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

ABOOD WOOD-FAY REAL ESTATE GROUP, LLC, ETC.

CASE NO.: 3D2024-0072
L.T. No.: 2014-008900 CA-01

Appellant

V.

SEASHORE CLUB SOUTH CONDOMINIUM ASSOCIATION, INC., ETC., ET AL.,

Appellees.
______________________________________/

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal of the Order Granting Defendants' Motion for Final Summary Judgment & Final Judgment ("Order") entered on December 12, 2023. The Order entered final judgment in favor of the Defendants RDR Seashore, LLC ("RDR"), Dezer Laroche Holdings, LLC ("Dezer Laroche"), 17011 Holdings, LLC ("17011 Holdings"), SIB Units, LLC ("SIB") and Seashore Club South Condominium Association, Inc. (the "Association"). on Count I (Breach of Agreement), Count II (Unjust Enrichment), and Count III (Tortious Interference).

Citations containing "R." refer to pages of the Record on Appeal. "FAY Decl. __" refers to the Declaration of Michael T. Fay [R. 11768]. "Dezer Dep. _" refers to the deposition transcript of Gil Dezer [R. 10639]. "Hernandez Dep. __' refers to the deposition transcript of Joseph M. Hernandez, Esq. [R. 11046]. "Fay Dep. _" refers to the deposition transcript of Michael Fay [R. 10407]. "Fordin Dep. _" refers to the deposition transcript of Eric Fordin, [R. 11243]. "Def. Answ. _" refers to the Answer and Amended Affirmative defenses of Dezer Laroche Holdings, LLC, RDR Seashore, LLC, SIB Units, LLC and 1701 Holdings, LLC [R. 10615].

STATEMENT OF THE CASE AND THE FACTS

I. Statement of the Case

Plaintiff, Abood Wood-Fay Real Estate Group, LLC, a Florida limited liability company ("Abood Wood Fay" or "Plaintiff") filed a multi-count Amended Complaint [R. 447] seeking to recover damages and other relief, due to the non-payment of commissions owed to Abood Wood Fay, against RDR, Dezer Laroche, 17011 Holdings, SIB and the Association. Abood Wood Fay filed a voluntary dismissal [R. 11389] of the Counts seeking relief for violating Florida Statutes Chapter 726 and for declaratory and Supplemental Relief [R. 11389], leaving Counts I, II and III, which were disposed of by the trial court via the granting of a motion for partial summary judgment on Count III (Tortious Interference) [R. 11765] and a motion for final summary judgment (as to Counts I and II) [R. 11,843]. Regarding Count I (Breach of Contract) and Count II (Unjust Enrichment), the trial court concluded that there was no breach of contract because the transaction described in the Purchase Agreement, **as amended**, did not close and there was a special contract (an amended commission agreement) barring the claim for unjust enrichment. Abood Wood Fay filed its appeal on January 10, 2024. Abood Wood Fay's Motion for Rehearing [R. 11830] was denied by the trial court on February 12, 2024 [Index number 426, R. 34].

II. Statement of the Facts

Abood Wood Fay procures a buyer

Abood Wood Fay, a real estate brokerage company, had been contacted by Joe Hernandez (counsel for the Association) and asked if they knew anyone who might be interested in buying the Condominium property ("Property") and Abood Wood Fay was told to bring a buyer and to make sure the buyer was going to pay any commission. [Fay Dep. at 18-20, R. 10412]. The Association did not want to be responsible for the payment of any commission which should be paid for by the buyer. [Hernandez Dep. at 24, R. 11069]. Abood Wood Fay was a transaction broker with respect to this matter and brought in Eddie Nurielli, Trustee of Florida Land Trust 55 ("FLT 55") as a buyer for the Property and was to be paid a fee for doing so. [Fay Dep. at 15, R. 10411]

The Board of Directors of the Association passed a resolution assuring the unit owners that the Association would not go below a sales price of less than $82 million net. [R. 10949-50; Dezer Dep. at 172-174, R. 10810-12; Hernandez Dep. at 42-43, R. 11087-88] The Association was firm on the $82 million number based on what the unit owners wanted. [Hernandez Dep. at 9-11, 30, 42, R. 11054-56, 11075, 11087].

With respect to the Seashore Condominium – Abood Wood Fay knew the right people and had the rights ideas to effectuate a sale. Abood Wood Fay reviewed valuations, worked with the buyer, dealt with Joe Hernandez

and attended several meetings. Abood Wood Fay also worked with counsel for Dezer Laroche and the Related Group. [Fay Dep. at 128-129, R. 10439].

