it directly to the plaintiff's attorney.

That may help to alleviate the concern that's going on with your client, Mr. Lian and maybe put you all in a better position to then try to work something out versus trying to put into the court registry paying all the fees, since you say that it's too expensive to do that for this amount of money.

Mr. Reiner: My only concern is that I think it's not a liquid sum. It's a sum that's challenged right now because my client has done a significant amount of work to try to remediate the property.

The Court: Okay, so then I'm going to have to order that the money go into the court registry then.

Mr. Reiner: Okay.

The Court: Yeah, so the $46,454.31 will need to go into the court registry. Today is Thursday. I'll give you to Monday at 12 p.m. [Appellee's App. 36-39.]

Later that day, Judge Darrough issued the Order on Defendant's Motion for Determination Rent. [App. 46.]

Appellant did not appeal the court's determination that rent in the amount of $46,454.31 had to be paid into the registry by July 17, 2023, nor did Appellant protest the issuance of the order because it was done without an evidentiary hearing; instead, Appellant complied and paid the $46,454.31 plus the clerk's fee. [App. 48-50.]

Even if Appellant had appealed the July 13, 2023 Order on the grounds that it was entitled to an evidentiary hearing, that argument would have been unsuccessful because a rent determination hearing under section 82.232(2) is limited to two issues: whether the landlord has properly credited the tenant for rental payments that have been made, or what properly constitutes "rent" under the Lease.

It is indisputable that the Appellant brought neither issue to the attention of Judge Darrough. It did not contend that the Appellee had failed to properly account for submitted rental payments; it did not address the issue of how the Lease defines rent. Appellant argued, instead, that it deserved an offset for monies supposedly spent on remediating the Premises. Offset for sums spent on remediation is not a recognized ground for a rent determination hearing under section 83.232(2). Furthermore, the Lease states in Paragraph 34 — as Appellee noted in its Response to Appellant's Motion To Set Aside Default — that the "[t]enant expressly waives the right to offset Rent." [App. 30-31 at ¶ 34; Appellee's App. at 3.]

2. Appellee Seeks Monthly Rent Payments In Circuit Court

After Appellant paid the $46,454.31 into the registry on July 17, it agreed to Appellee's motion to transfer; the case was sent to the circuit court. [App. 53.] Once notified of the August 1, 2023 transfer, the Appellee immediately filed its Motion for Leave to File an Amended Complaint to reflect the additional amounts sought in unpaid rent, and filed its Motion for Order to Tenant to Pay Rent. [App. 55-56.]

Appellee submitted the Motion for Order to Tenant to Pay Rent because Judge Darrough had indicated, rightly or wrongly, that she was precluded from requiring Appellant to pay succeeding monthly rental

payments into the court registry due to the county court's $50,000 jurisdictional limitation. July's rent went unpaid, as did August's and every succeeding month to this day.

In response to Appellee's motion the Appellant filed a countermotion (Motion to Determine Accruing Rent, dated August 10, 2023) that, for the first time, argued for an evidentiary hearing because the Appellee is "seeking the deposit of amounts which do not properly constitute "rent" such as late charges, sales tax, and interest." [App. 103-106.]

Beyond the fact that the Lease clearly defines "Rent" to include both Base Rent and "all other sums, charges or amounts of whatever nature to be paid by Tenant to Landlord[,]" the Appellant's motion is misnamed. [App. 10.] It is not a new "Motion to Determine Accruing Rent" but rather a motion for *reconsideration* of Judge Darrough's July 13 order on its initial Motion to Determine Rent.

The Appellant sought a second bite at the apple by having a new judge, Judge Beovides, hear a motion that Judge Darrough had already decided, and by including a new issue — the definition of "rent" — conspicuously missing from its original Motion to Determine Rent. [App. 40-43.]

3. Appellee's Emergency Motion for Disbursement

Judge Beovides heard Appellee's Motion for Order to Tenant to Pay Rent and Appellant's motion for reconsideration, "Motion to Determine Accruing Rent," on the August 15 motion calendar. Without deciding either motion, Judge Beovides adjourned the hearing and orally set it as a special set evidentiary hearing for August 18 despite expressing doubts on the need for such a hearing given that the docket showed the Judge Darrough's July 13, 2023 order requiring Appellant to pay rent into the court registry.

The day before the re-scheduled hearing Judge Beovides' judicial assistant via email cancelled it.

