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

CASE NO. 3D2024-0264
L.T. NO. 18-3917-CA

SEPTENTRIONA DOMUS, LLC,
MERIDIANA DOMUS LLC, JEAN-PAUL CHARLES
AND THIERRY GOIX,
Plaintiffs/Appellants

v.

KEYSTONE PROPERTY MANAGEMENT, INC.,
AND JOAN BENNETT,
Defendants/Appellee,

APPELLANTS
SEPTENTRIONA DOMUS, LLC,
MERIDIANA DOMUS LLC, JEAN-PAUL CHARLES
AND THIERRY GOIX,
INITIAL BRIEF

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PRELIMINARY STATEMENT

Throughout this Initial Brief, Appellants will be referred to as "Plaintiffs" and Appellees will be referred to as "Defendants." References to pages of the Record will be labeled "R."

STATEMENT OF THE CASE

Plaintiffs appeal from the entry of summary judgment in favor of Defendants and the failure of the lower court to reconsider its summary judgment order.

I. PARTIES

Appellant JEAN-PAUL CHARLES is an individual who is a French national residing in France.

Appellant THIERRY GOIX is an individual who is a French national residing in France.

Appellant, SEPTENTRIONA DOMUS, LLC, is a Florida limited liability company created by GOIX and CHARLES with the assistance

of Defendants to purchase investment properties in or near Detroit, Michigan.

Appellant, MERIDIANA DOMUS, LLC, is a Florida limited liability company created by GOIX and CHARLES with the assistance of Defendants to purchase investment properties in or near Atlanta, Georgia.

Appellee, KEYSTONE PROPERTY MANAGEMENT, INC. is a Florida corporation that was involved in the creation and management of the Defendant entity in the underlying action, Keystone Morgan Real Estate and Property Management, LLC.

Appellee JOAN BENNETT is an individual residing in Florida who is the owner and manager of KEYSTONE PROPERTY MANAGEMENT, INC. and was involved in the creation and management of the Defendant entity in the underlying action, Keystone Morgan Real Estate and Property Management, LLC.

II. FACTS

1. Plaintiffs Jean-Paul Charles ("Charles") and Thierry Goix ("Goix") are residents of France who primarily speak French (R. 1863).

2. Defendant Joan Bennett ("Bennett") is a resident of Florida, is a Florida licensed realtor, and is the owner of Defendant Keystone Property Management, Inc. ("Keystone Property") (R. 1904; R. 1993).

3. Charles and Goix owned a vacation condominium in a building that was managed by Bennett through her company, Keystone Property, and knew Bennett from her management of the building (R. 1863; R. 1913).

4. In March of 2014, Charles and Goix asked Bennett about real estate investing in the United States as they were unfamiliar with such investing. Bennett wrote Charles and Goix an email stating that her and Defendant Bruno Cluzel ("Cluzel") were partners and owned Defendant Keystone Morgan Real Estate and Property Management, LLC, ("Keystone Morgan") and that they had an "incredible inventory" of well-managed rented properties for sale in Detroit and Atlanta (R. 1868).

5. Bennett further stated in the email that Cluzel would continue speaking to Charles and Goix as he spoke French (R. 1868).

6. Charles and Goix continued emailing with Cluzel about the properties offered by Keystone Morgan, and Cluzel sent photographs, descriptions, renovation details, financial spreadsheets showing that the properties were all allegedly profitable, in good repair, highly desirable, and being offered by Keystone Morgan at the best price possible (R. 1870; R. 1878).

7. Charles and Goix established Plaintiff Sepentriona Domus, LLC ("Septentriona") to purchase properties in Detroit, and used Plaintiff Meridiana Domus, LLC ("Meridiana") to purchase Atlanta properties (R.1870).

8. In April 2014, Bennett became the registered agent for both Septentriona and Meridiana (R. 1881; R. 1882).

9. Bennett instructed Charles and Goix to transfer funds to a Keystone Property bank account managed by her to fund the purchase of the Keystone Morgan properties. (R. 1943)

10. Bennett furnished Plaintiffs with all of the closing documents to buy the properties and signed several documents to complete the transactions (R. 1871).

11. Bennett required that Charles and Goix agreed to Keystone Morgan managing the properties and provided them with a contract to sign stating same (R. 1871; R. 1884).

