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

DCA Case No. 3D2024-0264
L.T. Case No. 2018-003819-CA-01
THE HONORABLE REEMBERTO DIAZ

SEPTENTRIONA DOMUS LLC, et, al.,
Appellant,

v.

KEYSTONE MORGAN REAL ESTATE AND PROPERTY MANAGEMENT, LLC, et, al.,
Appellees.

ANSWER BRIEF

ON APPEAL OF ORDER GRANTING DEFENDANTS', VERIFIED MOTION FOR SUMMARY FINAL JUDGMENT, RENDERED ON JANUARY 9, 2024; FINAL JUDGMENT, RENDERED ON JANUARY 17, 2024; and ORDER DENYING PLAINTIFFS' MOTION FOR REHEARING, RENDERED ON FEBRUARY 7, 2024 FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Respectfully submitted,

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STATUTES/RULES

STATEMENT OF THE CASE AND FACTS

Appellant's Statement of the Case and Facts is incomplete, incorrectly cites to the record, refers to matters outside of and wholly unsupported by the record, and is factually inaccurate. See *Greenfield v. Westmoreland*, 156 So. 3d 1, 1-2 (Fla. 3d DCA 2007).

Appellees have prepared their own Statement of the Case and Facts substantiated by the record to ensure that this Court obtains a complete briefing of the appeal. Appellants' Complaint was filed on February 8, 2018 (R. at 35-48). The Amended Complaint was then filed on February 27, 2019 (R. at 96-109) against all named Defendants below including Appellees, Keystone and Bennett, alleging that Appellants suffered a total loss in the amount of $580,000 following their acquisition and disposition of ten (10) parcels of real property located in both Georgia and Detroit. It is undisputed that Keystone and Bennett were not the Sellers of any of the ten (10) parcels none of which were named as Defendants in the lower court, nor were they the closing agent for any of the acquisitions and sales and had no written agreements with the Appellants at any point in time during the period that the Appellants

allege it had management contracts with Keystone Morgan which lasted no more than six months.

It is also undisputed that the Appellants acquired the ten (10) parcels of property during the months of April through August 2014 and then held title to the properties for over two and a half years. It is undisputed from the record that the Appellants misled the trial court by attempting to argue that they suffered a total loss notwithstanding the fact that they sold the properties as follows: Five of the six Detroit properties were sold in one deed to Sorrento 12, LLC for $1.00 when the assessed values of the six properties at the time were collectively $73,200.00. It is also important to point out that the Appellants have continually represented that the properties were sold to a not-for-profit corporation which is blatantly false. (R.) The sixth Detroit property, 14014 Robson Street, Detroit, MI 48227 was then conveyed to Sorrento 12, LLC for $1.00 on November 2, 2016 and was then conveyed on November 17, 2016 to D&M Capital Investments, LLC for $11,000.00. The four properties in Atlanta were sold for a total of $298,800.00 (R. at 2067).

It is further undisputed that the Appellants have failed to

produce any business records as repeatedly set forth in the record below to support these claims.

The causes of action directed at Bennett and Keystone were: "Fraudulent Inducement," "Breach of Fiduciary Duty," "Civil Conspiracy;" "Unfair Trade Practices," and "Negligent Misrepresentation."

In the interim, Keystone Morgan was defaulted on April 11, 2019 (R. at 119). Bruno Cluzel, also named individually and who directly communicated with the Appellants regarding their acquisitions of the subject properties, was then served via publication on January 18, 2022 (R. at 248) and was subsequently defaulted on March 16, 2022 (R. at 217-272). The Court entered a Final Judgment on December 15, 2022 (R. at 305-307) in the amount of $580,000 in favor of the Appellants against Bruno Cluzel and Keystone Morgan with no record evidence substantiating its claims as alleged.

During this lawsuit, discovery was undertaken by Keystone and Bennett by serving four separate requests for production on the Plaintiffs which sought their most basic business records. Additionally, Interrogatories were propounded which were ultimately

answered with minimal substance. Further, the Appellants repeatedly stonewalled Keystone and Bennett's efforts to schedule their depositions, despite residing in France at all relevant times, which ultimately led to no depositions taking place.

The Trial Court conducted numerous hearings and adjudicated many motions regarding discovery in this case as evidenced by the Record.

Most notably, Appellants failed to produce any business records other than 135 unauthenticated hearsay documents together with their 2016 Tax Returns. For reasons unexplained, the Appellants failed to produce their tax returns for 2014 and 2015 while also refusing to produce the back up to support their tax filings for 2014, 2015, and 2016. This led to the entry the August 31, 2023 Discovery Order where the Appellants admitted that they are not in possession, nor do they have any documents in their care, custody and control responsive to the Defendants' discovery request that have not been already produced. (S.R. A. 1-2[1]) Specifically, the Order stated, in

[1] This inclusion of this Court Order is being included in an abundance of caution pending the Court's determination of the Appellee's Motion to Supplement the Record on Appeal filed on November 1, 2024. This court Order will be identified as A. 1-2 throughout this brief where applicable.

pertinent part, that:

"*The Plaintiffs have stipulated that they are not in possession nor do they have any documents in their care, custody and control responsive to Defendants' discovery requests that have not been otherwise been produced; (emphasis added)…"*

It is also undisputed that the Appellants held title to the subject properties for over two years but failed to produce any business records to evidence their efforts to stabilize the properties, if any were made. Additionally, they did not produce any documentation evidencing the sale of the ten (10) parcels that occurred two years later.