Throughout September Appellee's counsel attempted to have the hearing reset on the court's calendar for two reasons. First, to force the Appellant to pay into the registry the overdue rent for July, August, and September (totaling almost $70,000). Second, to add to the hearing, once set, a motion for disbursement of the $46,454.31 given the pending November 2023 deadline for payment of the 2023 property taxes, and the financial hardship the lack of rental payment for successive months was creating for the Appellee and its president and owner, Gladys Matz.

Finally, unwilling to wait any longer for an open slot on the trial court's completely booked hearing calendar, Appellee on October 5, 2023 filed its Emergency Motion for Disbursement of Rent and supporting affidavit, "Affidavit of Glady Matz in Support of Plaintiff's Emergency Motion for Disbursement of Rent" ("Matz Affidavit")). [App. 126-135.] The Matz Affidavit details how Appellant's refusal to pay any rent — from May through October 2023, a more than $140,000 shortfall — had created significant financial hardships for both the Appellee and its majority owner, Ms. Matz, an elderly woman who depends on rental income to meet her living expenses. The Matz Affidavit specifically explained how the lack of rental payments put Appellee in danger of losing the property because it did not have the funds on hand to meet the Miami-Dade County property tax obligation for 2023, due on November 1. [App. 132-135.]

Appellant counters that any proclaimed hardship was unreal and the danger to the property manufactured because the public records show that Ms. Matz has an ownership interest, direct or indirect, in other properties. And because she lives in an $8 million residence (currently on the market). On Appellant counsel's reckoning, the "hardship" which section 83.232(1), Florida Statutes, requires is not a *true* hardship unless the exigencies are so draconian as to force the landlord to the brink of financial despair or to

seek, as has his client, Mr. Torosian, the respite of bankruptcy protection. Section 83.232(1) does not require the landlord to become impoverished or impecunious before petitioning the court for redress.

By the same token, a landlord need not wait for a property tax lien to issue before requesting the disbursement of funds sufficient to pay the outstanding tax obligation ($43,109.18).

As a final point, though there was no court reporter present for the October 9, 2023 emergency hearing, scheduled for 12:00 pm because Judge Beovides was in trial, Appellee's counsel distinctly remembers Appellant's counsel informing the Court that he had no objection to the release of the funds ($46,454.31) from the court registry. Counsel did object, though, to any order that would require his client to make monthly rental payments into the registry without an evidentiary hearing.

II. NATURE OF THE CASE

Factually, this case is a commercial eviction case, plain and simple, not only for nonpayment but for other breaches including Appellant planting trees in the swale in violation of the City Code. [App. 57-102.] Appellee initiated a summary proceeding for possession under sections 83.21 and 51.011, Florida Statutes (2022), because rent was not being paid. Appellant's excuses for non-payment, having no support in the Lease, have

burgeoned. First, Appellant attempted to excuse payment of rent because of the parties' dispute over who had to pay for new flooring once the Appellee replaced the underground pipe that had caused a single urinal to malfunction. Appellant rejected Appellee's offer to pay half. Then Appellant blamed excessive water intrusion and lack of parking. Then the excuses ballooned even more, like some DC Comics archvillain, to the dimensions of declaring the Premises "unfit" and "untenantable" to counterclaiming for "wrongful eviction" and "constructive eviction." [App. 109-125.]

All nonsense. The gym is a going concern generating money which the Appellant is pocketing while operating rent free.

On the legal side, an evidentiary hearing is not a precondition for the court to order a tenant (Appellant) to pay rent into the court registry under section 83.232(2) when the tenant has not disputed the lease's rent payment terms or claimed that the landlord has not properly credited rent payments, Appellant's arguments to the contrary notwithstanding. On this basis the Order should be affirmed.

Regarding the disbursement of the $46,454.31 from the court registry, the issue is moot. The funds have been disbursed and used to pay the 2023 property taxes for the Premises. Even if not moot, the trial court's Order met all the essential legal requirements.

SUMMARY OF ARGUMENT

The first issue appealed, that of the disbursement of the $46,454.31 from the court registry, is moot. The clerk disbursed the funds to the Appellee before Appellant filed its Notice of Appeal on October 30, 2023. Appellee used the funds to pay for the outstanding 2023 property taxes for the Premises. Furthermore, the Appellant did not seek a stay of the Order when first entered, on October 10, or at any time afterwards.