12. Bennett repeatedly asked Plaintiffs for additional funds to supposedly make repairs to the properties (R. 1865).

13. Charles repeatedly asked Bennett for information regarding the financial state of the subject properties. (R. 887; R. 888)

14. After not receiving proper information from Bennett for months, Plaintiffs terminated the management agreement in 2015 (R. 1866).

15. Charles and Goix flew to the United States to see the properties that Bennett and Cluzel had convinced them to purchase and found that they were mostly vacant, in severe disrepair, in dangerous neighborhoods, and that their value had been overstated (R. 1866).

16. Public property records show that many of the properties were purchased by Keystone Morgan or companies owned by Bennett or Cluzel mere days before they were sold to Plaintiffs for up to five times the Defendants' purchase price (R. 1888 – R. 1897)

17. Charles and Goix decided to sell the Atlanta properties and also decided to donate the Detroit properties to a non-profit organization as they were in major disrepair and posed a severe liability that Plaintiffs could not manage from France (R. 1866; R. 786 – R. 836; R. 841 – R. 867).

III. THE PROCEEDINGS

On February 8, 2018, Plaintiffs filed a Complaint against Defendants and three other parties, Keystone Morgan Real Estate and Property Management, LLC, Morgan Stachs, LLC, and Bruno Cluzel (R. 35) alleging that defendants had collectively engaged in a scheme to deceive Plaintiffs regarding real property in Detroit and Atlanta, convincing Plaintiffs to purchase same. On January 23, 2019, Defendants filed a Motion to Dismiss the Complaint (R. 82),

which was granted as to Bennett and denied as to Keystone on February 7, 2019 (R.94). On February 27, 2019, Plaintiffs filed an Amended Complaint amending the claims against Bennett (R. 96). On May 6, 2019, Defendants filed separate Answers and Affirmative Defenses to the Amended Complaint (R.122, R. 132).

On April 11, 2019, an Order of Default was entered against Keystone Morgan Real Estate and Property Management, LLC and Morgan Stachs, LLC (R. 119). On March 16, 2022 an Order of Default was entered against Bruno Cluzel (R. 271). On December 15, 2022 a Default Final Judgment was entered against Keystone Morgan Real Estate and Property Management, LLC, Morgan Stachs, LLC, and Bruno Cluzel (R. 305).

On March 17, 2023 Defendants moved to amend their Answers and Affirmative Defenses to the Amended Complaint (R. 339), less than two months before this matter was scheduled for trial. On April 24, 2023, a week before the trial period was set to commence, Defendants filed an emergency motion for continuance (R. 424). Defendants' motion was granted with the understanding that the

case would essentially be stayed for three months for the reasons elaborated in the motion (R. 436). Defendants' motion for leave to amend was subsequently granted over Plaintiffs' objections on June 20, 2023 (R. 438). Plaintiffs moved to strike Defendants' amended affirmative defenses on July 11, 2023 (R. 452). On July 14, 2023, Defendants filed the Motion for Summary Judgment at issue (R. 521). On October 5, 2023, Plaintiffs' Motion to Strike Defendants' Amended Affirmative Defenses was granted in part, providing Defendants leave to amend their affirmative defenses with the remaining defenses that were not stricken (R. 1645). On November 7, 2023, Plaintiffs filed their Response in Opposition to Defendants' Motion for Summary Judgment (R. 1663) and a Motion for Extension of Time requesting additional time to file exhibits to the Response (R. 1666). On November 13, 2023, Plaintiffs filed their Amended Response in Opposition to Defendants' Motion for Summary Judgment (R. 1852).

On November 27, 2023, the lower court heard Defendants' Motion for Summary Judgment and without stating any findings of fact at the hearing, verbally granted the Motion in favor of Defendants. As there were no findings of fact stated at the hearing,

Plaintiffs filed a Motion for Clarification on January 7, 2024 (R. 2038), and the parties submitted competing proposed orders on the granted summary judgment to the Court. The Motion for Clarification was not responded to or adjudged, and on January 9, 2024 the court entered the Order granting summary judgment, as provided and proposed by Defendants (R. 2157). On January 17, 2024, Defendants moved for the entry of a Final Judgment in their favor (R. 2071), which was entered on the same day. On February 1, 2024, Plaintiffs filed a Motion for Rehearing (R. 2142). On February 7, 2024, the court denied the Motion for Rehearing without hearing.