Simply put, no business records were ever produced to substantiate Appellants claims that Bennett and Keystone caused Appellants' alleged loss. Appellants' counsel also communicated with Keystone and Bennett's counsel, admitting that the Appellants were not in possession, nor did they have any documents in their care, custody, and control responsive to the Appellees' discovery requests that had not been produced (R. at 896). See the July 25, 2022 email from Appellants' counsel which stated:

i) "all responsive documents in possession have been previously produced, and my clients have diligently

searched for other responsive documents." (emphasis added)

ii) "You requested "closing files" regarding the acquisition of the properties.
Response: All closing documents in possession for each property were previously produced.";

iii) "You requested "due diligence files" regarding the properties.
Response: All due diligence documents in possession, which are those sent by Defendants to Plaintiffs as due diligence was performed by Defendants, were previously produced.";

iv) "You requested communications regarding "capital expenditures".
Response: All communications in possession regarding the expenditures were previously produced."

v) "You requested communications regarding "carrying costs"
Response: All communications in possession regarding the carrying costs were previously produced.";

vi) "You requested "contracts regarding the sale of the properties".
Response: There are none in possession of the Plaintiffs as most of the properties were deeded to a non-profit entity. My clients will continue to search diligently for other responsive documents but same will likely have to be obtained from third parties.";

vii) "You requested "closing files regarding the sale of the properties".
Response: There are none in possession of the Plaintiffs as most of the properties were deeded to non-profit entity."; and

viii) "You requested appraisals regarding the properties.
Response: There are none in possession of the Plaintiffs."

Then on July 14, 2023, Keystone and Bennett filed their Verified Motion for Summary Judgment pursuant to Fla. Rule Civ. Pro. 1.510

("Summary Judgment Motion") (R. at 521-545).

In support of the Verified Motion for Summary Judgment which was twenty-five pages long, Keystone and Bennet filed their Verified Summary Judgment Evidence Appendix on July 14, 2023, (R. at 546-551) identifying the evidence as follows:

i) Ex. A -Amended Complaint filed February 27th, 2019 (R. at 767-781);
ii) Ex. B – Division of Corporation Detail Page for Meridiana Domus, LLC (R. at 782-784);
iii) Ex. C - 2016 Tax Return Documents for Meridiana Domus, LLC (R. at 785-836);
iv) Ex. D – - Division of Corporation Detail Page for Septentriona Domus, LLC (R. at 837-839);
v) Ex. E - 2016 Tax Return Documents for Septentriona Domus, LLC (R. at 840-867);
vi) Ex. F – Division of Corporation Detail Page for Keystone Property Management, Inc. (R. at 868-871);
vii) Ex. G - 2023 Florida Profit Corporation Annual Report for Keystone Property Management, Inc. (R. at 872-873);
viii) Ex. H - Division of Corporation Detail Page and 2014 Florida Limited Liability Company Amended Annual Report for Keystone Morgan Real Estate and Property Management, Inc. (R. at 874-877);
ix) Ex. I - Keystone Morgan Real Estate and Property Management, LLC Operating Agreement (R. at 878-884);
x) Ex. J - Email from Jean-Paul Charles dated July 29th, 2014 (R. at 885-889);
xi) Ex. K - Email from Jean-Paul Charles dated July 31st, 2014 (R. at 890-894);
xii) Ex. L - Email from Plaintiff's Counsel, Nicole Milson, Esq., dated July 25th, 2022 (R. at 895-898);

xiii) Ex. M - Five Detroit Property Deeds to Sorrento 12, LLC, dated June 29th, 2016 (R. at 552-565);
xiv) Ex. N - Sixth Detroit Property Deeds to Sorrento 12, LLC dated November 2nd, 2016, Deed to D&M Capital Investments, LLC dated November 17th, 2016 and City of Detroit Property Assessor (R. at 566-571)
xv) Ex. O – Septentriona Domus, LLC bate stamped documents #001 - #135 (R. at 899-1034);
xvi) Ex. P – Keystone Property Management, Inc. bate stamped documents #001-#641 (R. at 572-641); (R. at 642-723); (R. at 724-766); (R. at 1161-1232); (R. at 1233-1312); (R. at 1313-1387); (R. at 1388-1469); (R. at 1470-1550); and (R. at 1551-1615)
xvii) Ex. Q – (DE #172) - Default Final Judgment entered on December 15th, 2022 (R. at 1035-1038);
xviii) Ex. R – (DE #212) - Defendant's Amended Answer and Affirmative Defenses filed June 20th, 2023 (R. at 1039-1048);
xix) Ex. S – Request for Judicial Notice filed July 11th, 2023 (R. at 1049-1111);
xx) Ex. T – (DE #83) - Plaintiffs' Exhibit List filed June 4th, 2021 (R. at 1112-1118);
xxi) Ex. U - Plaintiffs' Responses to Defendant's Third Request for Production dated January 5th, 2023 (served but not filed with the Court) (R. at 1119-1143); and
xxii) Ex. V - Plaintiffs' Responses to Defendant's Fourth Request for Production dated March 30th, 2023 (served but not filed with the Court) (R. at 1144-1160)

On November 7, 2023, Appellants filed their Response in Opposition to Defendants' Summary Judgment (R. at 1669-1843) which included an unsigned Declaration for the Plaintiff, Jean-Paul Charles (R. at 1679-1682) and exhibits.