Even if not mooted by the clerk's disbursement, the Order should be affirmed because Appellee provided record evidence of both financial hardship and potential loss of the Premises.

As to the second issue, the circuit court properly required the Appellant to deposit additional unpaid monthly rents into the court registry. An evidentiary proceeding was not required for the October 9, 2023 emergency hearing because the Order from that hearing — which is the Order under appeal — simply followed-up on the county court's July 13, 2023 order on Appellant's initial Motion to Determine Rent. In that motion, the Appellant did not contest the construal of rent owed under the Lease's "rent" clause, nor did Appellant allege that the Appellee had not properly credited rent payments.

Section 83.232(2), Florida Statutes (2022), requires a tenant to introduce either issue to prompt an evidentiary hearing. Absent that, the county court properly ruled on July 13, 2023 that the full amount of the rent due under the Lease must be deposited into the court registry. Appellant did not contest this ruling and complied on July 17, 2023. The time for appealing the July 13, 2023 order has long passed.

STANDARD OF REVIEW

A non-final order determining the rent that must paid into or that may be withdrawn from the court registry is reviewed de novo because the appeal involves issues of contract and statutory interpretation. *Double Park, LLC v. Kaine Parking 125, LLC*, 168 So. 3d 278, 279 (Fla. 3d DCA 2015) (*citing Cascella v. Canaveral Port. Auth.*, 827 So. 2d 308, 309 (Fla. 5th DCA 2002)); *see also First States Investors 3300, LLC v. Pheil*, 52 So. 3d 845, 848 (Fla. 2d DCA 2011) (noting that while a trial court has broad discretion in deciding whether to permit a deposit into or withdrawal from the court registry, an appellate court must conduct a de novo review of the trial court's interpretation of a rule of court).

ARGUMENT

I. ISSUE OF DISBURSEMENT OF $46,454.31 IS MOOT

Mootness. Appellant complains that the trial court ordered the disbursement of the $46,454.31 without an evidentiary hearing. Apart from Appellant implying a requirement that section 83.232(1), Florida Statutes (2022), does not contain, the issue is moot. The Clerk of the Court disbursed the $46,454.31 to Gladys Matz, president and owner of Tixe Designs, Inc. The funds were used to pay the outstanding property taxes.

"Mootness occurs when an intervening event makes it impossible for the court to grant a party any effectual relief." *Waters v. Department of Corrections*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020). In addition, "[a]n issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *City of Miami Gardens v. City of North Miami Beach*, 346 So. 3d 648, 657 (Fla. 3d DCA 2022); *see also Casiano v. State*, 310 So. 3d 910, 913 (Fla. 2021).

In *Campbell v. Racetrack Bingo, Inc.*, the Court in a concurring opinion argued that once the sheriff returned the seized money to the appellees' account, an affirmance or reversal by the appellate court would have no *effect* on the pending case because the money seized and

returned was now gone from the account, as all the parties acknowledged. *Campbell v. Racetrack Bingo, Inc.*, 75 So. 3d 321, 324 (Fla. 1st DCA 2011) (J. Marstiller, concurring specially).

As the concurring decision further noted, "[i]t is the function of a judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles of rules of law which cannot affect the matter in issue." *Id.* (*quoting Montgomery v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985)).

The Appellant's appeal of the Order will not return the disbursed funds to the court registry. Any reversal of the Order would be a futile act. The rent money deposited has been disbursed to the Appellee for the payment of the property taxes. The money is no longer under the jurisdiction of the trial court or this Court. Furthermore, the released funds are on no different footing, legally speaking, than the rent monies Appellant paid to Appellee without protest from August 1, 2022 through March 2023.

The released funds are on no different footing because the Appellant has no legal rights under the Lease regarding rental payments that would be vindicated by this Court reversing the Order on the disbursement issue. The Lease clearly states that the "[t]enant expressly waives the right to

offset rent[,]" and that sentence is in the same section of the Lease, section 15, that the Appellant relies upon to support its affirmative claims, claims it now alleges the unauthorized disbursement undermined. [App. 17-19.] *See, infra,* Section II(B)(4).

In short, the Lease does not permit the Appellant to use rent deposited into the court registry as a source of indemnification for unrelated alleged damages.