This appeal followed.

SUMMARY OF ARGUMENT

Summary judgment is not proper on the Motion for Summary Judgment filed by Defendants and the evidence in the record on Plaintiffs' Amended Complaint counts directed towards them. The lower court therefore erred in entering summary judgment in favor of Defendants, entering final judgment for Defendants, and denying Plaintiffs' Motion for Rehearing.

Defendants' Motion for Summary Judgment is largely an improper and irrelevant diatribe claiming that Plaintiffs' Amended Complaint is improperly pled, that the parties had lengthy discovery disputes that Plaintiffs should be punished for, and that Defendants disagree with any and all claims asserted by Plaintiffs. In the few actual legal arguments made that may have been appropriate on summary judgment, Defendants assert erroneous interpretations of law and circular arguments to state their entitlement to summary judgment.

For example, Defendants incorrectly assert, among other erroneous legal and factual arguments, that:

1) A fraudulent inducement claim requires that Plaintiffs demonstrate that they "justifiably" relied on Defendants false statements;
2) A breach of fiduciary duty claim requires that Plaintiffs show a contractual agreement by Defendants to assume the duty;
3) Florida's Deceptive and Unfair Trade Practices Act does not apply to commercial transactions;

4) A negligent misrepresentation claim requires that Plaintiffs demonstrate Defendants' assumption of a duty of trust; and
5) Defendants are entitled to summary judgment based on a stricken affirmative defense.

None of these arguments, that are at the heart of Defendants' Motion, have legal merit, as they are contradicted in their entirety by prevailing case law.

Further, the record evidence, when viewed in a light most favorable to Plaintiffs, as is proper at this juncture, demonstrates that Plaintiffs claims are viable and are appropriate for determination by a jury. Defendants, however, essentially assert that summary judgment should be entered as a type of sanction towards Plaintiffs for alleged pleading and discovery deficiencies and not on the actual legal and factual merits of the case.

The Motion for Summary Judgment therefore did not reach Defendants' burden of proving that there was no genuine issue of material fact, and that the applicable law was in their favor. On this appeal, the Motion for Summary Judgment should be denied, and

this matter should be remanded accordingly to prevent violation of due process and blatantly erroneous application of law in the trial court. In the alternative, the entire Motion should be remanded for rehearing based on Plaintiffs' Motion for Rehearing that pointed out these deficiencies in the subject Order.

STANDARD OF REVIEW

I. SUMMARY JUDGMENT

On appeal, a trial court's entry of summary judgment is reviewed *de novo*. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *Castro v. Citizens Prop. Ins. Corp.*, 365 So. 3d 1203 (Fla. 3d DCA 2023).

II. REHEARING

The standard of review on appeal of a motion for rehearing is abuse of discretion. *Villas at Laguna Bay Condo. Assn. Inc. v. Citimortgage, Inc.*, 190 So.3d 200 (Fla. 5th DCA 2016). However, when the motion only addresses issues of law, the standard of review

is *de novo*. *Randall v. Walt Disney World Co.*, 140 So.3d 1118, 1119–20 (Fla. 5th DCA 2014) (quoting *Mistretta v. Mistretta*, 31 So.3d 206, 208 (Fla. 1st DCA 2010); *Bank of Am., N.A. v. Eastridge*, 253 So. 3d 722 (Fla. 5th DCA 2018); *Zahav Refi LLC v. White Hawk Asset Mgmt.*, Inc., 2D2023-0072, 2024 WL 1669520 *2 (Fla. 2d DCA Apr. 17, 2024).

ARGUMENT

I. INTRODUCTION

Plaintiffs' action against Defendants and their associates alleges in five counts that Defendants engaged in improper tactics in coordinating the sale of ten (10) "investment" properties in Detroit and Atlanta to Plaintiffs. Plaintiffs allege that Defendants engaged in fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and deceptive and unfair trade practices.

Defendants' Motion for Summary Judgment essentially asserts legal argument that Plaintiffs did not plead these counts correctly

and as such Defendants are entitled to summary judgment. Alleged pleading deficiencies are **not** a proper basis for summary judgment. Defendants further assert that their discovery efforts were "thwarted" and they are therefore entitled to summary judgment. Alleged discovery disputes are **not** a proper basis for summary judgment. The Defendants also argue an affirmative defense that was stricken by the lower court. A stricken affirmative defense is no longer a valid defense and therefore is **not** a proper basis for summary judgment. The remainder of Defendants' legal arguments are made without proper supporting case law. Defendants are therefore not entitled to summary judgment as a matter of law on the motion made.