Appellants also designated the following documents in opposition to the Appellees' Summary Judgment Motion:

i) "Unverified Response" in Opposition to Defendant's Summary Judgment which included Plaintiffs' Unverified Statement of Facts (R. at 1669-1678);
ii) "Unsigned and unverified" Declaration of the Plaintiff Jean-Paul Charles (Response Exhibit "A") (R. at 1679-1682);
iii) Email exchange which appears to be from John Paul Charles and Bruno Cluzel in French (Response Exhibit "B") (R. at 1683-1686);
iv) 2014 Amended Annual Report for Meridiana Domus, LLC and Articles of Organization for Septentriona Domus LLC (Response Exhibit "C") (R. at 1687-1689);
v) Keystone Morgan Management Agreement with Septentriona Domus LLC regarding 15482 Sorrento Street (Response Exhibit "D") (R. at 1690-1691);
vi) Unauthenticated and undated worksheet labeled "Properties purchased by Septentriona Domus in 2014" which appears to include Parcel ID Cards for 262 Elm Forest Way, 760 Constitution Rd., and for 2584 Fieldstone View Ln., a document that appears to be a recording receipt for 14014 Robson in Detroit, (Response Composite Exhibit "E") (R. at 1692-1704); and
vii) Two (non-certified) deposition transcripts for Joan Bennett (Response Composite Exhibit "F") (R. at 1704-1843).

Also on November 7, 2023, the Appellants filed a Motion for Extension of Time to submit Evidence in Opposition to the Defendants' Motion for Summary Judgment (R. at 1666-1668). The Appellants did not seek a continuance for the Summary Judgment hearing set for November 27, 2023.

Thereafter, on November 13, 2023, Plaintiffs filed their Amended Response in Opposition to Defendants' Motion for Summary Judgment (R. at 1852-2037) in violation of Fla. Rule 1.510.

Appellants' submission was then supplemented by their untimely Declaration of Jean-Paul Charles (R. at 1863-1867) which materially stated:

i) That I, Jean-Paul Charles, am *sui juris* and have personal knowledge of the facts and matters herein.
ii) Myself and THIERRY GOIX are presently, and were at all material times, residents of France;
iii) We speak some English but are not fluent or proficient in it. (The contents of this Declaration were translated into French to allow Charles a thorough review of the statements herein);
iv) In 2014, I was acquainted with Defendant JOAN BENNETT ("Bennett") as she was the manager through her management company, Defendant KEYSTONE PROPERTY MANAGEMENT, INC. ("Keystone Property Management") that managed a building where we had purchased a vacation condominium in Miami Beach, Florida;
v) In 2014, I was acquainted with Defendant JOAN BENNETT ("Bennett") as she was the manager through her management company, Defendant KEYSTONE PROPERTY MANAGEMENT, INC. ("Keystone Property Management") that managed a building where we had purchased a vacation condominium in Miami Beach, Florida;
vi) On March 27, 2014, Bennett emailed us that she was partners with Defendant, BRUNO CLUZEL ("Cluzel") in owning Defendant KEYSTONE MORGAN REAL ESTATE AND PROPERTY MANAGEMENT, LLC ("Keystone Morgan") and that they owned incredible rented, well-managed investment properties in Detroit, Michigan, and Atlanta, Georgia that we could purchase as investments;

vii) As we thought Bennett was trustworthy due to her being a realtor, we informed them that we were interested in the described properties and that we were relying on their judgment to recommend suitable rental investment properties that were either occupied or immediately marketable as we did not reside in the United States, and did not have any knowledge of the real estate market in the United States or of choosing investment properties;

viii) We subsequently emailed and spoke with Cluzel about the properties that were supposedly on offer from Keystone Morgan. Cluzel confirmed that Keystone Morgan would protect our best interests in recommending real estate purchases and in managing the properties after we purchased them;

ix) Cluzel then sent us emails with photographs of Keystone Morgan properties, spreadsheets of the financials of the properties, and alleged renovation details, stated that all the properties were inspected, earning significant income, highly desirable and being offered at the best prices possible;

x) We relied on Defendants' statements in deciding to purchase the recommended properties and felt pressured to buy them quickly;

xi) We were told to establish LLCs to purchase the properties, and we decided to create SEPTENTRIONA DOMUS, LLC ("Septentriona") to purchase properties in Detroit, and MERIDIANA DOMUS, LLC ("Meridiana") to purchase the Atlanta properties;

xii) Bennett served as the registered agent for Septentriona and Meridiana;

xiii) We then transferred enough funds to cover the purchases to a bank account managed by Bennett;

xiv) Bennett provided us with all of the closing documents to sign for the properties such as the purchase agreements, and the closing statements;

xv) We signed agreements for the following properties:

Septentriona Domus LLC		
Detroit	Closing Date	Sale Price
4333 Sturtevant	4/18/2014	$39,500.00
10960 Rossiter	5/7/2014	$32,500.00
15482 Sorrento	6/23/2014	$47,200.00
15826 Sorrento	7/18/2014	$37,500.00
14014 Robson	8/19/2014	$47,200.00
15895 Cloverlawn	8/19/2014	$48,700.00