The Appellant had the option and the time to seek a stay if it was truly concerned about retaining the funds in the court registry. Its own counsel declared in open court to Judge Beovides that he had no objection to the disbursement; he only objected to the requested additional deposit of $91,454.31 in unpaid rent.

On these grounds, the first part of the Order should be affirmed.

II. SECTION 83.232 DESIGNED TO PROTECT COMMERCIAL LANDLORDS

A. Intent of Section 83.232, Florida Statutes (2022).

If this Court does not consider the disbursement issue moot, the Order should then be affirmed because section 83.232 is designed to protect commercial landlords from irreparable harm, especially when the tenant uses litigation to stay on the premises without paying rent. The trial court's Order comports with the intent to protect the landlord; it followed the

specific statutory requirements in section 83.232(1) for the disbursement of funds from the registry to the landlord. *See Famsun Invest, LLC v. Therault*, 95 So. 3d 961, 963 (Fla. 4th DCA 2012) (noting that section 83.232 designed to protect a commercial landlord from irreparable harm sustained when tenant holds over during eviction proceedings without paying rent); *Lennar Realty, LLC v. Sun Electric Works, Inc.*, 317 So. 3d 125, 129 (Fla. 4th DCA 2021); *see also Premici v. United Growth Properties, L.P.*, 648 So. 2d 1241, 1243 (Fla. 5th DCA 1995) ("The statute is designed to remedy the problem of commercial tenants remaining on the premises for the duration of the litigation without paying the landlord rent.").

As the *Lennar Realty* Court noted, the statute aims to expedite how the landlord may obtain unpaid rents, especially when, as in this case, the summary procedure under section 51.011 is used. "The point of a rental deposit statute is to secure rental monies in a neutral place so that they can be quickly allocated and distributed by the court." *Lennar Realty, LLC v. Sun Electric Works*, 317 So. 3d at 129.

B. Disbursement of Funds Met Statutory Requirements.

Appellant argues that the trial court wrongly ordered the disbursement of the $46,454.31 from the court registry because, (1) it did not conduct an evidentiary hearing; (2) the Appellee did not show the

requisite amount of hardship; (3) the amount disbursed was disproportionate to the alleged hardship; and (4) Appellant's Counterclaim precludes any disbursement from the court registry.

1. Section 83.232(1) does not require an evidentiary hearing.

The last sentence of section 83.232(1) states: "If the landlord is in actual danger of loss of the premises or other hardship resulting from the loss of rental income from the premises, the landlord may apply to the court for disbursement of all or part of the funds so held in the court registry."

The express language of section 83.232(1) does not require the court to hold an evidentiary hearing. It only requires that the landlord "apply" to the court, which Appellee did through its Emergency Motion for Disbursement of Rent. Appellee supported its application for hardship disbursement with the Matz Affidavit. The Matz Affidavit details the specific financial hardship that the many months of unpaid rent were causing the Appellee — including chronic undercapitalization and inability to meet monthly expenses — as well as to its president and majority shareholder, Ms. Matz. [App. 126-135.]

Most important, the Matz Affidavit stated that Appellee was in actual danger of losing the Premises because it did not have the necessary funds on hand to pay the 2023 property taxes. Attached to the Matz Affidavit as

Exhibit 2 is the notice from the Miami-Dade Property Appraiser of the estimated amount due in property taxes for 2023 ($43,109.18), payable as of November 1, 2023. [App. 135.]

As the intent of section 83.232 is to protect the landlord from the irreparable harm caused when commercial tenants use the premises without payment, an affidavit in support of an application for disbursement due to financial hardship or because the landlord is close to losing the Premises is sufficient to meet the statutory requirement.

Appellant's filing of records listing other assets of Appellee or of its president, or its president's involvement in other business enterprises, does not undermine Appellee's basic point: that it did not have sufficient funds on hand to pay the property taxes due for the Premises. The statute draws a direct connection between the *loss of rental income from the premises* and the hardship that lack of income imposes on the landlord or the heightened possibility the landlord may lose that specific property because of the continued lack of rental income. That a landlord may own other properties or assets is irrelevant to the analysis.

In essence, section 83.232 lays out the pathway for the court to make a summary decision on disbursement when the landlord's application makes a sufficient showing to meet the statute's requirements. It is not

unlike a summary judgment proceeding under Rule 1.510, Fla. R. Civ. P. (2023), where evidence through affidavit is permitted when a summary judgment order is requested; it does not require an evidentiary hearing. Appellant has not alleged that Ms. Matz was not competent to testify or that the evidence submitted through her affidavit is inadmissible.