II. SUMMARY JUDGMENT GENERALLY

To prevail on their motion for summary judgment, Defendants must conclusively show the absence of any genuine issue of material fact and the non-existence of any genuine triable issues in this matter. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1996). The burden is not shifted to the Plaintiffs until the Defendants have successfully met

this burden. *Id.*; *Serrano v. Citizens Prop. Ins. Corp.,* 368 So. 3d 1064 (Fla. 3d DCA 2023).

In ruling on Defendants' summary judgment motion, evidence must be viewed in the light most favorable to the Plaintiffs. *See Luckman v. Wills*, 306 So. 3d 990, 993 n.2 (Fla. 3d DCA 2020); *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000); *Rodriguez v. Cent. Florida Equip. Rentals, Inc.,* 321 So. 3d 382, 383 (Fla. 3d DCA 2021). "Summary judgment may not be used as a substitute for trial. If the affidavits and other evidence raise any doubt as to any issue of material fact then a summary judgment may not be entered." *E. Qualcom Corp. v. Glob. Commerce Ctr. Ass'n*, 59 So. 3d 347, 350-51 (Fla. 4th DCA 2011).

Further, summary judgment would only be proper if Defendants showed that they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Finell v. Florida Ins. Guar. Ass'n, Inc.*, 4D2022-0378, 2024 WL 1543615 *2 (Fla. 4th DCA Apr. 10, 2024).

III. DEFENDANTS DID NOT ESTABLISH THEIR BURDEN ON ANY COUNT OR AFFIRMATIVE DEFENSE

A. Count I – Fraudulent Inducement

Plaintiffs' allegation in Count I of the Amended Complaint is that the defendants collectively, including Bennett and her company Keystone Property, fraudulently induced Plaintiffs into entering purchase agreements and management agreements for the subject properties for Defendants' financial gain by lying to Plaintiffs about the condition of the properties, the defendants' ability and intention to manage the properties, about the financial data of the properties, and about the true ownership of the properties.

Defendants, in their Motion for Summary Judgment memorandum of law, in summary, argue that:

a) Count I is pled insufficiently
b) The fact that there are purchase and management agreements negate the allegations.

Neither of these arguments is a proper legal basis for summary judgment.

Firstly, the sufficiency of the allegations of a complaint are determined on a motion to dismiss, not by summary judgment. *Scheuer v. Wille*, 385 So.2d 1076 (Fla. 4th DCA 1980); *Bowman v. Davies*, 586 So. 2d 1332, 1333–34 (Fla. 1st DCA 1991). Here, Defendants made the same arguments regarding the sufficiency of the pleadings in their Motions to Dismiss the Complaint, which led to the Amended Complaint. The Amended Complaint was answered by the Defendants. At summary judgment, therefore, these criticisms regarding the form of the pleadings are moot.

In regards to Defendants' second argument for summary judgment on Count I, it is clear that Plaintiffs are asserting that they were fraudulently induced into entering the purchase and management agreements of the subject properties. The existence of such agreements therefore does not negate the claim. The elements of fraudulent inducement are (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation. *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010).

Here, Bennett, from her Keystone Property email address, stated to Plaintiffs that her and her partners owned "incredible inventory" of rented properties that were well-managed (R. 1868), knowing that those statements were fabricated as she had no knowledge of same (R. 1924; R. 1939), and intending that Plaintiffs would be induced to act on these and further similar representations to those ends made about such properties.

Defendants' underlying argument appears to be that Plaintiffs should have investigated Defendants' untruthful statements prior to entering the agreements, however justifiable reliance is not an element of fraudulent misrepresentation. *Butler v. Yusem*, 44 So. 3d at 105. To the contrary, a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him. *Id.* This policy exists to prohibit one who purposely uses false information to induce another into a transaction from profiting from such wrongdoing. *Id.*

Notably, Defendants also do not prove that the statements made were true or that the statements were not made at all. Defendants therefore have in no way met their burden of establishing entitlement to summary judgment based on the facts or law, and summary judgment must be denied as to Count I.