Meridiana Domus, LLC		
Atlanta	Date	Sale Price
760 Constitution	4/15/2014	$51,200.00
2584 Fieldstone	4/22/2014	$115,000.00
136-138 Gramling	4/23/2014	$63,000.00
262 Elm Forest	4/23/2014	$81,000.00

xvi) Bennett stated that she would rent and manage the properties because she had staff located near the properties and required us to sign a management agreement with Keystone Morgan for all of the properties that would be effective at closing;

xvii) After purchasing the properties, we learned that the properties were not actually renovated or rented, as Bennett began demanding funds for repairs;

xviii) We provided over $45,000.00 to Bennett as requested, but never received any proof that repairs were being made on any of the properties;

xix) We did not receive any rental income from Defendants on the properties;

xx) We decided to terminate the Defendants' management agreements as we were gravely concerned with the state and value of the properties;

xxi) After terminating Defendants, we flew to the United States to see the properties and confirmed that not only were most of the properties vacant, that several were in severe disrepair, or in dangerous neighborhoods, that their value had been overstated by Bennett and Cluzel, and that the

properties had not been in any way suitable for the short-term investment strategy that was pitched to us;

xxii) We subsequently also were shown in the public records that Defendants purchased many of the properties on the same day or mere days before selling them to us for up to 5 times more, which was not disclosed to us at the time of the purchases;

xxiii) As we could not properly manage the properties from France we decided to sell them;

xxiv) The properties in Detroit were such a severe liability due to the disrepair and location that we decided to donate the entire portfolio to a non-profit organization; and

xxv) As a result of Defendants' deception, we suffered damages of the purchase prices of the properties, lost use of the funds for other investments, amounts remitted to Bennett for repairs that were never made by Keystone Morgan, amounts for the repairs that we needed to make to the properties to make them less hazardous and attorneys' fees, in addition to the stress and mental anguish that this situation has caused.

The Appellants' Responses to the Summary Judgment Motion and the exhibits relied upon failed to refute the record evidence and Appellees' Summary Judgment and also failed to identify any admissible business records that created any material issues of fact.

The Summary Judgment hearing went forward on November 27, 2023. After hearing legal argument, the Court granted Keystone and Bennett's Motion for Summary Judgment and then directed Counsel to circulate and submit a proposed Order for the Appellants' counsel review. Although counsel acknowledged receipt, no

objections were raised for over ten (10) days leading up to the submission of the proposed Order to the Court.

Appellants then unilaterally corresponded to the Court and uploaded their own version of the proposed form Order and also filed a Motion for Clarification (R. at 2038-2043).

Disregarding both competing "form" Orders, on January 9, 2024, the lower court entered its own version of the Order Granting Defendants' Motion for Summary Final Judgment (R. at 2157-2169) and identified the supporting documents (R. at 2044-2049) that it relied on.

After reviewing the Record, the Summary Judgment Motion (R. at 521-545), Evidence (R. at 552-1615) and Appendix filed by Defendants (R. at 546-551), the Responsive documents filed by Plaintiffs (R. at 1669-1843), Amended Response (R. at 1852-2037), and conducting the hearing on November 27, 2023, the Trial Court made the following findings (R. at 2157-2169):

i) Plaintiff, Meridiana, was formed on November 18, 2009, was solely managed by the Plaintiffs, Charles and Goix, and the nature of business was to rent real estate. (DE #222) (R. at 2161);

ii) Septentriona, was formed on April 15, 2014, was also solely managed by Charles and Goix, and the nature of business was to rent real estate. (DE #222) (R. at 2161);

iii) Defendant, Keystone, is a Florida corporation formed on April 28, 1988 and existed sixteen (16) years before the Plaintiffs became involved with Keystone and Bennett other than by the mere coincidence that Keystone managed an unrelated condominium association where Meridiana owned one unit in a 21-unit building (R. at 2161);

iv) Since its inception, Bennett was and still is the president. The nature of the business was and remains managing real property in South Florida. (DE #222) (R. at 2161).

v) Keystone Morgan, a Florida limited liability company was formed on February 25, 2013 over a year prior to any dealing with the Plaintiffs to invest and manage real estate and continued operating for 3 ½ years following the termination of management agreements by the Plaintiffs. (DE #222 SUNBIZ and operating agreement) (R. at 2161);

vi) There is no evidence in this record to support the Plaintiffs allegations that Keystone and Bennett would be corporately bound by the acts of Keystone Morgan (R. at 2161);

vii) There is no evidence in this record to support the Plaintiffs allegations that between January of 2014 through the present, Bennett had any conversations other than three email communications with any of the Plaintiffs, because Bennett does not speak French (R. at 2161);

viii) There is no evidence in this record to support the Plaintiffs' allegations that Bennett was ever aware of or a party to any conversations between Defendant Cluzel and Plaintiffs (R. at 2162).

ix) Nowhere in this record has Septentriona and Meridiana produced any evidence supporting Plaintiffs' allegations that Plaintiffs entered into any written management

agreements with Keystone and Bennett directly (R. at 2162).

x) Prior to buying the properties in this lawsuit, the Plaintiffs admittedly undertook no efforts to conduct any due diligence, never visually inspected the properties, and never retained any third parties to inspect the properties prior to closing (R. at 2162).

