

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No.: 3D2024-0500
L.T. Case No.: 2023-001340-CA-01

LA PALOMINA, LLC

Appellant,

v.

GABLES MIRACLE MILE LLC,

Appellee.

APPELLANTS' INITIAL BRIEF

Barakat + Bossa, PLLC
2701 Ponce de Leon Blvd.,
Suite 202
Coral Gables, Florida 33134
Tel: (305) 444-3114
Fax: (305) 444-3115

/s/Angelique Gulla
Angelique Gulla, Esq.
Florida Bar No. 1018032
agulla@b2b.legal
service@b2b.legal
Counsel for Appellant

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PRELIMINARY STATEMENT

For the Court's convenience, the Appellant, LA PALOMINA LLC, will be referred to as the "La Palomina." The Appellee, GABLES MIRACLE MILE, LLC, will be referred to as "Landlord."

The trial court docket entries will be referred to as "D.E. [entry number]."

The Final Partial Summary Judgment, Appx. 481-484, D.E. 134, dated February 14, 2024, will simply be referred to as the "Order."

Accompanying the filing of this Initial Brief is an Appendix that contains all filings cited herein. Citations to the Appendix are noted as "Appx. [page]."

The Appendix includes a copy of the Summary Judgment Hearing transcript which will be denoted as follows: "Appx. [page] Tr. [page]:[line]."

STATEMENT OF THE CASE AND THE FACTS

I. NATURE OF THE CASE

This is an appeal from a final order of the trial court that granted Appellee's Motion for Summary Judgment against La Palomina and co-Defendants Seasy C.G. LLC ("Seasy"), Giovanni Esposito ("Esposito"), Giovanni Maglione ("Maglione"), Ciro Adamo ("Adamo"), and Damian Matias Gonzalez ("Gonzalez") after the conclusion of a hearing on Landlord's Motion for Summary Judgment ("the Motion") (the "Order"). Appx. 481-84. The Order concludes the matter against La Palomina and all Defendants other than Jose Luis Palomino ("Mr. Palomino"). Appx. 481-84. The Order does not state any specific findings as to the reasons the Motion was granted. Appx 481-84.

This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A) and 9.110(k) ("If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition).

To the extent this Court determines that the Order under review is not within the scope of Rule 9.130(b)(1)(A) or 9.110(k), this request is made to this Initial Brief as a timely petition for a writ of certiorari. Fla. R. App. P. 9.030(b)(2).

II. THE UNDERLYING ACTION

The gravamen of this case arises from the First Amendment to Lease (“Amended Lease”) for the property located at 136 Miracle Mile, Coral Gables, Florida 33134 (“Property” or “Premises”). Appx. 256-303.

A. The Lease

On July 2, 2020, Gables Miracle Mile, LLC (“Landlord”) entered into a lease with Seasy for the Property (“Lease”). Appx. 198-233. Contemporaneous with the signing of the Lease, Esposito, Maglione, and Adomo (“Original Guarantors”) signed a Guaranty for payment and performance of the Lease (“Original Guaranty”). Appx. 235-242.

B. The Amended Lease

On December 1, 2021, Seasy assigned its right, title, and interest in the Lease to La Palomina (“Assignment”). Appx. 244-254. Contemporaneously with the Assignment, the Landlord and La Palomina entered into a First Amendment to the Lease (“Amended Lease”). Appx. 256-303. The Original Guarantors ratified their Original Guaranty as to the Amended Lease. Appx. 249, 254. On December 21, 2021, Gonzalez and Mr. Palomino signed a Guaranty for payment and performance of the Amended Lease (“Second Guaranty”). Appx. 263-267.

In September 2022, Hurricane Ian hit Florida and caused damage throughout the state, including at the Property. Appx. 447-48 ¶¶ 6, 7. Tenant alleges that as a result of Hurricane Ian damage, the Property's roof began leaking, ruining equipment located therein. Appx. 448 ¶ 7. Tenant also alleges that despite La Palomina alerting the Landlord to the roof damage, leaks, and equipment damage, the Landlord made no effort to remedy the roof. Appx. 448 ¶¶ 7, 8. As a result, Tenant alleges that Landlord was in breach of the Amended Lease due to its failure to repair the roof. Appx. 204 (Article 8. Repairs and Maintenance. Section 1. "Landlord shall keep the foundation, the outer walls and **roof** of the building in which the Premises is located in good repair"). Due to Landlord's breach, La Palomina withheld rent.

Subsequently, Landlord filed suit for eviction. On July 25, 2022, landlord and La Palomina entered into a Settlement Stipulation. Appx. 311-321. Landlord contends that La Palomina breached the Settlement Stipulation and filed suit to accelerate rent, La Palomina denied those allegations.

C. New Tenant and New Lease

On August 23, 2023, Landlord and Maman Coral Gables LLC ("New Tenant") entered into a new lease ("New Tenant Lease"). Appx. 433-476.