B. Count II – Breach of Fiduciary Duty

Count II of the Amended Complaint asserts that the Defendants breached a fiduciary duty to Plaintiffs in knowingly selling them properties unfit for the investment Defendants knew Plaintiffs sought for Defendants' profit.

The Motion for Summary Judgment essentially argues that there was no fiduciary relationship between Plaintiffs and Defendants. This argument establishes, at best, a dispute regarding a material fact rather than a proper basis for summary judgment.

The evidence in the record, interpreted in the light most favorable to Plaintiffs, establishes that there was a fiduciary relationship with Defendants. Firstly, Plaintiffs knew and trusted Defendant Bennett and her company Keystone Property because

Bennett was a realtor and her company managed their vacation unit (R. 1863; R. 1864). As a real estate broker licensed in Florida, Bennett had a plethora of duties and obligations that also extended towards Plaintiffs. For example, Fla. Stat. § 475.278(4) requires that, even when there is a no brokerage relationship, a licensed broker has the following duties and the obligation to disclose such duties:

1. Dealing honestly and fairly;
2. Disclosing all known facts that materially affect the value of the residential real property which are not readily observable to the buyer; and
3. Accounting for all funds entrusted to the licensee.

Bennett knew that Plaintiffs were trusting her and her company, and were trusting her work with her partners, because of her position as a real estate broker and as Plaintiffs' property manager. Further, the evidence shows that Bennett specifically introduced Plaintiffs to Defendant Cluzel because she knew that they were not fluent in English and that Cluzel would speak to them in French to convince them to buy properties (R. 1868).

It is immaterial that there was no direct contract between Plaintiffs and Bennett or Keystone Property on these issues. Defendants knowingly assumed the role of guiding and assisting Plaintiffs in their purchases (R. 1868). This is additionally evidenced by Bennett assisting with the operation of the LLC Plaintiffs by serving as the registered agent (R. 1881; R.1882). Bennett guided Plaintiffs through signing the requisite documents to purchase the properties (R.1871). Bennett assured Plaintiffs that the properties would be rented and managed in the professional manner that Bennett was known for by Plaintiffs (R. 1871). Plaintiffs trusted and relied upon Defendants, and Defendants were aware of and accepted same, thereby establishing a fiduciary duty.

In light of the evidence in the record and applicable law, Defendants have not conclusively established the absence of a fiduciary duty in these circumstances. Defendants have therefore not met their burden of establishing entitlement to summary judgment on Plaintiffs' claim, and summary judgment should be denied as to Count II.

C. Count III – Civil Conspiracy

Plaintiffs' Count III makes a claim that defendants in the action, including Bennett and Keystone Property, worked jointly and knowingly to defraud Plaintiffs for the defendants' financial gain. Defendants again complain at length about the pleading style of this Count of the Amended Complaint, which, as previously established *supra*, is not a proper basis for summary judgment. Defendants further falsely assert that Plaintiffs "thwarted" their discovery efforts, which, even if it were true, is likewise not a proper basis for summary judgment. *See Blackford v. Florida Power & Light Co.*, 681 So. 2d 795 (Fla. 3d DCA 1996)(holding that entering summary judgment for discovery violation was an abuse of discretion).

Contrary to Defendants' conclusory statement, the record evidence, viewed in the light most favorable to Plaintiffs, shows that the Defendants took overt acts with the other defendants to unlawfully induce Plaintiffs to purchase unworthy investment properties. Namely, Bennett through Keystone Property introduced Plaintiffs to the other Defendants (R.1868), Bennett individually became the registered agent for the LLC Plaintiffs that were used to

purchase the properties (R. 1881; R.1882), and Keystone Property held Plaintiffs' money in its accounts for the transactions (R. 2016).

Defendants fail to carry their burden of establishing that they are entitled by fact or law to summary judgment on Count III and summary judgment should therefore be denied.

D. Count IV – Deceptive and Unfair Trade Practices

Plaintiffs' Count IV of the Amended Complaint makes a claim for Defendants' violation of the Florida Deceptive and Unfair Practices Act (FDUTPA), Fla. Stat. §§ 501.204 et seq for the misrepresentations made and unfair actions taken for financial gain. The Motion for Summary Judgment asserts on this Count, without any supporting case law, that the subject transactions do not fall within the purview of FDUTPA.