xi) In April of 2014, Meridiana purchased four (4) properties located in or near Atlanta and then six (6) properties located in or near Detroit pursuant to separate contracts, closing statements, where the Sellers warranted title, and where they received title insurance, although none of the supporting documents were produced by the Plaintiffs through discovery (R. at 2162).

xii) The ten (10) parcels are identified as follows (R. at 2162-2163):

4333 Sturtevant Street, Detroit, MI 48204; 15482 Sorrento Street, Detroit, MI 48227 15895 Cloverlawn Avenue, Detroit, MI 48227; 10960 Rossiter Street, Detroit, MI 48227 15826 Sorrento Street, Detroit, MI 48227, 14014 Robson Street, Detroit, MI 48227, 760 Constitution Road SE, Atlanta, GA 30315, 2584 Fieldstone View Ln SE, Marietta, GA 30013, 262 Elm Forest Way, Riverdale, GA 30274, and 136-138 Gramling Street SE, Marietta, GA 30008;

xiii) There is no evidence in this record to support the Plaintiffs allegations that Bennett functioned as closing agent on any of the properties purchased in Georgia or Detroit contrary to Plaintiffs allegations (R. at 2163);

xiv) This record does not support the Plaintiffs' allegations that Bennett and Keystone were the Sellers of any of the ten (10) properties at issue in this case (R. at 2163);

xv) The Management Agreements and Purchase and Sale Agreements evidence that Keystone Morgan made no warranties as to the properties at issue in this case or to anyone under management agreement contrary to

Plaintiffs' allegations (Amended Complaint, DE #33, DE #216 at Exhibit "O" and Exhibit "P") (R. at 2163).

xvi) On July 29, 2014, Charles acknowledged that the houses purchased in Atlanta have been good choices, again contrary to the Plaintiffs' allegations in their Amended Complaint at paragraph 2 (Amended Complaint, DE #33, Summary Judgment Motion DE #216 at Exhibit "J") (R. at 2163).

xvii) After purchasing the Detroit property on Rossiter Street in May of 2014 and several of the Atlanta properties, Charles acknowledged in an email to Bennett on July 31, 2014 that Bennett was a very good manager and honest and wanted to work with her on purchasing other Detroit properties (Summary Judgment Motion DE #216 at Exhibit "K") (R. at 2163).

xviii) The Plaintiffs then terminated the management agreements with Keystone Morgan in August 2014. Both Meridiana and Septentriona then held title and were in exclusive possession of the subject properties for over two and a half years following the termination of the Keystone Morgan Management Agreement (Request For Judicial Notice, DE #215) (R. at 2163).

xix) Nowhere in this record has Septentriona and Meridiana produced any evidence regarding what it did following their acquisition of the subject properties to stabilize, manage, rent, sell, nor has anything of substance been produced in discovery (DE #179, #183 and #203) (R. at 2163).

xx) At some point during 2016, which was more than two years after the Keystone Morgan Management contracts were terminated, Meridiana and Septentriona decided to sell the subject real properties (R. at 2163).

xxi) Five of the six Detroit Properties were sold in one deed to Sorrento 12, LLC for $1.00 who then transferred title one-month later to King-Lofton Real Estate Holdings for $15,000 when the assessed values of the six properties at

the time were collectively $73,200.00 (DE #215) (R. at 2163).

xxii) Title to the sixth Detroit property, 14014 Robson Street, Detroit, MI 48227 was then conveyed to Sorrento 12, LLC for $1.00 on November 2, 2016 (DE #215), and that on November 17, 2016, Sorrento 12, LLC then conveyed title to 14014 Robson Street to D&M Capital Investments, LLC for $11,000.00 (DE #215) (R. at 2163).

xxiii) The four properties in Atlanta were sold for $298,800 (DE #215) (DE #179, #183 and #203) and within one year following the filing of IRS returns by Meridiana and Septentriona, the Plaintiffs filed suit (R. at 2163-2164).

Following the entry of the Summary Final Judgment, the Court then entered a Final Judgment in favor of Appellees on January 17, 2024 (R. at 2170-2171).

On February 1, 2024, the Appellants filed a Motion for Rehearing (R. at 2142 - 2149) which failed to raise any issue that trial court may have overlooked and failed to consider which was denied without hearing on February 7, 2024. (R. at 2172-2173).

The Appellants then sought review by this court. Keystone and Bennett assert that this Court should affirm the Final Summary Judgment entered by the trial court for the reasons set for below.

POINTS ON APPEAL

Appellants' attempted points on appeal appear to be those contained in the section labeled on page 22 of the Appellants' Initial

Brief labeled as Sections III(A-F), IV(A-B), and V. They are difficult to follow. Appellee poses that they raise the following questions or points:

1. Appellants' filings which included the untimely filing of their Declaration, although considered by the Court, were insufficient to qualify as a proper response to Appellees' Motion for Summary Judgment and thereby raise cognizable issues of fact to precluding the entry of Summary Judgment.
2. Whether the Lower Tribunal erred in Denying Appellants' Motion for Rehearing.
3. The failure to file a certified copy of the summary judgment hearing transcript in this court compels affirmance.

Points 1 and 3 center on the mechanics attendant to Fla. R. Civ. P. 1.510 regarding summary judgment inviting *de novo* review. Point 2 calls for review following the denial of the Motion for Rehearing for an abuse of discretion.