Finally, the few reported cases that directly involve disbursement from the court registry to the landlord under section 83.232 do not hold that an evidentiary hearing is required. In *Exclusive Motoring Worldwide, Inc. v. Soral Investments, Inc.*, this Court noted that the trial court held an evidentiary hearing on the hardship which the loss of rental income created for the landlord. *Exclusive Motoring Worldwide v. Soral Investments, Inc.*, 349 So. 3d 490, 490 (Fla. 3d DCA 2022). It did not suggest in its review that such a hearing was the only way the landlord could meet its burden of showing hardship or the property's potential loss.

More to the point, as the court in *Lenmar Realty* noted, section 83.232 is designed to expedite the landlord's possession of the property and to protect it from irreparable harm, especially when as in the present case the landlord has used the summary procedure provided in section 51.011. Section 83.232(1) does not require a landlord to plead its right to obtain the deposited funds; an ordinary motion under Rule 1.100(b), Fla. R.

Civ. P., will do. Similarly, an evidentiary hearing to vet the landlord's overall financial condition to determine the degree of hardship the loss of rental income represents would be contrary to the statute's purpose.

Lastly, Appellant cites no case to support its position that section 83.232(1) requires an evidentiary hearing when the landlord seeks disbursement. Its reliance on *Tribeca Aesthetic Medical Solutions, LLC v. Edge Pilates Corp.*, is misplaced. The hearing to which the opinion refers, the hearing on the landlord's right to intervene in the dispute between the tenant and subtenant, did not address the landlord's right to disbursement under section 83.232(1). Nor was there any discussion in the decision whether the statute mandated an evidentiary hearing. The Court simply noted that the issue was neither pled nor proved, without comment, except to note that the landlord was an intervenor. The subtenant's actual "landlord" was the tenant, which an evidentiary hearing would have clarified. *Tribeca Aesthetic Medical Solutions, LLC v. Edge Pilates Corp.*, 82 So. 3d 899, 903 (Fla. 4th DCA 2011).

2. Statute does not require a specific degree of hardship.

Appellant's second argument is that the Matz Affidavit focused more on the degree of hardship the loss of rental income is causing Ms. Matz than to her company, Appellee Tixe Designs, Inc. Appellant's argument,

essentially, is that it does not matter that its failure to pay rent for many months is causing the Appellee to operate at a loss and forcing Ms. Matz to provide additional capital for Appellee to meet its monthly business expenses. If the money can be found elsewhere, no hardship results. If the landlord cannot meet its financial commitments because the rent is unpaid, that is not the tenant's problem. This argument is perverse and monumentally wrongheaded. The statute does not qualify "hardship" as "undue" or require that the landlord run through all available resources and succumb to the edge of destitution before turning to the court for help.

3. The amount disbursed proportionate to Appellee's need.

Relying on this Court's *Exclusive Motoring Worldwide, Inc.* decision, Appellant maintains that the trial court erred by ordering the disbursement of the entire amount held, $46,454.31. In supporting this argument, Appellant only focuses on the monthly expense listed in the Matz Affidavit and not on the looming $43,109.18 tax bill. That bill, along with the listed expenses, shows that even the disbursement of the full amount held in the registry does not fully alleviate Appellee's ongoing financial hardship. *See Exclusive Motoring Worldwide, Inc. v. Soral Investments, Inc.*, 349 So. 3d 490, 491 (Fla. 3d DCA 2022).

Proportionality should not be based on what has been paid into the court registry but on the total amount of rent unpaid. As of October 10, 2023, $142,680.08 was due and owing. $46,454.31 is approximately 33% of that amount. In other words, 67% of Appellant's rent as of October 10, 2023 was unpaid. That's a huge hole in the budget of any business. If there is a lack of proportionality, it lies in the amount of rent unpaid not in the amount disbursed.

Lastly, Appellant adds, as a side note, that the trial court also erred because it directed the Clerk to release the funds directly to Appellee's president, Ms. Matz, not to the Appellee, the landlord.