The Florida Deceptive and Unfair Trade Practices Act provides that there is a civil right of action for unfair methods of competition, unconscionable acts or practices, and unfair or deceptive practices in the conduct of any trade or commerce. FDUTPA is in place for exact

situations like this where unsuspecting consumers are taken advantage of by parties more knowledgeable than them about the industry they are participating in. Contrary to Defendants' bare assertion, FDUTPA has been repeatedly applied in situations that have commercial aspects. *See e.g. PNR, Inc. v. Beacon Prop. Mgmt., Inc.,* 842 So. 2d 773 (Fla. 2003)(applying FDUTPA to business dispute regarding commercial real estate); *Eventys Mktg. & Products, Inc. v. Comcast Spotlight, Inc.,* 28 So. 3d 959 (Fla. 3d DCA 2010)(applying FDUTPA to business dispute); *Stewart Agency, Inc. v. Arrigo Enterprises, Inc. et al*, 266 So.3d 207, 212 (Fla. 4th DCA 2019)(explaining that an injured entity may bring a FDUTPA claim); *Dolphin LLC v. WCI Communities, Inc.*, 715 F.3d 1243 (11th Cir. 2013)(applying FDUTPA to a business contract dispute); *State Farm Mut. Auto. Ins. Co. v. Performance Orthopaedics & Neurosurgery, LLC*, 278 F. Supp. 3d 1307, 1324 (S.D. Fla. 2017)(discussing a business dispute FDUTPA claim and stating that the definition of trade or commerce is quite broad and must be construed liberally). Further, Fla. Stat. §501.203(8) defines "trade or commerce" as "the advertising, soliciting, providing, offering, or distributing, whether by

sale, rental, or otherwise, *of any good or service*, or *any property*, whether tangible or intangible, or any other article, commodity, or thing of value, *wherever situated*." Emphasis added. This definition clearly includes the deceptive sale or brokerage of investment properties.

As there is no legal support for Defendants' singular argument on the Count IV FDUTPA claim, Defendants have not carried their burden of establishing entitlement to summary judgment, and summary judgment on Count IV must be denied.

E. Count VI – Negligent Misrepresentation

Plaintiffs have alleged Negligent Misrepresentation in Count VI of the Amended Complaint, stating that Defendants knew or at least should have known that the information given to Plaintiffs about the subject properties was false, and that Plaintiffs would rely on such information in purchasing the properties through Keystone Morgan.

Defendants improperly cite *Gracey v. Eaker*, 837 So.2d 348 (Fla. 2002) for a proposition that negligent misrepresentation requires Defendants' assumption of a duty of trust, but that is clearly in error.

Gracey is a case holding that the impact rule does not apply to a breach of fiduciary cause of action, and does not state any law or even dicta regarding negligent misrepresentation. There is no element of negligent misrepresentation that requires that Defendants accepted a duty towards Plaintiffs. Even if such a requirement existed, however, Plaintiffs have explained *supra* that there is sufficient evidence that Defendants did have a fiduciary duty to Plaintiffs.

Again, importantly, Defendants also do not prove that the statements made were true or that the statements were not made at all. Here the evidence shows, that Defendants were real estate professionals in the business for an extensive time (R. 1904 - 1905; R. 1994) that would have been able to conduct proper diligence on the subject properties, that Defendants did not ever go to see the properties themselves or perform any investigation before stating in March 2014 that the properties were suitable for investment and well-managed (R.1924 - 1925, R. 1868), and that Defendants at some point knew that the properties were not fit for investment (R.1924 -

1925) but kept allowing properties to be misrepresented and sold to Plaintiffs through Keystone Morgan afterwards.

Defendants again have not met their burden of demonstrating that they are entitled to summary judgment regarding negligent misrepresentation, and therefore summary judgment on Count VI should be denied.

F. Affirmative Defense – Alter Ego/Piercing the Corporate Veil

The Motion for Summary Judgment lastly asserts that Defendants are entitled to summary judgment based on their Affirmative Defense stating that Plaintiffs cannot "pierce the corporate veil." However, Defendants' Affirmative Defense on this matter was stricken by the trial court on October 5, 2023 and is therefore not a proper basis for summary judgment for Defendants. *See Chris Craft Indus., Inc. v. Van Valkenberg*, 267 So. 2d 642 (Fla. 1972)(affirming entry of summary judgment in favor of plaintiff where affirmative defenses of defendant were stricken).