SUMMARY OF THE ARGUMENT

Under Fla. R. Civ. P. 1.510 as amended, in particular that requiring citation to particular sources relied upon or against in the motion, the lower tribunal acted properly in entering summary judgment in its well-reasoned Order which identified admissible record evidence presented by the Appellees that properly supported their motion and was not defeated by Appellants' response, which

was not in conformity with the rules and which did not rebut Appellees' motion.

As for the issues presented by the Appellants in their Initial Brief, the Appellants neglect to recognize that they failed to timely file an Affidavit in response to the Motion for Summary Judgment, that the trial court considered the filings presented anyways, the documents submitted by the Appellants do not constitute competent evidence and cannot be used as part of the summary judgment record, and the legal arguments in their Initial Brief failed to identify how summary judgment was improper warranting reversal.

Further, the reasons for granting summary judgment are set forth in the well-reasoned summary judgment Order which identified admissible record evidence presented by the Appellees.

The Appellants also challenge the entry of the Summary Judgment Order on theories the Appellees misapplied the law while neglecting to recognize that their counsel's legal argument does not create disputed issues of material fact while at the very same time they have failed to file a certified copy of the hearing transcript in this record.

No abuse of discretion occurred when the lower court denied Appellants' Motion for Rehearing, because the Motion for Rehearing did not offer a well-grounded basis setting forth any facts and law that the Court overlooked and failed to consider.

ARGUMENT

POINT I

APPELLANTS' FILINGS WERE INSUFFICIENT TO QUALIFY AS A PROPER RESPONSE TO APPELLEES' MOTION FOR SUMMARY JUDGMENT AND THEREBY RAISE COGNIZABLE ISSUES OF FACTS THEREBY PRECLUDING ENTRY OF SUMMARY JUDGMENT

The Appellants' Initial Brief argues under the former summary judgment standard. Under the former summary judgment standard, it was commonplace for some parties to file responses and affidavits to create the appearance of disputed facts and triable issues and then argue therefrom as a means to defeat summary judgment.

Present Fla. R. Civ. P. 1.510(c)(1) and (5) disallows this, requiring a movant or opponent, to cite to "particular parts of materials of the record", including depositions, documents, electronically stored information, admissions, interrogatory answers or other material in the record.

The rules now require the non-movant to designate the specific facts in the record that create genuine issues precluding summary judgment and what record evidence supports the claims as asserted.

Mere argumentation with general references to the record is insufficient. In *Gervas v. Gazul*, 358 So. 3d 1257 (Fla. 3d DCA 2023) quoting from Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), his Court noted: "A party asserting that a fact ... is genuinely disputed must support the assertion by ... citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers or other materials[.]" Fla. R. Civ. P. 1.510(c)(1)(A). Importantly, "[i]f the evidence [presented by the nonmovant] is merely colorable, or is not significantly probative, summary judgment may be granted." *In re Amendments to Fla. Rule of Civil Procedure* 1.510, 309 So. 3d 192, 193 (Fla. 2020) (quoting Anderson, 477 U.S. at 249-50, 106 S.Ct. 2505).

The present rule for summary judgment aligns us with the

standard established by the Federal Summary Judgment Standard articulated by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (the Celotex trilogy).

Under this standard, a moving party is not required to support its motion with affidavits or other materials negating the opponent's claim. Instead, "the burden on the moving party may be discharged by showing and pointing out to the court that there is an absence of evidence to support the non-moving party's case." *Celotex, supra* at 323.

Notably, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment." *Anderson, supra* at 247-248. Summary judgment is to be granted if the summary judgment record shows that: (1) there is no genuine dispute, (2) as to any material fact, and (3) the moving party is entitled to judgment. See *Beard v. Banks*, 548 U.S. 521, 529, 19 S. Ct. 2572 (2006); *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999);

Nebraska v. Wyoming, 507 U.S. 584, 589, 113 So. Ct. 1689, 1694 (1993); *Celotex*, 477 U.S. at 322, 106 S. Ct. At 2552 (1986).

A genuine dispute exists when a rational factfinder, after considering the evidence in the record, could rule in favor of the non-moving party. See *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 1658, 2677 (2009). Thus, a dispute is "genuine" if it has a real basis in the evidentiary record or is insufficiently probative. See, *Melton v. Abston*, 841 F.3d 1207, 1219 (11th Cir. 2016); See, *Anderson v. Liberty Lobby*, 477 U. S. 242, 247-252 , 106 S. Ct. 2505 (1986).

It is also not created by positing a factual scenario that is definitively contradicted by uncontestable evidence in the record. See *Scott v. Harris*, 550 U. S. 372, 380, 127 S. Ct. 1769 (2007). The court will test for a "genuine dispute" through the lens of the quantum of proof applicable to the substantive claim or defense at issue (e.g. if the claim or defense requires clear convincing evidence, the court may scrutinize if the quantum of proffered evidence meets this measure). Disputes over irrelevant or unnecessary facts will not defeat a Motion for Summary Judgment. See *Anderson v. Liberty Lobby*, 477 U. S. 242, 247-252 , 106 S. Ct. 2505 (1986).