The language in the Order directing the Clerk to make the check payable to Ms. Matz and not to Tixe Designs, Inc. was an oversight by the initial drafter of the proposed order, the undersigned, one which Appellant's counsel did not bring to his attention when the proposed order was sent to him for review and approval before being submitted to Judge Beovides. Regardless, the mistake did not enrich Ms. Matz at the expense of the Appellee or the Appellant. The money was used to pay the outstanding property taxes. It protected the property.

4. Counterclaim does not preclude disbursement.

Appellant rounds out its wrongful disbursement arguments by contending, oddly, that the trial court has undermined its Counterclaim by permitting the release of the funds from the court registry. To understand why this argument is strange, one must be clear on the procedural history.

Appellee filed its initial Complaint in county court on June 6, 2023. On June 30, 2023, Appellant filed its combined, “Motion to Determine Rent and/or Motion to Dismiss/Answer and Affirmative Defenses.” The June 30th filing did not include a Counterclaim. [App. 1-43.]

On July 13, 2023, Judge Darrough entered the Order on Defendant’s Motion for Determination of Rent which required Appellant to deposit the $46,454.31 by no later than noon on July 17. [App. 46.] When Appellant complied on July 17 there was still no Counterclaim. That was not filed until after the case has been transferred to the circuit court and the Appellee filed its Amended Complaint on August 6, 2023. Appellant filed its Answer, Affirmative Defenses, and Counterclaim on August 14. [App. 109-116.]

By that time, the $46,454.31 had already been sitting in the court registry for over a month. The Counterclaim comprises two counts, (I) Breach of Contract, and (II) Wrongful and Constructive Eviction. Appellant demanded $20,000,000 in damages. [App. 114.]

It is undisputed that when Appellant filed its Counterclaim it had not complied with section 83.232(1)'s requirement that it deposit into the court registry, not only the amount which had been determined by Judge Darrough, but "*any rent accruing during the pendency of the account, when due*, unless tenant has interposed the defense of payment or satisfaction of the rent in the amount the complaint alleges as unpaid." § 83.232(1), Fla. Stat. (2022) (emphasis added).

The amount deposited on July 17 only covered rent outstanding for the months of April, May, and June. Appellant did not deposit additional funds for July or August. Section 83.232(4) provides that, "[t]he filing of a counterclaim for money damages does not relieve the tenant from depositing rent due into the registry of the court."

Thus, when Appellant filed its Counterclaim for $20,000,000 it had not complied with section 83.232's express requirements. It now seeks to evade this violation, and sidetrack the issues, by mixing in case decisions under Rule 1.600, Fla. R. Civ. P., — governing voluntary deposits into the court registry — with the strict section 83.232 regime overseeing a commercial tenant's involuntary duty to pay rent into the registry to maintain its defenses and counterclaims to the landlord's action for possession.

In sum, to stay in possession the statute requires the tenant to keep paying rent.

That has not happened in this case. The Appellant has stayed in possession and in business without paying rent. It has opportunistically taken advantage of the county court's self-imposed jurisdictional limitation — believing it could not require more than $50,000 to be paid into the registry — to maintain defenses and counterclaims without satisfying the necessary preconditions under section 83.232. Appellant had no choice but to pay unlike the tenant in *First States Investors 3300, LLC v. Pheil*, which, as the court noted did have a choice; it "did not unconditionally tender the monies [into the court registry] as rent due[.]" That tenant deposited the money conditionally, pending the court's determination on the proper rent due and whether it had overpaid. *See First States Investors 3300, LLC v. Pheil*, 52 So. 3d 845, 849 (Fla. 2d DCA 2011).

The same was true in *Masser v. London Operating Co.*, 145 So. 72, 76 (Fla. 1932), upon which Appellant also relies. Appellant's obligation to pay rent was not conditioned on any other event nor was it a voluntary payment. It is a statutory duty to avoid immediate dispossession. Moreover, the Lease is straightforward and there is no ambiguity regarding what rent is owed, to whom, from whom, and when. There are no gray areas. The

Order for disbursement of $46,454.31 did not deprive the Appellant of an interest in property, *i.e.*, sums used for rental payments, that Appellant had not already voluntarily relinquished when it signed the Lease.