On November 13, 2012, Eddie Nurielli, Trustee of Florida Land Trust 55 ("FLT 55") and Seashore Club South Condominium Association, Inc. (the "Association") entered into a Purchase Agreement for the purchase of the Condominium property ("FLT Purchase Agreement"). [R. 10451]. The FLT Purchase Agreement was subject to a right of first refusal in favor of Gilco Realty, LLC ("ROFR") (See Section 16 of FLT Purchase Agreement). The FLT Purchase Agreement also provided for (i) a purchase price of $82 million (see Section 2 of FLT Purchase Agreement), (ii) that FLT 55 would pay Abood Wood-Fay its broker's commission based on a separate agreement between Abood Wood Fay and FLT 55 (see Section 17 of FLT Purchase Agreement), and (iii) that any subsequent purchaser of the property based on the exercise of a right of first refusal would be responsible for paying Abood Wood Fay's commission (see Section 17 of FLT Purchase Agreement). Abood Wood Fay and FLT 55 agreed to the payment of a $2 million broker's commission to Abood Wood Fay [R. 10248].

The right of first refusal

The ROFR was assigned to Dezer Laroche Holdings, LLC ("Dezer Laroche") who exercised its right of first refusal and entered into the Dezer

Purchase Agreement. [R. 10483; Def. Answ. at ¶ 23, R. 10618]. Dezer Laroche assigned the Dezer Purchase Agreement to RDR on or about August 23, 2013. [R. 10569; Def. Answ. at ¶ 25, R. 10618].

Dezer Laroche sues the Association resulting in an Amendment to Purchase Agreement being signed, the Commission being reduced to $1 million, but the net to the Condominium being reduced from $82 million to $81 million

Dezer Laroche sued the Association [R. 10541, 10549] contesting the validity of the FLT Purchase Agreement. [Def. Answ. at ¶ 27, R. 10618]. Dezer Laroche also thought the $2 million broker fee was excessive and FLT 55 was trying to screw Dezer Laroche for the $2 million commission. Dezer Laroche thought it was a play just to get the commission. [Dezer Dep. at 22-23, 54-65, 93, R. 10660-61, R. 10702-03, R. 10731; Fordin Dep. at 44, R. 11286].

As part of the settlement of the lawsuit with the Association, Dezer Laroche agreed to dismiss the lawsuit and the Association agreed to assume the payment of the first $1 million in commissions owed to Abood Wood Fay. [R. 10765-66]. Dezer Laroche also entered into an agreement with Abood Wood Fay to reduce the $2 million commission to $1 million (The "Amended Commission Agreement"). [R. 10250]. The Amended Commission Agreement was drawn up by the attorneys for Dezer Laroche. [FAY Decl. at ¶7, R. 11769].

The Association's agreement to assume the payment of the first $1 million in commissions owed to Abood Wood Fay reduced the net purchase price from $82 million to $81 million. [R. 10801-02]. In accordance with the settlement, Dezer Laroche and the Association entered into the Amendment to Purchase and Sale Agreement [R. 11778] which was assigned by Dezer Laroche to RDR [R. 10569; Dezer Dep. at 127-128, R. 10765-66; Def. Answ. at ¶ 29, R. 10619].

Many of the favorable unit owner votes that the Association had already obtained were tied to the Board of Director's resolution that it would not go below $82 million net. [R. 11370; Hernandez Dep. at 42-43, R. 11086-87]. If the net price was reduced from $82 million to $81 million there was a very real fear that the Board of Directors of the Association would lose support for the deal. [Dezer Dep. at 174-178, R. 10812-14; R. 10941-52; Hernandez Dep at 44, R. 11089]. Some of the unit owners did not consent to the plan of termination submitted under the Dezer Purchase Agreement as amended because instead of netting the $82 million provided for under the FLT Agreement (and the BOD resolution not to take anything less than $82 million), the net proceeds were being reduced by $1 million to a net of $81 million under the Dezer Purchase Agreement as Amended. [R. 11357-61; R. 11369-71]. Certain unit owners objected to the Plan of Termination for

the Condominium and filed a lawsuit contesting it (the "Mahone Lawsuit"). [Def. Answ. at ¶ 34, R. 10619].

<u>Objecting unit owners cause resort to back up plan to close the transaction via purchasing of individual units.</u>

If 100% unit-owner approval could have been obtained, the transaction could have closed without changing the structure; but based on the inability to get 100% unit-owner approval, the structure of the transaction changed to a coordinated bulk purchase of individual units – "ultimately that's the way **<u>the transaction</u>** happened." (emphasis added) [Hernandez Dep. at 51-54, R. 11096-99] with the same goal being achieved – 100% ownership and termination of the condominium. [Hernandez Dep. at 73-74, R. 11118-19]. The transaction described in the purchase agreement closed – just under different terms through the purchase of the individual units. [Fay Dep. at 119, R. 10437].