Judgment is appropriate "as a matter of law" when the moving party should prevail because the non-moving party has failed to make an adequate showing on an essential element of its case, as to which that party has the burden of proof. See *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 804 (1999); *Celotex Corp v. Catrett*, 477 U.S. at 323, 106 S. Ct. at 2552 (1986). The party moving for summary judgment bears the initial burden of showing the absence of a genuine, material dispute and an entitlement to judgment. *Celotex Corp v. Catrett*, 477 U.S. at 323, 106 S. Ct. at 2552 (1986). This showing does not necessarily require the moving party to disprove the opponent's claims or defenses. *Edwards v. Aguillard*, 482 U.S. 578, 595, 107 S. Ct. 2573 (1987); *Celotex Corp v. Catrett*, 477 U.S. at 323, 106 S. Ct. at 2553 (1986). This burden may often be discharged simply by pointing out for the court an absence of evidence in support of the non-moving party's claims or defenses. *Celotex, supra* at 323. See also *Spierer v. Rossman*, 798 F.3d 502, 503 (7th Cir. 2015) (burden is often just "one of demonstration rather than production").

If the moving party meets its prima facie burden, then the

burden of going forward shifts to the non-moving party to show, by affidavit or otherwise, that a genuine dispute of material fact remains for the factfinder to resolve. *Celotex Corp v. Catrett*, 477 U.S. at 317, 106 S. Ct. 2548 (1986); see also Beard v. Banks, 548 U.S. 521, 529, 126 S. Ct. 2572, 2578 (2006).

A Motion for Summary Judgment brings with it "put up or shut up" time for the non-moving party. See *Harney v. Speedway Superamerica, LLC.*, 526 F.3d 1099, 1104 (7th Cir. 2008); *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006); See also *Kreg Therapeutics, Inc. v. Vital Go, Inc.*, 919 F.3d 405, 416 (7th Cir. 2019) ("Summary Judgment is not time for halfhearted advocacy."); *Sommerfield v. City of Chicago*, 863 F. 3d 645, 649 (7th Cir. 2017) (parties required "to put their evidentiary cards on the table ").

Once this moment occurs, the non-moving party is not saved by mere allegations or argument to create the appearance of disputed facts. See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12, 133 S. Ct. 1138, 1148-49 (2013); *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592 (1968). See

Acker v. Gen. Motors, LLC., 853 F. 3d 784, 788 (5th Cir. 78 2017); *Berckeley Inv. Group, Ltd v. Colkitt*, 355 F. 3d 195, 201(3d Cir., 2006).

Accordingly, a non-moving party must "go beyond the pleadings," and show adequately probative evidence creating a triable controversy. See *Celotex, supra* 477 U.S. at 324; see also *Thierault v. Genesis Health Call, LLC*, 890 F.3d 342, 348 (1st Cir. 2018) (Motion's role is "to pierce the pleadings" and probe the proof"). See *Robbins v. Becker*, 794 F.3d 988, 993 (8th Cir. 2015); *Kenney v. Floyd*, 700 F.3d 604, 608 (1st Cir. 2012).

A party does not meet this burden by offering evidence which is merely colorable, or which implies some metaphysical factual doubt, or by simply theorizing a "plausible scenario" in support of the party's claims, especially when that proffered scenario conflicts with direct, contrary evidence. See *Robbins v. Becker*, 794 F.3d 988, 993 (8th Cir. 2015); 88 th *Kenney v. Floyd*, 700 F.3d 604, 608 (1 Cir. 2012). st See *Minnihan v. Mediacom. Corp*. 779 F.3d 803, 809 (8th Cir. 2015). See also *Scott v. Harris*, 550 U.S. 372, 380, 127 So. Ct. 1709 (2007); *Swanson v. Leggett & Platt Inc.*, 154 F.3d 730, 733 (7th Cir.

1998). See *Matsushita Elec. Indus Co.* v. Zenith Radio Corp., 475 U.S. at 586 (1986).

Rather, the non-moving party must identify specific record evidence and explain how that material defeats summary judgment, and if the non-moving party has the ultimate burden of persuasion (e.g., as a claimant), it must do so as to each essential element on which it bears that burden. See *Swanson v. Leggett & Platt Inc.*, 154 F.3d 730, 733 (7th Cir. 1998). See *Diaz v. Kaplan Higher Educ. LLC*, 820 F.3d 172, 176 (5th Cir. 2016); *Denn v. CSL Plasma Inc.*, 816 F.3d 1027, 1032 (8th Cir. 2016). See *Scruggs v. Pulaski Cnty*, 817 F.3d 1087, 1092 (8th Cir. 2016).

Here, Keystone and Bennett's Motion for Summary Judgment, which included Bennett's affidavit and record designations, evidenced that Appellants could not meet their burden. Based on Appellees' Motion, which identified record evidence, and the lack of record evidence proffered by the Appellant, it was appropriate to grant summary judgment at issue as Appellants failed to meet their burden of proof.

Further, what appears before this Court is that Appellants are

failing to recognize that mere legal argument alone and the lack of evidence does not create facts or material issues that should be considered in this appeal. This is what is apparent in the Statement of Facts and legal arguments.

Moreover, a careful review of the Appellants' Responsive Declaration evidence that it did not set out facts that would be admissible evidence and shows that the affiant or declarant is competent to testify on the matters stated." Fla. R. Civ. P. 1.510(c)(4) (emphasis added) in addition to the fact that it is based upon inadmissible hearsay. See, *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 470 (3d Cir. 1989).

