IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

APPEAL NO. 3D23-642

OLIVA'S HOME CORP,

PLAINTIFF-Appellant,

v.

DECO TRUSS CO. INC

DEFENDANT-Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI–DADE COUNTY, FLORIDA
LOWER TRIBUNAL CASE NO. CACE-2021-017934-CA-01

APPELLEE'S ANSWER BRIEF

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DECO'S ANSWER TO OLIVA'S INITIAL BRIEF

A. Introduction and Statement of the Facts

This appeal arises from Oliva's failure to present admissible evidence in response to Deco's Motion for Summary Judgment (the "Motion"), which would support its claim that Deco made negligent misrepresentations resulting in damages to Oliva or at a minimum which would create a genuine dispute as to whether negligent misrepresentations were made by Deco to Oliva. (R. 1,781-1,836). The crux of Oliva's argument on appeal is that the trial judge failed to weigh the evidence along with any reasonable inferences therefrom in the light most favorable to Oliva as the non-moving party. Oliva, however, failed to recognize that future promises do not constitute misrepresentations. Second, Oliva failed to present *any* contradictory or conflicting statements or evidence for the trial court's consideration. As a result, Oliva's conclusion that Deco lacked the intent to abide by its future representations to Caribbean – without pointing to actual disputed facts in the record – is just argument and not enough to create an issue of material fact. *See Citizens Prop. Ins. Corp. v. Zamanillo*, 3D22-1564, 2024 WL 172611 (Fla. 3d DCA Jan. 17, 2024) citing to *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 193 (Fla. 2020) ("If the evidence [presented by the nonmovant] is merely colorable, or is not significantly probative, summary judgment may be granted.") (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

"The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. To the contrary, the evidence that Oliva did assert would only support a finding by a reasonable juror that Deco at all times abided by its representations to Caribbean and Oliva.

The following facts are undisputed. On March 24, 2020, Deco provided Caribbean, Oliva's contractor, with a proposal for roof trusses for the Project. (R. 1166, 961). The proposal was not executed by Caribbean and, at the request of Caribbean, Deco sent a second proposal on July 29, 2020. (R. 961). The July 29, 2020 proposal was accompanied by a written list of specific steps to be followed for the fabrication of the trusses, to wit: (1) the execution of the proposal by Caribbean and its return to Deco; (2) Caribbean issuing payment to Deco for the deposit amount required by the proposal; (3) upon receipt of the deposit Deco proceeds to prepare the preliminary truss plans to be provided to Caribbean within 1 to 2 weeks; (4) Caribbean's review, approval and/or revisions and return of the Deco preliminary plans to Deco; (5) upon receipt Deco prepares the final truss plans, including any revisions made to the preliminary plans by Caribbean to then be sent back to Caribbean for approval; (6) once Deco receives the final approved plans and final payment only then does Deco proceed with truss production which per the proposal is to take 6-7 weeks. (R. 961-962, 970-971, 1166-1167). The proposal also indicates

that unless it is accepted on or before 30 days from the date it was issued, Deco cannot guarantee prices and/or desired delivery date. (R. 971, 1174). Caribbean executed the proposal on September 1, 2020. (R. 962, 974, 1167). The contractually required deposit was not provided to Deco until November 17, 2020. (R. 963, 984). Deco provided Caribbean and Oliva with the preliminary plans on December 4, 2020 (R. 963). Yet, as of February 25, 2021, Deco had not yet received the revisions approved by Caribbean. (R. 963-964, 993). On March 4, 2021, Deco submitted a change order for $4,650.00 to account for an increase in the size of certain trusses from 8" to 12" which Oliva's engineer attributed to a drafting error but did not specify whose error it was. (R. 1232). Deco did not receive the final payment until March 25, 2021. (R. 964, 995). Deco delivered the trusses on April 14, 2021. (R. 964, 1171).

B. Argument

I. THIS COURT SHOULD AFFIRM SUMMARY JUDGMENT FOR DECO BECAUSE THE EVIDENCE IS SUCH THAT NO REASONABLE JURY COULD RETURN A VERDICT FOR OLIVA ON ITS NEGLIGENT MISREPRESENTATION CLAIM.

Pursuant to Florida law, a negligent misrepresentation claim requires the plaintiff to prove that: (1) the defendant made a misrepresentation of an existing material fact that he believed to be true but which was in fact false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely on

the misrepresentation; and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation. *See Beaver v. Inkmart, LLC*, 12-60028, 2012 WL 3822264, at *4 (S.D. Fla. Sept. 4, 2012) (applying Florida law).