In sales of condominiums, it does not matter if it is done as a group sale or by individual units. Michael Fay has done it both of these ways and in the case of the Seashore Condominium, this is one where they went the individual unit purchase route because they had some decenters. Whether you do it as a group or individual units it is still a transaction. [Fay Dep. at 78-81, R. 10427].

RDR closed on the sale of the individual units,[1] voted in favor of terminating the condominium and the Association recorded a Certificate of Termination [Def. Answ. at ¶ 35, 39, R. 10619-20]. The Seashore Condominium was demolished and in its place The Residences by ARMANI CASA & Condominium was built. [Dezer Dep. at 189, R. 10827; Def. Answ. at ¶ 35, R. 10619].

The intention was to pay commissions on the back-up plan

From the time the FLT Commission Agreement was signed, it has always been the understanding, agreement and intention that Abood Wood Fay would be entitled to its commission in the event a back-up plan to buy individual units was pursued. [FAY Decl. at ¶8, R. 11769].

This intention was confirmed when Abood Wood Fay was told by Matt Allan (the Chief Operating Officer with the Related Group) that Abood Wood Fay would be paid its commission on the purchases of the individual units. More specifically, after Judge Bloom ruled in favor of the objecting unit owners in April 2014 in the Mahone Lawsuit, Michael Fay spoke with Matt Allan who indicated they were going to have to buy the individual units and that the commission would be paid over a period of time as the units closed.

[1] The Units were acquired in the names of RDR, SIB and 17011 Holdings, entities partnering with, related to, succeeding to, affiliated with or otherwise connected to Dezer Laroche. [R. 453-454].

Mr. Fay told Mr. Allan that was not a problem. Although Mr. Allan called Mr. Fay back to tell him Gil Dezer does not want to pay at all,[2] the fact is that Matt Allan acknowledged the intention and understanding that Abood Wood Fay would be paid its commission because the transaction was closing though the vehicle of purchasing individual units. [FAY Decl. at ¶17, R. 11771].

With respect to the sale of the property that is the subject matter of this lawsuit, Abood Wood Fay initiated the negotiations, performed valuations, worked with the parties involved and attended several meetings. Abood Wood Fay brought buyer and seller together which led to the FLT Agreement and the subsequent exercise of the right of first refusal by Dezer Laroche[3]

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[2] Dezer Laroche later took the position that they did not want to pay any commission at all because according to Gil Dezer, he felt that Michael Fay "[was] the mother fucker scumbag who [was] stealing money from [Dezer]." Gil Dezer also told Michael Fay "you guys are scumbag brokers. I don't – I'm never paying guys like you. I don't pay people like you. I don't pay brokers anyway." [Fay Dep. at 50-53, R. 10420].

[3] Dezer Larcohe never sought to buy the units independent of the right of first refusal – the intention was to wait until the right of first refusal was activated. [Dezer Dep. at 16-18, R. 10654]. The FLT Agreement forced the hand of Dezer Larcoche who did not want to give up on the opportunity to buy this oceanfront property [Dezer Dep. at 143-144, R. 10781] and would have paid $150 million for the property. [R. 10756, Dezer Dep. at 118-119]. The amount RDR ultimately paid was still in an acceptable range, so they proceeded [Fordin Dep. at 37, R. 11279] and they would have exercised the right of first refusal no matter what. [Fordin Dep. at 100, R. 11342].

which then led to the acquisition of the property via individual purchases of the units. Abood Wood Fay set in motion the events leading up to RDR's acquisition of the Property and was the procuring cause of RDR's acquisition. After the decision was made to pursue the purchase of individual units, none of the Defendants requested any further assistance from Abood Wood Fay. It appears that Abood Wood Fay was intentionally excluded by Defendants from participating in any negotiations that may have taken place with the any of the individual unit owners based on Gil Dezer's sentiment (as he expressed to Michael Fay) that Mr. Fay was the mother fucker scumbag who was stealing his money and that Abood Wood Fay were scumbag brokers and that he is never paying guys like Abood Wood Fay and that he does not pay brokers anyway. [FAY Decl. at ¶6, R. 11769].

The Amended Commission Agreement was intended to include the purchase of individual units as a triggering event for the payment of the agreed upon $1 million commission.