Here, Appellants Response and Declaration as argued in their Initial Brief, are more focused on pointing out Appellees' arguments regarding pleading deficiencies and Appellants' failure to comply with and engage in discovery which is arguably not a basis for summary judgment giving way to reversible error.

However, the Initial Brief is not based on proper evidence before this Court, contrary to the Appellants' arguments. Further, the Appellants' arguments in their Initial Brief are not only improper but

are properly classifiable as mere allegations - barely colorable, theorizing possible and not even plausible scenarios, denials, and speculative empty rhetoric all of which, as pointed out above, are inappropriate.

The only showing made by Appellants in this record was their response and their self-serving hearsay affidavit/declaration which literally fails to prove a genuine issue of material fact that would preclude the entry of the Summary Judgment Order on review. Here, it is obvious that the affidavit was not based on personal knowledge, and did set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fla. R. Civ. P. 1.510(c)(4).

Thus, the trial Court properly granted summary judgment in favor of Bennett and Keystone following the Appellants' admitted failure to overcome their burden to present competent, factual evidence to defeat Keystone and Bennett's Motion for Summary Judgment, such that the Order on review should be affirmed.

POINT II

WHETHER THE LOWER TRIBUNAL ERRED IN DENYING APPELLANT'S MOTION FOR REHEARING

Following the entry of the Summary Judgment Order on review, the Appellants field their Motion for Rehearing. However, the Initial Brief in Argument V shows that there is no merit to this argument. The primary purpose of granting a rehearing under rule 1.530 is to give the trial Court an opportunity to consider matters which it overlooked or failed to consider. See, *Fast Funds, Inc. v. Aventura Orthopedic Care Center*, 279 So. 3d 168, 171 (Fla. 4th DCA 2019); *Balmoral Condominium Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013).

Further, in *Carollo v. Carollo*, 920 So.2d 16, 19 (Fla. 3d DCA 2004) this Court has explained that under the provisions of rule 1.530:

> [a] rehearing is a second consideration of a cause for the sole purpose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration. Upon the timely filing of a petition for rehearing, the court may reopen the case and reconsider any or all of the provisions of its final decree.

Id., quoting *Langer v. Aerovias, S.A.*, 584 So. 2d 175 (Fla. 3d DCA 1991.

In the Initial Brief, the Appellants argue that the trial Court was legally obligated to grant the Motion for Rehearing. However, the

Appellants have not set forth any arguments or identified any evidence in the record in its Motion for Rehearing to which the Court may have overlooked and failed to consider, that did not exist at the time of the summary judgment hearing.

Therefore, the Initial Brief shows that there is no merit to this argument when the trial exercised its discretion by denying the Motion for Rehearing.

POINT III

LACK OF THE SUMMARY JUDGMENT HEARING TRANSCRIPT COMPELS AFFIRMANCE

Appellant seeks reversal but failed to provide a hearing transcript of the Summary Judgment Hearing.

Here, this Court ordered that the Appellant comply with Florida Rules of Appellate Procedure 9.200(b)(4) and 9.220(c)(4) by filing transcripts that comply with the Florida Rules of Appellate Procedure within thirty (30) days from the date of this Order. However, not only did the Appellants fail to cure their filings of a condensed transcript, but they also failed to file a certified transcript of the November 25, 2023 Summary Judgment hearing.

Notwithstanding, the Appellants ask this Court to reweigh the

evidence and second-guess the Trial Court's evidentiary determinations in the reasoned summary judgment Order on review without providing complete transcripts of the hearing precipitating the Order on Appeal. *Applegate*, which is squarely implicated in this case, forecloses such a request.

In *Applegate*, the Court was asked to review an issue that "clearly involve [d] underlying issues of fact" with only an "incomplete record on appeal." 377 So. 2d at 1152 (Fla. 1980). The court observed that "[w]hen there are issues of fact the appellant necessarily asks the reviewing Court to draw conclusions about the evidence." *Id.* Against this backdrop, the Applegate Court so-held: Without a record of the trial proceedings, the appellate Court cannot properly resolve the underlying factual issues so as to conclude that the trial Court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate Court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial Court should have been affirmed because the record brought forward by the Appellant is inadequate to demonstrate reversible error. *Id.*

Again, without a transcript, the Court "cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory." *Applegate*, 377 So. 2d at 1152 (Fla. 1980) and *Umana v. Citizens Property Insurance Corporation*, 282 So.3d. 933 (Fla. 3rd DCA 2019). For this reason alone, the Summary Judgment Order on review must be affirmed, because the Appellants have made no showing that the Trial court committed error.

CONCLUSION

The Appellants refuse to recognize that entry of the Summary Judgment was proper in light of the undisputed facts. After seven years of litigation, they failed to produce any substantive evidence (business records) and thwarted the discovery process, which did not even arguably support the hearsay allegations set forth in their Amended Complaint. This was evident during the course of the litigation and, most notably, in response to the Appellees' compliant Summary Judgment Motion. That based upon the record and summary judgment record coupled with the Appellants' failure to identify a basis for reversal in their Initial Brief, this Court should affirm the order on review.

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the foregoing was emailed this 1st day of November 2024 to Nicole Milson, Esq., Milson Law, P.A., nicole@milsonlaw.com, Counsel for Appellants.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing motion was prepared in Bookman Old Style 14-point font and complies with the font requirements of Fla. R. App. P. 9.210; word count is: 8,168.

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