The New Tenant Lease required the New Tenant to make rent payments in the amount of \$15,250.00 for the first Year. Appx. 434. Further, the New Tenant Lease requires that the monthly base rent is increased each year by 3.5%. Appx. 434. The New Tenant Lease substantially increases the base rent that Landlord would have obtained from La Palomina. Additionally, Landlord agreed to forgo rent for \$65,400.00.” Appx. 435.

III. PROCEDURAL HISTORY

On November 30, 2023, Landlord filed its Motion for Partial Summary Judgment (the “Motion”). **D.E. 107**. At the time of filing, La Palomina was represented by Ian-Illych Martinez, Esq. of the Law Offices of Martinez, Inc. and Bello & Martinez PLLC (“Former Counsel”).

On January 16, 2024, the Parties participated in mediation in an attempt to resolve the dispute. The Parties were unsuccessful.

On January 22, 2024, Former Counsel for La Palomina filed its Motion to Withdraw. **D.E. 120**. Former Counsel did not file a response to the Motion.

On January 30, 2024, the undersigned’s firm simultaneously filed a Notice of Appearance, **D.E. 123**, Motion for Leave to File Response to Plaintiff’s Motion for Summary Judgment, **D.E. 124**, and its Response to Plaintiff’s Motion for Summary Judgment (“Response”), **D.E. 123**.

IV. THE SUMMARY JUDGMENT HEARING

On February 9, 202, the trial court conducted a hearing on Landlord's Motion for Summary Judgment (the "MSJ Hearing"). See Appx. 485-511.

At the MSJ Hearing, the Court found that it would not consider La Palomina's Response because it was not filed timely. Appx. 490 6:23-24. In fact, the Court would not allow La Palomina to present argument at the MSJ Hearing. See *e.g.* Appx 485-511.

Instead, the Court insisted that La Palomina should have filed a motion for continuance with supporting affidavits. Appx. 491 7:14-16. La Palomina alerted the Court that La Palomina filed a motion for leave to file its Response with the Response attached, including its supporting Declaration. Appx. 491 7:21-23.

La Palomina directed the Court to Florida Rules of Civil Procedure Rule 1.510(e) which allows a party an opportunity to properly address or support a fact if such party failed to properly support an assertion as required by Florida Rules of Civil Procedure Rule 1.510(c). Appx. 498 14:3-6.

Appellant again requested to present argument to the Court as to the merits of Appellee's Motion for Summary Judgment, which the Court refused:

16 THE COURT: All right.
17 MS. GULLA: May I or no?
18 THE COURT: No. I am going to -- I am not
19 going to -- it's down to the -- I am going to
20 rule.
21 At this time the motion based on the
22 record evidence and the untimeliness of the
23 response is going to be granted. Have a good
24 day.

Appx. 503 19:16-24.

The trial court granted Landlord's Motion for Summary Judgment.

Appx. 481-484; 503:19-24.

SUMMARY OF THE ARGUMENT

First, this Court should find that La Palomina's Response to Landlord's Motion for Summary Judgment should have been considered because (1) the trial court abused its discretion and had a duty to rescue La Palomina from the incompetence of its former counsel or alternatively, the trial court should have continued the MSJ Hearing for ten days, which would have then resulted in La Palomina's Response being considered timely filed.

Second, there is a genuine issue of dispute prevent entry of summary judgment because the trial court did not strike La Palomina's Response and there is a genuine dispute as to whether (1) the Landlord anticipatorily breached the Lease by its failure to repair the roof after hurricane damage, which would relieve La Palomina from its obligations to pay rent and (2) the Landlord failed to properly calculate damages. A proper calculation demonstrates that the Landlord will have suffered no damages because (i) the Landlord has a New Tenant and (ii) the New Tenant's rent is substantially more than La Palomina's.

Third, even if this Court does not consider La Palomina's response, the Landlord still failed to meet its burden to establish undisputed evidence of damages because the damage calculation is fatally flawed.

Accordingly, the Final Partial Summary Judgment Order should be reversed, and the case remanded for further proceedings.

STANDARD OF REVIEW

The standard of review in this matter is de novo as to the Motion for Summary Judgment. “The standard of review for summary judgment is de novo.” *Tropical Glass & Constr. Co. v. Gitlin*, 13 So. 3d 156, 158 (Fla. 3d DCA 2009); See also *940 Lincoln Rd. Assocs. LLC. V. 940 Lincoln Rd. Enters.*, 237 So. 3d 1099 (Fla. 3d DCA 2017). “In reviewing a summary judgment, [the] Court ‘must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the nonmoving party . . . and if any doubt exists, the summary judgment must be reversed” (emphasis added). *Tropical Glass*, 13 So. 3d at 158. This Court should apply “the same legal standards that bound the [trial court].” *Carter v. Galloway*, 352 F. 3d 1346, 1348 (11th Cir. Ct. 2003).