The alleged misrepresentation, however, cannot be predicated on statements or promises of future action, but rather must be based on a statement concerning a past or existing fact. *See Mejia v. Jurich*, 781 So .2d 1175, 1177 (Fla. 3d DCA 2001); *Rothis v. M&I Marshall & Isley Bank*, 8:10-CV-446-T-23EAJ, 2010 WL 3893960, at *5 (M.D. Fla. Sept. 29, 2010) (applying Florida law to dismiss a negligent misrepresentation claim based on alleged representations concerning the future value of real estate prices).

Here, the alleged misrepresentations concern; (1) the preparation of preliminary truss plans and; (2) the delivery of the trusses to the jobsite. As to the preparation of the plans, the July 29, 2020 Deco email to Caribbean asserts that the preliminary plans <u>will be</u> provided within 1 to 2 weeks of Deco receiving the deposit required by the Contract. (R. 961-962, 970-971, 1166-1167). That statement is not actionable because it is a promise of future action – i.e. Deco's delivery of the preliminary plans within 1 to 2 weeks after receiving the deposit payment. Even if the statement was actionable, Oliva failed to present any evidence to support that Deco did not substantially comply with its promise. It is undisputed that Deco received the deposit on November 17, 2020, and that Deco provided the preliminary

plans on December 4, 2020, 17 days later but including the Thanksgiving holiday (R. 963, 984). Oliva also failed to present any evidence of having suffered any injury in justifiable reliance upon the alleged misrepresentation. According to Oliva, Deco should have provided preliminary plans within 1-2 weeks of signing the contract because that is what Oliva claims Deco represented. Yet, the Contract is clear that payment is required before Deco prepares and delivers the preliminary plans to Oliva.

The same legal principle applies to the alleged misrepresentation concerning the delivery date for all of the trusses. The Deco February 25, 2021 email to Caribbean, not Oliva, states that the trusses will be manufactured by March 8th, subject to the engineer's review and approval of the truss plans. (R. 963-964, 993). Clearly, the statement is nothing more than Deco asserting what it will do in the future conditioned on the approved plans arriving on time. Nowhere does the statement implicate a known or existing fact. The trusses delivery date is simply not a misrepresentation. Additionally, Oliva again did not point to any evidence to support the possible conclusion that Deco knew the trusses delivery date was false from the outset. Instead, Deco provided undisputed evidence that the trusses delivery timeframe of 6 to 7 weeks was conditioned on several triggers, the last one being the receipt of final payment. It is undisputed that Deco received final payment on March

25, 2021. It is undisputed that Deco delivered the trusses to the Project on April 14, 2021 – 20 days later. (R. 964, 1171).

Oliva, on the other hand, argues on appeal that the misrepresentation stems from the finalized drawings being provided to Deco on or about January 28, 2021. Yet, Oliva provided no evidence of this in its response to the summary judgment motion. Furthermore, Oliva simply ignores that it failed to pay Deco the final payment until March 20, 2021, which was also a trigger for Deco to manufacture the trusses. Finally, Oliva did not present any evidence to establish that it justifiably relied to its detriment upon the representation that the trusses would be manufactured by March 8, 2021, especially since it did not make the final payment until March 20, 2021.

In *Stoler v. Metropolitan Life Ins. Co*., 287 So.2d 694 (Fla. 3d DCA 1974), the plaintiff filed a negligent misrepresentation claim alleging the defendants promised to manage plaintiff's pension plan but that such managerial duties were never performed. This Court held the management of plaintiff's pension plan involved promises of future performance and therefore the complaint failed to set forth an actionable misrepresentation, and ultimately affirmed the trial court's dismissal of the complaint. *See also Kahama VI, LLC v. HJH, LLC*, 8:11-CV-2029-T-30TBM, 2013 WL 6511731, at *5-7 (M.D. Fla. Dec. 12, 2013) (dismissing

fraudulent and negligent misrepresentation claims where the statements concerned a promise of future action regarding the outcome of litigation).