It was never the intention of Abood Wood Fay in signing the Amended Commission Agreement to narrow the terms under which it would be entitled to compensation. By signing the Amended Commission Agreement, Abood Wood Fay did not expressly limit its sole right to compensation to if and when a closing on the Dezer Purchase Agreement occurred. Nor did Abood Wood Fay agree that its sole right to compensation would stem from a closing

"under the plan of termination" as Defendants contend. [FAY Decl. at ¶9, R. 11769].

The Amended Commission Agreement was intended to reduce the amount of the agreed upon commission from $2 million to $1 million "upon the closing of the transaction described in the referenced Purchase Agreement". The referenced "Purchase Agreement" is defined in the Amended Commission Agreement as being the "Purchase and Sale Agreement between Seashore Club South Condominium Association, Inc. ("Seller") and Dezer Laroche Holdings, LLC and/or its assigns ("Purchaser"), **as amended** (collectively "Purchase Agreement")" (emphasis added). [FAY Decl. at ¶10, R. 11769].

The Purchase Agreement, **as amended** specifically provides for, describes and contemplates the possibility of purchasing individual units as being part of the transaction. For example, Section 4.b of the Amendment to Purchase and Sale Agreement provides that Section 5 of the Purchase and Sale Agreement is amended to read as follows:

"Purchaser will use commercially reasonable efforts to obtain sufficient votes in favor of the Plan so that the Plan may be adopted pursuant to the Statute, at Purchaser's sole cost and expense, **which efforts may include purchasing units** (subject to approval by the Association) upon terms, conditions and prices, reasonably acceptable to Purchaser, and providing assistance from Purchaser's counsel to collect and review unit owner joinders and other documentation required by the Title Company in order to adopt the Plan."(emphasis added)

(FAY Decl. at ¶11, 12, R. 11770].

Additionally, the Amendment to Purchase and Sale Agreement also replaces Section 17 of the Purchase and Sale Agreement with the following, in pertinent part: “Purchaser agrees that it shall be responsible for negotiating with Colliers a reduction of any commission claimed to be owed by any of the Parties to Colliers and Purchaser shall indemnify Seller (and Seller’s board of directors and officers) from any claim for a commission or brokerage fee due Colliers or any broker claiming through Colliers in connection with the **Amended PSA**.” (emphasis added) [FAY Decl. at ¶13, R. 11770].

Accordingly, the Amended Commission Agreement did not, and was not intended to, exclude the right to the payment of a commission in the event a back-up plan to buy the individual units was pursued. On the contrary, it was intended to include the purchase of individual units as a triggering event for the payment of the agreed upon $1 million commission. It is noteworthy that in May 2013, objecting Seashore unit owners filed a lawsuit (the “Mahone Lawsuit”) contesting the applicability of Chapter 718.117 as amended, making the back-up plan to buy individual units a more likely possibility. The Amended Commission Agreement was drafted thereafter and signed on July 11, 2013. [FAY Decl. at ¶14, R. 11770]. Because the

possibility of having to buy individual units was now specifically being addressed, spelled out and included in the Purchase Agreement, **as amended**, it was not necessary to carry forward and use the same language ("successfully close on the purchase of the Property or a portion of the interests therein,") in the Amended Commission Agreement that had been previously used in the FLT Commission Agreement (prior to the Amendment to the Purchase and Sale Agreement). No further protection was necessary because it (the buying of individual units) was now spelled out in the Purchase Agreement, as amended. [FAY Decl. at ¶15, R. 11770]

Bottom line – as part of the transaction, the Purchase Agreement, **as amended**, contemplated the possibility of purchasing individual units to obtain the approval and if that was done (as it was done in this instance), Abood Wood Fay would be and is entitled to its commission under the terms of the Amended Commission Agreement because the transaction described in the Purchase Agreement, **as amended,** closed. [FAY Decl. at ¶16, R. 11770].

Miscellaneous.

Gil Dezer of Dezer Laroche thought a reasonable commission would be $400,000. (Dezer Dep. at 49-53, PL App. Ex B.). Eric Fordin (who was the project lead for and had development control of the Residence by Armani

Casa project and reported directly to Matt Allen, Carlo Rosso and Jorge Perez) [R. 11245-47] thought 1% would be a reasonable commission. [Fordin Dep. at 70-71, R. 11312-13]. David Shear, Esq., testifying at deposition as the designated representative to testify on behalf of Dezer Laroche Holdings, LLC. [Shear Dep. at 7, R. 10509] thought a reasonable commission would have been 1% or 1.25% or from $800,000 to $1 million. [Shear Dep. at 68, R. 10524].