Even if Defendants' Affirmative Defense had not been stricken, it would not be successful. While Defendants baldly assert that

formalities were followed by Defendants, they offer no evidence of such formalities. Instead, the evidence, when viewed in the light most favorable to Plaintiffs, shows that Bennett inextricably intertwined her businesses in furtherance of these transactions. Bennett admits that she used the same office, the same phone number, the same email address, and the same employees for the operation of Keystone Property and Keystone Morgan, also using the phone number and email address personally (R. 1991 – R. 1993; R. 1996).[1] It could therefore plainly appear to a jury that Keystone Morgan was a mere instrumentality of Bennett and Keystone Property. This is an issue that, under the evidentiary facts presented, is at the very least, appropriate for a jury. *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984)(holding that the trial court erred in granting directed verdict on disputed corporate veil issue).

[1] As Final Judgment was entered against Keystone Morgan, it is already established that Keystone Morgan was used for an improper purpose, the other element of piercing the corporate veil.

Since, as a matter of law, Defendants are not entitled to summary judgment on this Affirmative Defense, summary judgment should be denied on this basis.

IV. DEFENDANTS DID NOT ESTABLISH THEIR BURDEN ON DAMAGES

A. Summary Judgment is Improper on This Basis

To the extent that Defendants insist they are entitled to summary judgment on the assertion that the record evidence does not reflect the amount of damages stated in the Amended Complaint, this is an improper basis for summary judgment as it was not briefed in the memorandum of law in Defendants' Motion for Summary Judgment.

Florida Rule of Civil Procedure 1.510(c) requires a party seeking summary judgment to "state with particularity the grounds upon which [the motion] is based and the substantial matters of law to be argued." This rule is designed to prevent "ambush" by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing. *City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So. 2d 283, 284 (Fla. 4th DCA 1995). It is a

reversible procedural due process error to enter summary judgment on a ground not raised with particularity in the motion for summary judgment. *Design Neuroscience Centers, P.L. v. Preston J. Fields, P.A.*, 359 So. 3d 1232 (Fla. 3d DCA 2023).

Here Defendants discuss Plaintiff's damages in the supposedly "Undisputed Facts in Support of Motion for Summary Judgment in Favor of Keystone and Bennett" portion of their Motion (R._____), but make no legal argument at any point further. Plaintiffs were therefore not on notice, and are still not, of the specific legal argument regarding the damages that Defendants believe they should prevail on. Any argument made by Defendants at this juncture to that end is therefore an improper basis for summary judgment, and any request for summary judgment on same should be denied.

B. The Evidence Demonstrates that Plaintiffs Sustained Damages

Even if a legal argument regarding damages had been made in Defendants' Motion, the evidence that they point out themselves demonstrates that Plaintiffs sustained damages from the defendants' scheme. The parties do not dispute that the subject properties were

purchased by Plaintiffs for a total of $580,000.00. Defendants admit in their Motion that the record evidence shows that the LLC Plaintiffs sold all of the Detroit properties contemporaneously to an unrelated entity called Sorrento 12, LLC for a total of $7.00. Defendants further admit that Plaintiffs sustained a loss of at least $11,400.00 on the sale of the Atlanta properties. Therefore, while the parties may factually dispute the *amount* of damages, the evidence clearly shows that Plaintiffs suffered measurable losses in this matter. Defendants would therefore not be entitled to summary judgment on any supposed basis of lack of damages.

V. REHEARING IS PROPER ON THIS MATTER

In the event that this Court does not see fit to disturb the trial court's ruling themselves on Defendants' Motion for Summary Judgment leading to the entry of Final Judgment in favor of Defendants, at a minimum, Plaintiffs should be entitled to a rehearing by the trial court, as summary judgment was not properly

entered based on the facts on record, controlling substantive law, or procedural due process.