Recognizing that its misrepresentation theory of liability is lacking legal and factual support, Oliva alternatively argued the exception to the future promise doctrine. That is, a future promise is actionable if Oliva demonstrates that Deco knew the promise was false. Oliva reasoned that since it took Deco much longer to complete the trusses than 6 to 7 weeks, Deco knew the 6-to-7-week truss delivery timeframe was false when made. Yet, in coming to this superficial conclusion Oliva ignores the obligations imposed on it by the Contract that triggered the start of Deco's time to deliver the preliminary plan and time to deliver the trusses. It took Oliva over 30 days to sign the July 29, 2020, Proposal, more than 45 days to issue the deposit (Nov. 17, 2020), yet Deco prepared and returned the preliminary plans on Dec. 4, 2020. On February 25, 2020, it was Deco who followed up with Caribbean on the status of the approval of the preliminary plan and reconfirming what was set forth in the Contract, i.e., that Deco requires the final payment before it begins to manufacture the trusses. In fact, Deco's February 25, 2021 correspondence confirms that a March 8, 2021 delivery was still doable if no more changes were made, the preliminary plan was approved, and final payment was received immediately. Oliva did not make the final payment until March 25, 2021. Oliva did not present any evidence that Deco lacked the intent to honor its representations, nor did it present

any evidence that Deco failed to honor its representations. Oliva cites email after email from Deco to somehow suggest that if the emails are interpreted to mean something other than what they say, inferences of mal intent can be drawn from them. (R.1396-1398). In fact, the evidence presented only confirms Caribbean and Oliva's unexplained delays.

Oliva also attempts to argue that Deco made negligent misrepresentations under a second exception to Florida's negligent misrepresentation pleading requirement, which requires the plaintiff to show that the person expressing the opinion is one having superior knowledge of the subject of the statement and that the person knew or should have known from facts in his or her possession that the statement was false. But once again, Oliva provides no evidence of such knowledge, actual or constructive.

II. OLIVA'S NEGLIGENT MISREPRESENTATION CLAIM IS BARRED BY THE INDEPENDENT TORT DOCTRINE.

Oliva also alleged that Deco engaged in misrepresentation because its contract states that it would deliver the trusses within seven weeks, but Deco took longer. Conveniently, for purposes of this appeal though Oliva has failed to make mention of this allegation and instead says the misrepresentation was premised solely on email communications which included steps to Domestic Truss Orders. Oliva's Third Amended Complaint however speaks for itself. (R.827). Even if this Court were to consider only the representations made in the July 29, 2020 email and the

February 25, 2021 communication, in neither of those instances were the alleged misrepresentations made to Oliva, they were made to Caribbean who *was* in privity with Deco. (R. 961, 1166). In other words, Oliva has sought to couch a contract claim as a tort claim. Indeed, all the misrepresentations Deco allegedly made are the very same promises included in the Contract and promises made to Caribbean, NOT Oliva. It is too obvious to recite. However, it is hornbook Florida law that "[a] breach of contract, alone, cannot constitute a cause of action in tort." *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.,* 110 So. 3d 399, 408 (Fla. 2013) (Pariente, J., concurring) (quoting *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.,* 482 So. 2d 518, 519 (Fla. 3d DCA 1986) ("[a] breach of contract alone, cannot constitute a cause of action in tort,") ("[w]hen the parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort"); *Certain Underwriters at Lloyd's of London, UK Subscribing to Pol'y No. B1230AP56189A14 v. Ocean Walk Resort Condo. Ass'n. Inc.,* 6:16-cv-258-Orl-37GJK, 2017 WL 3034069 (M.D. Fl 2017) (Applying Florida law, the Middle District rejected a negligence claim based upon the independent tort doctrine because "the alleged tort claim cannot stem from a contractual relationship between the parties"); *Spears v. SHK Consulting and Development, Inc.,* 338 F. Supp.3d 1272 (M.D. Fla. 2018) ("it is well settled that a plaintiff may not recast causes of action that are otherwise breach-of-contract claims

as tort claims"). Here, because the alleged misrepresentations stem from statements made as part of the contract between Deco and Caribbean, the only true actionable claim is that of breach of contract. As Oliva's negligent misrepresentation claim is barred by the independent tort doctrine, the trial court correctly granted summary judgment in Deco's favor.

C. Conclusion.

For the reasons set forth herein, this Court should affirm the trial court's order granting final summary judgment for Deco for all the claims alleged in Plaintiff's Third Amended Complaint.[1]

[1] Oliva in footnote 2, page 1 of its appellate brief, confirms that it is not challenging the trial court's entry of final summary judgment for Deco on Oliva's FDUPTA claim.

CERTIFICATE OF COMPLIANCE WITH
FLORIDA RULE OF APPELLATE PROCEDURE 9.210

I certify that this Brief complies with the requirements set forth in Florida Rule of Appellate Procedure 9.210.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2024, a true and correct copy of the foregoing was electronically filed with the Clerk of Courts through its E-Filing Portal and served via email through the E-Filing Portal to:

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