Section 25 (b) of the Dezer Purchase Agreement [R. 10498] provides: "In the event any term or provision of this Agreement be determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be given its nearest legal meaning or be construed as deleted as such authority determines, and the remainder of this Agreement shall be construed to be in full force and effect." Pursuant to the terms of Section 2 of the Amendment to Purchase and Sale Agreement, [R. 11779] the above quoted Section 25 (b) of the Dezer Purchase Agreement remained in full force and effect.

STANDARD OF REVIEW

I. Applicable Standard of Appellate Review

"The standard of review on orders granting final summary judgment is de novo." *Ibarra v. Ross Dress for Less, Inc.*, 350 So. 3d 465, 467 (Fla. 3d DCA

2022) (quoting *Orozco v. McCormick 105, LLC*, 276 So. 3d 932, 935 (Fla. 3d DCA 2019)). A trial court's interpretation of a contract is reviewed under a de novo standard. *Merlot Commc'ns., Inc. v. Shalev,* 840 So.2d 446 (Fla. 3d DCA 2003).

II. Applicable Summary Judgment Standard

Under the newly revised Rule 1.510, "the correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So.3d 72, 75 (Fla. 2021) (internal quotes and citations omitted). "A court "view[s] the evidence in the non-movant's favor, but only to the extent that it would be reasonable for a jury to resolve the factual issues that way."" *Perez v. Citizens Prop. Ins. Corp.*, 345 So. 3d 893, 895 (Fla. 4th DCA 2022), review denied, SC22-1399, 2023 WL 155492 (Fla. Jan. 11, 2023) (internal citations omitted).

"Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). The "new" summary judgment standard is construed in accordance with the federal summary judgment standard. See In re: Amendments to Fla. Rule of Civ. Procedure 1.510, 317 So. 3d 72 (Fla. 2021). Under this standard "the burden on the moving party

may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)." *Smith v. Westdale Asset Mgmt., Ltd.*, 47 Fla. L. Weekly D2620 (Fla. 1st DCA Dec. 12, 2022).

SUMMARY OF ARGUMENT

I. The trial court improperly granted summary judgment in Defendants' favor as to Count I for breach of contract incorrectly concluding that the transaction described in the Purchase Agreement, as amended failed to close. The record evidence established that the Purchase Agreement, as amended contemplated and provided for a possible closing via the purchase of individual units and as such, the transaction did close and the entitlement to a commission under the Amended Commission Agreement was triggered. At a minimum there was ambiguity within the Amended Commission Agreement. in light of the record evidence concerning the parties' intention to pay a commission should the back-up plan to purchase individual units be pursued, summary judgment should have been denied as to Count I.

II. The trial court improperly granted summary judgment in Defendants' favor as to Count II for Unjust Enrichment. There is no special

contract barring the Plaintiff's unjust enrichment claim as the procuring cause of the acquisition of the condominium through the purchase of individual units. As per the trial court's ruling on Count I, the Amended Commission Agreement required a closing pursuant to a plan of termination and not the acquisition of individual units. Accordingly, the scope and subject matter of what was claimed to be the special contract (the Amended Commission Agreement) is not the same as the subject matter and scope of the Count II unjust enrichment/procuring cause claim under which Abood Wood Fay claims it was the procuring cause of the acquisition of the condominium through the purchase of individual units.

ARGUMENT

I. DEFENDANTS BREACHED THE AMENDED COMMISSION AGREEMENT AND SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED AS TO COUNT I

The closing on the Purchase Agreement, **<u>as amended</u>**, did in fact occur. Accordingly, under the terms of the Amended Commission Agreement, Abood Wood Fay is entitled to a $1 million commission and the Motion seeking Final Summary Judgment on Count I should have been denied. Furthermore, the trial court should have granted summary judgment in favor of Abood Wood Fay on Count I pursuant to Fla. R. Civ. P. 1.150(f).

At the hearing, the trial court granted summary judgement on the breach of contract claim (Count I) because according to the court – "you are stuck with the clear text of the language in the Commission Agreement and that transaction (singular) did not close." However, the trial court's finding that the Amended Commission Agreement was clear and the closing of the transaction described in the Purchase Agreement, as amended, did not occur is just plain wrong and contrary to the record evidence. The record evidence did not support Defendants' contentions that by signing the Amended Commission Agreement Abood Wood Fay altered the terms under which Abood Wood Fay would be owed a commission and Abood Wood Fay was no longer entitled to a commission for a closing pursuant to any back-up plan because the Purchase Agreement was premised entirely on a statutory plan of termination. Instead, the record evidence detailed in the factual section of this Brief actually supports a contrary finding that (i) Abood Wood Fay was entitled to a commission under the Amended Commission Agreement if the transaction closed under the terms of the Purchase Agreement, **as amended**, (ii) the Purchase Agreement, **as amended**, contemplated and provided for a possible closing of the transaction via the purchase of individual units (the back-up plan), and (iii) as such the transaction did close, triggering Abood Wood Fay's entitlement to the agreed

upon reduced $1 million commission under the Amended Commission Agreement. Accordingly, Defendants' request for summary judgment on Count I should have been denied and summary judgment should have been granted in favor of Abood Wood Fay on Count I.