III. EVIDENTIARY HEARING NOT REQUIRED ON APPELLANT'S MOTION FOR RECONSIDERATION OF THE JULY 13th ORDER

Appellant's initial June 30th Motion To Determine rent did not apprise the county court that it disputed the Lease's definition of "rent" or that the Landlord had failed to credit rental payments. [App. 40-43.] Appellant's argument disputing what constituted "rent" under the Lease did not appear until it filed its Motion to Determine Accruing Rent on August 10, 2023. [App. 103-106.] That motion was filed as a countermotion to Appellee's Motion For Order To Tenant To Pay Rent, which Appellee filed once the case was transferred from the county to the circuit court. [App. 55-56.]

Appellant's Motion to Determine Accruing Rent is, fundamentally, a motion for reconsideration of Judge Darrough's July 13th Order on Defendant's Motion to Determine Rent. The labels don't matter. What matters is whether Appellant sought through its new motion brought before a new judge (Judge Beovides) to have the issue of rent determination heard once again.

What had been decided on July 13, 2023? Judge Darrough had determined that the monthly rent ($20,600) plus late charges ($500) plus

sales tax (6.5%) plus interest (18%) as listed in the Complaint — which Appellant did not contest as inaccurate — should be deposited by the Appellant into the registry of the court for the unpaid part of April and all of May and June. Per section 83.232(1) the Appellant also had the obligation to pay "any rent accruing during the pendency of the action, when due[.]" That the Appellant did not do; it could not rely on the defense of payment or satisfaction of rent to excuse its nonperformance because those defenses are inapplicable.

The two motions — Appellee's Motion For Order To Tenant To Pay Rent and Appellant's Motion to Determine Accruing Rent — were heard but not decided on August 15, 2023. Subsequently, Appellee filed its Emergency Motion for Disbursement of Rent and included in that motion the request that the trial court order Appellant to pay into the registry the total of unpaid rent from July through October ($91,454.31), which the trial court granted on October 10, 2023. It also requested that the trial court require Appellant to pay the monthly rent as it accrued into the registry as section 83.232(1) provides. That request the trial court denied.

Appellant's claim that the October 10, 2023 Order is erroneous as a matter of law because it was entered without an evidentiary hearing subtly seeks to efface from the record the July 13, 2023 order, which has never

been overturned. It still controls the disposition of rent payments under section 83.232. Only at the "reconsideration" stage — when Appellant filed its Motion to Determine Accruing Rent — did Appellant first dispute the Lease's definition of "rent" as section 83.232(2) requires. As that motion has never been decided, the July 13th order continues to control the issue given Appellant's original agreement that the Lease's rent terms are accurate. *See Double Park, LLC v. Kaine Parking 125, LLC.*, 168 So. 3d 278, 282 (Fla. 3d DCA 2015) (holding that an evidentiary hearing is only required when there is a dispute on the amount to be paid into the registry per the terms of the lease); *Rowe v. Macaw Holdings I, LLC*, 248 So. 3d 1178, 1180 (Fla. 4th DCA 2018) (holding that a rent determination evidentiary hearing is only required when the parties dispute lease provision expressly tied to the amount of rent set forth in the lease).

CONCLUSION

The trial court's Order should be affirmed. The Lease's rent terms are clear; the Appellant did not dispute those terms, or allege that rental payments had gone uncredited, prior to the July 13, 2023 hearing on its Motion to Determine Rent before the county court. It complied with the July 13th order to pay $46,454.31 into the registry by noon on July 17, 2023. That order it did not appeal. Subsequently, upon the transfer of the case to the circuit court, it sought to have the circuit court rule on the rent determination issue again, and this time included in its motion for reconsideration the section 83.232(2) required "dispute" regarding the definition of "rent" in the Lease. That motion, Appellant's Motion to Determine Accruing Rent, was partially heard but not decided on August 15, 2023.

The trial court in its October 10, 2023 Order on Appellee's Emergency Motion for Disbursement relied on what the July 13th order had determined regarding due rent under the Lease to require additional rental payments into the registry.

As for the part of the Order disbursing the $46,454.31 from the registry to the Appellee, that issue is moot as the money has already been disbursed and used to pay the 2023 property taxes for the Premises.

Alternately, that part of the Order should be affirmed because there is no statutory mandate for the court to hold an evidentiary hearing under section 83.232(1). Appellant's other arguments for reversal are unavailing; they seek only to draw attention from the fact that Appellant continues to operate its full-service gym on the Premises without paying rent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief was emailed to those in the service list on December 18, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that his answer brief complies with the requirements of Fla. R. App. P. 9.210(a)(2) and has been prepared in Arial 14 point font.

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