The summary judgment Order, which was verbatim Defendants' proposed order to the trial court, contained several improprieties, including the following:

1) Failing to weigh the facts of the case and evidence on the record in a light most favorable to the non-movants
2) Granting summary judgment based on alleged pleading deficiencies
3) Granting summary judgment based on a stricken Affirmative Defense
4) Granting summary judgment on erroneously interpreted case law
5) Granting summary judgment on the damages argument that was not properly raised in the Motion for Summary Judgment
6) Granting summary judgment based on the parties' discovery disputes

7) Denying Plaintiffs' Motion for Extension of Time to submit additional evidence

Notably, the trial court's findings in the Order regarding each applicable count of the Amended Complaint repeats the following language:

> "As such, a review of the Record, Evidence filed in support of the Summary Judgment Motion, Plaintiffs' Trial Exhibits, Plaintiffs' legally insufficient response, the Plaintiffs admitted failure to produce any business books, records and "admissible evidence" to support their alleged damages claims clearly evidence that the Plaintiffs have nothing more than bare bones legal conclusions to support claim for…"

This language incorporates several of the noted improprieties such as stating the Plaintiffs response to the Motion was "legally insufficient," presumably because Plaintiffs' Motion for Extension of Time was denied; stating that Plaintiffs had an "admitted failure to produce" discovery where discovery disputes are not a proper basis for summary judgment; stating that Plaintiffs did not submit "admissible evidence"[2] of damages where no damages argument was

[2] A nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

made in Defendants' Motion and Defendants' own factual recitation demonstrated damages; stating that Plaintiffs claims were "bare bones legal conclusions" where pleading deficiencies are not a proper basis for summary judgment.

As these deficiencies were pointed out in Plaintiffs' Motion for Rehearing, the trial court abused its discretion in failing to grant Plaintiffs' Motion and rehear the Motion for Summary Judgment on all of the listed points. Further, as these deficiencies in the summary judgment Order are failings as a matter of law, this Court should review Plaintiffs' Motion de novo and grant same.

To the extent that the trial court found Plaintiffs' factual support against summary judgment to be improperly supported or addressed, it was within its discretion to give Plaintiffs an opportunity to properly support or address the fact in light of Plaintiffs' pending Motion for Extension of Time, and in accordance with Fla. R. Civ. P. 1.510(e)(1). "Florida courts have a preference for deciding cases on the merits of the claims rather than on a technicality." *SunTrust Mortg. v. Torrenga*, 153 So.3d 953 (Fla. 4th DCA 2014)(citing *J.J.K.*

Int'l, Inc. v. Shivbaran, 985 So.2d 66, 69 (Fla. 4th DCA 2008)); *Villas at Laguna Bay Condo. Ass'n, Inc. v. CitiMortgage, Inc.*, 190 So. 3d 200 (Fla. 5th DCA 2016). As this was also pointed out in the Motion for Rehearing, this Court should consider granting same, as it was an abuse of discretion for the trial court not to consider and allow this remedy.

Not only should the papers of the party opposing summary judgment be liberally read and construed, as opposed to a strict reading of the movant's papers, but this same favorable weighting of the balance should have been afforded Plaintiffs' Motion for Rehearing. *Holl v. Talcott*, 191 So. 2d 40, 46–47 (Fla. 1966). When a motion for rehearing is filed by the party against whom a summary judgment has been entered, the discretion not to grant is narrowed and every disposition should be indulged in favor of granting the motion. *Id.* Only after it has been conclusively shown that the party moved against cannot offer any proof to support its position on the genuine and material issues in the cause should the right to trial be foreclosed. *Id.*

Here, the Motion for Rehearing was denied without hearing and Plaintiffs had no opportunity to offer additional proof to support their position as contemplated by Fla. R. Civ. 1.510(e)(1). The trial court clearly abused its discretion in denying rehearing in this matter, and this Court should require rehearing under the circumstances, in the alternative.

CONCLUSION

Defendants' Motion for Summary Judgment was granted despite its entire reliance on improper bases for summary judgment and erroneous conclusions of law. The entry of summary judgment in this manner flies in the face of fairness and justice, and should not be allowed to stand by this Court. As Defendants in no way met their burden of establishing entitlement to summary judgment based on the facts or law, their Motion must be denied at this juncture.

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Initial Brief of Appellant was typed in Bookman Old Style, 14-point size.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed or mailed on this 3rd day of June, 2024 to: John L. Penson, Esq., John L. Penson, P.A., 1900 Sunset Harbour Drive., Annex 2nd Floor, Miami, FL 33130, john@pensonlaw.org, Counsel of record for Appellees.

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