Furthermore, at page 10 of Defendants' Motion for Final Summary Judgment [R. 11340] Defendants concede that Abood Wood Fay would have been entitled to a Commission under the FLT Commission Agreement "for closing on less than complete portions therein or pursuant to any "backup plan".[4] The Amended Agreement Commission Agreement did nothing to change that entitlement because the possibility of having to buy individual units was now specifically being addressed and included in the Purchase Agreement, **as amended**. Accordingly, it was not necessary to carry forward and use the same language ("successfully close on the purchase of the Property or a portion of the interests therein,") in the Amended Commission Agreement that had been previously used in the FLT Commission Agreement. Bottom line – as part of the transaction, the Purchase Agreement, **as amended**, contemplated the possibility of purchasing

[4] Specifically, the Motion states: "[the Amended Commission Agreement] no longer included Colliers being entitled to a commission for closing on less than the complete portions therein or pursuant to any 'back up plan', as Mr. Fay called it." (emphasis added).

individual units to obtain the approval and if that was done (as it was done in this instance), Abood Wood Fay would be and is entitled to its commission under the terms of the Amended Commission Agreement because the transaction described in the Purchase Agreement, **as amended,** closed. Abood Wood Fay never agreed to expressly limit its sole right to compensation to if and when a closing on the Dezer Purchase Agreement occurred, meaning a closing under the plan of termination. Instead, the Amended Commission Agreement refers to the Purchase Agreement, **as amended**, that contemplated the possibility of purchasing individual units to obtain the approval and if that was done (as it was done in this instance), Abood Wood Fay would be and is entitled to its commission because the transaction described in the Purchase Agreement, **as amended,** closed.

At a minimum there is ambiguity as to whether the reference to "transaction" in the Amended Commission Agreement was intended to reference a singular transaction to the exclusion of the back-up plan under which individual units would be purchased.[5] On this issue, Michael Fay

[5] "A contract is ambiguous when its language is reasonably susceptible to more than one interpretation, or is subject to conflicting interests." *Real Estate Value Co., Inc. v. Carnival Corp.,* 92 So.3d 255, 260 (Fla. 3d DCA 2012) (quoting *Pan Am. W., Ltd. v. Cardinal Commercial Dev., LLC,* 50 So.3d 68, 71 (Fla. 3d DCA 2010)); *Miller v. Kase*, 789 So.2d 1095, 1097–99 (Fla. 4th DCA 2001) ("where [a] contract is susceptible of two different

repeatedly testified in his Declaration (which was unrefuted) that the intention was and always had been that Abood Wood Fay would be entitled to its commission in the event a back-up plan to buy individual units was pursued. This position is also further supported by Mr. Fay's unrefuted testimony that Matt Allen (Chief Operating Officer for Related) indicated they were going to have to buy the individual units and that the commission would be paid over a period of time as the units closed. Additionally, the Amended Commission Agreement was drawn up by the attorneys for Dezer Laroche and as such should be construed against the Defendants. *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) ("An ambiguous term in a contract is to be construed against the drafter."). This is in addition to the requirement that the evidence be viewed "in the light most favorable to the non-moving party." *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000). The trial court improperly overlooked this unrefuted evidence to arrive at its erroneous conclusion to support its granting of summary judgment as to Count I. Furthermore, Summary Judgment as to Count I should have been denied and the issue concerning the intention of the parties as to whether "transaction" as used in the Amended Commission Agreement was intended

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interpretations, each one of which is reasonably inferred from the terms of the contract, the agreement is ambiguous").

to reference a singular transaction pursuant to a plan of termination to the exclusion of the back-up plan to buy individual units to obtain control over and acquire the condominium property so it could be demolished should have been left for the trier of fact to decide . *S & T Anchorage, Inc. v. Lewis*, 575 So. 2d 696, 699 (Fla. 3d DCA 1991) ("[W]here the terms of the instrument are ambiguous, casting doubt upon the intent of the parties, this intent must be determined by the trier of fact and is not to be determined upon a motion for summary judgment.").

II. SUMMARY JUDGMENT IS NOT APPROPRIATE ON COUNT II FOR UNJUST ENRICHMENT[6]

A. There is no special contract that precludes Plaintiff's procuring cause argument and claim for unjust enrichment based on the acquisition of the Condominium through the purchase of individual units.

In the Order, the trial court incorrectly concludes that the Amended Commission Agreement was an express special contract between Plaintiff and Dezer Laroche and its assignee, RDR barring the claim for unjust enrichment. The incorrectness of this conclusion is inescapable, given the Court's ruling on Count I. More specifically, the underlying premise for the trial court's ruling as to Count I is that for Abood Wood Fay to earn its

[6] Plaintiff withdrew its request for the imposition of equitable lien under Count II of its Amended Complaint.

commission under the Amended Commission Agreement there would need to have been the closing of a single transaction pursuant to a plan of termination and that because there were a series of individual purchases, the transaction under the Amended Commission Agreement did not close. Furthermore, according to Defendants and the trial court, the only transaction that would trigger a commission under the Amended Commission Agreement was a sale in accordance with a Plan of Termination. However, Count II seeks relief not based on the acquisition of the property via a plan of termination but based on the claim that Abood Wood Fay was the procuring cause of the acquisition of the property through the purchase of individual units. As such, in accordance with the reasoning applied by the trial court in granting Summary Judgment on the Breach of Agreement claim, the subject matter of the Unjust Enrichment claim (the purchase of individual units) was not part of the Amended Commission Agreement (the purchase though a plan of termination). Therefore, the procuring clause claim based on the purchase of the individual units does not supersede the intent of the parties to the Amended Commission Agreement (*see Eslinger-Wooten-Maxwell, Inc. v. Lones Family Limited Partnership*, 298 So. 3d 1176, 1180 (Fla. 3d DCA 2020)) and the Amended Commission Agreement cannot serve as a special contract barring relief

based on the Unjust Enrichment claim. Simply stated – the subject matter and scope of the special contract (the Amended Commission Agreement) is not the same as the subject matter and scope of the unjust enrichment/procuring cause claim. As such the trial court erroneously concluded that the Amended Commission Agreement was an express special contract that barred Plaintiff's claim under Count II for unjust enrichment. Accordingly, the Motion for summary judgment as to Count II should have been denied. Given the Court's ruling on Count I, and the unjust enrichment claim should have survived and the granting of summary judgment as to Count II was error.

Furthermore, the Court's reliance on *Eslinger-Wooten-Maxwell, Inc. v. Lones Family Limited Partnership*, 298 So. 3d 1176 (Fla. 3d DCA 2020) to support its ruling on the Unjust Enrichment claim is misplaced. In that case the listing "agreement explicitly limited EWM's right to recover a commission for any sale or lease of the property for a specified period." *Eslinger* at 1180. However, in the instant case, there is nothing in the Amended Commission Agreement that explicitly limits Abood Wood Fay's rights to seek the payment of a commission based on the purchase of individual units. As such, there is no superseding contractual provision, *Real Capital Partners, LLC v. Alhambra Ctr. Int'l, Ltd.*, 49 Fla. L. Weekly D1084 (Fla. 3d DCA May 22,

2024). Accordingly, the Amended Commission Agreement is not a special contract and "Florida law dictates that [i] the absence of a special contract, a broker is entitled to a commission where that person is the procuring cause of a sale." *Eslinger* at 1180 (internal quotes and citations omitted).

B. The express contract does not preclude the unjust enrichment claim

"The Florida Rules of Civil Procedure clearly permit a plaintiff to state causes of action in the alternative. *See* Fla. R. Civ. P. 1.110(g) (noting that a party may state as many separate claims as that party has, "regardless of consistency and whether based on legal or equitable grounds or both*"); see also Johnson v. Dep't of Health & Rehab. Servs.*, 695 So.2d 927, 930 (Fla. 2d DCA 1997) (stating that a party may assert inconsistent claims in the same pleading even when the claims are mutually exclusive)." *Haskel Realty Group, Inc. v. KB Tyrone, LLC*, 253 So. 3d 84, 86 (Fla. 2d DCA 2018) (reversing order of dismissal of complaint alleging breach of contract, unjust enrichment and quantum meruit rejecting argument that unjust enrichment and quantum meruit were negated by allegations of an express agreement).

Because the theory of unjust enrichment is equitable in nature, it is not available where there is an adequate legal remedy such as on a valid written contract. *Bowleg v. Bowe*, 502 So. 2d 71, 72 (Fla. 3d DCA 1987). However, in the instant case the validity or applicability of the express contract has

been contested, the Plaintiff's ability to recover under Count I has been denied and the scope and subject matter of the unjust enrichment claim and the Amended Commission Agreement are not the same. Accordingly, the unjust enrichment claim is available as an alternative to the relief sought under Count I.

C. Plaintiff did confer a benefit and was the procuring cause

Unjust enrichment is based on a finding that an implied contract to pay for services existed or that the broker was the procuring factor in the sale. *Daniel Levine & Co., Realtors v. Beach Enterprises, Ltd.*, 549 So. 2d 1131, 1132 (Fla. 3d DCA 1989). When the payment of a broker's commission is an obligation to be discharged by the purchaser, the broker's commission became part of the price to be paid by the purchaser and the commission is earned once the broker has performed by procuring the purchaser irrespective of whether the sale is made to a party with a right of first refusal. *City Nat. Bank of Miami Beach v. Lundgren*, 307 So.2d 870, 872 (Fla 3d DCA 1975). In a claim for unjust enrichment – to be procuring cause must have brought the parties together and effected the sale. *Media Services Group, Incorporated v. Bay Cities Communications, Inc.*, 237 F.3d 1326 (11th Cir. 2001) (broker sued alleging breach of contract as well as unjust enrichment and quantum meruit).

The question of procuring cause is a question of fact to be determined from the surrounding circumstances. *Easton-Babcock & Assocs. V. Fernandez*, 706 So.2d 916 (Fla. 3d DCA 1998). In the instant case, Plaintiff initiated the negotiations, performed valuations, worked with the parties involved and attended several meetings. Plaintiff brought buyer and seller together which led to the FLT Agreement and the subsequent exercise of the right of first refusal by Dezer Laroche which then led to the acquisition of the property (albeit via individual purchases of the units but an acquisition of the property nevertheless). Plaintiff set in motion the events leading up to RDR's acquisition of the Property. The evidence supports the inference that Abood Wood Fay was intentionally excluded by Defendants from participating in any negotiations that may have taken place with any of the individual unit owners. There is sufficient evidence to support a finding of procuring cause by the trier of fact.

Additionally, Defendants cannot avoid liability for the payment of the commission on the grounds that there was a lack of capacity to convey title. *Chastain v. Carroll*, 307 So.2d 491 (Fla. 2d DCA 1975). The condition of title to real property and the inability to make a valid contract to sell the property does not affect and does not determine the liability for the payment of the broker commission. *Keyes Co. v. Moscarella*, 223 So.2d 83 (Fla. 3DCA

1969). A broker has a right to a commission despite the sale not being consummated because of a serious defect in the title. *Hardin- Lowrey Realty Co. v. Hine*, 213 So.2d 308 (Fla. 2d DCA 1968).

As detailed above, the evidence is such that a reasonable jury could return a verdict for the Plaintiff on its claim for unjust enrichment, Defendants failed to meet their burden of showing that there is an absence of evidence to support Plaintiff's claim for unjust enrichment and accordingly the Motion seeking summary judgment as to Count II should have been denied.

CONCLUSION

For the reasons detailed above, Defendants failed to meet their burden of showing that there is an absence of evidence to support Plaintiff's claims for Breach of Agreement (Count I) and Unjust Enrichment (Count II). The evidence is such that a reasonable jury could return a verdict for the Plaintiff on these claims. Accordingly, the Defendants' request for summary judgment should have been denied and the trial court committed a reversible error in granting summary judgment. Furthermore, pursuant to Fla. R. Civ. P. 1.150(f), the trial court should have granted summary judgment in Plaintiff's favor on Count I and committed error by failing to do so.

For the foregoing reasons, the Court should reverse the Final Judgment and generally remand this case to the Trial Court or remand with

instructions to enter summary judgment in favor of Abood Wood Fay on Count I in an amount to be determined in accordance with further proceedings to be conducted by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2024, a true and correct copy of the foregoing was filed through the Third District Court of Appeal eDCA ePortal System and served via email on counsel for the appellant, Susan E. Raffanello, Esq. at sraffanello@coffeyburlington.com, lmaltz@coffeyburlington.com.

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<u>CERTIFICATE OF COMPLIANCE</u>

The undersigned certifies that this answer brief has been generated in Ariel 14-point font in compliance with Rule 9.045 of the Florida Rules of Appellate Procedure. The undersigned further certifies that this answer brief complies with the word count requirement of Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure because it contains 6,495 words, not including the cover page, table of contents, table of citations, certificate of compliance, certificate of service, and all signature blocks.

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