The standard of review is a question of abuse of discretion as to the Motion for Leave to File Reply to Appellee’s Motion for Summary Judgment. See *Fernandes v. Boisvert*, 659 So. 2d 412, 413 (Fla. 2d DCA 1995) (holding the trial court abused its discretion in refusing to rescue a defendant from the apparent incompetence of its lawyer).

ARGUMENT

I. THIS COURT SHOULD FIND THAT LA PALOMINA'S RESPONSE TO LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN CONSIDERED OR IN THE ALTERNATIVE THE COURT SHOULD HAVE GRANTED AN EXTENSION OF TIME.

Here, the trial court refused to consider Appellant's Motion for Leave, and instead took the position that Appellant should have filed a motion for continuance instead.¹ Appx. 490-492 Tr. 6:16-8:24. The Court's position is not supported by existing caselaw. In fact, Appellant could not find a case requiring the filing of a continuance in lieu of a motion for leave. Ultimately, the trial court abused its discretion in holding appellant responsible for its prior counsel's failures and 1) should have considered Appellant's Response, or 2) alternatively, granted a continuance, which would have rendered Appellant's response timely.

1. The trial court abused its discretion.

Florida Appellate Courts have consistently held that a trial court abuses its discretion when the trial court refuses to rescue a party from the apparent incompetence of her lawyer. See *Fatherly v. Cal. Fed. Bank, FSB*, 703 So. 2d 1101, 1103 (Fla. 2d DCA 1997). In *Fatherly*, the defendant failed to file a

1. Impliedly, the trial court seemed to admit that if a motion to continue had been filed, it would have been granted, putting semantics over the rights of Appellant.

response to a motion for summary judgment. *Id.* at 1102. The trial court granted summary judgment due to the failure to file a response. *Id.* Subsequently, the defendant hired a new counsel and filed a motion for rehearing presenting a valid affirmative defense to the summary judgment, that the prior counsel knew of the defense, and that the defendant did not know why the attorney did not assert the defense in a timely fashion. *Id.* The trial court denied the defendant's motion for rehearing. *Id.* The Second District Court held that "the circuit court abused its discretion in refusing to consider [defendant's] sworn allegations on rehearing." *Id.* at 1103. Notably, the Second District held that the trial court should have taken into account the defendant's prior counsel's actions, or rather inactions. *Id.* The Second District reversed final judgment and remanded for a disposition on the merits.

In *Fernandes*, the defendant's attorney failed to file a response to a summary judgment. *Fernandes v. Boisvert*, 659 So. 2d 412, 413 (Fla. 2d DCA 1995). The trial court subsequently granted summary judgment. *Id.* The defendant's attorney subsequently filed a "vague and rambling" request for reconsideration attaching an affidavit by the defendant contradicting plaintiff's affidavit in support of motion for summary judgment. *Id.* The Second District Court stated that it was "confronted with the question of whether the trial court abused its discretion in refusing to rescue [defendant]"

from the apparent incompetence of [its] lawyer.” *Id.* The Second District Court held that “while we do not know the underlying reasons which compelled the attorney to pursue this matter in the way he did, it is apparent to us that something has gone awry. Therefore, considering the unique circumstances presented here, we determine that the trial court abused its discretion in refusing to consider [defendant’s] affidavit on rehearing.” *Id.*

Similarly, the Third District Court has held that “had it not been for excusable neglect of appellant’s counsel, appellant would have timely filed in opposition to the appellee’s motion for summary judgment more than ample evidence to indisputable raise a genuine issue of fact.” *Coastal States Mortg. Corp. v. Commonwealth Sav. & Loan Asso.*, 497 So. 2d 917, 917 (Fla. 3d DCA 1986). In *Costal*, the Third District Court found that the trial court abused its discretion in denying a motion for rehearing when such motion was made immediately upon the discovery of counsel’s mistake. *Id.* See also *Wiskeman v. First Bank of Hollywood Beach*, 405 So. 2d 1044, 1045 (Fla. 3d DCA 1981).

Importantly, trial courts abuse its discretion when sanctions against a lawyer could have been a more appropriate course, rather than denying a motion. See *Tooke v. Downing*, 564 So. 2d 250, 251 (Fla. 1st DCA 1990).

Here, La Palomina suffered from its Former Counsel's failure to file a response to the Motion. The trial court acknowledged Former Counsel's failure yet did nothing to protect La Palomina. Appx. 492 Tr. 8:23-24. Former Counsel attended the MSJ Hearing and addressed the trial court. Appx. 492-497 Tr. 8-13. Former Counsel admitted that it did not file a response despite La Palomina having affirmative defense, including the issue with the roof, which could constitute an anticipatory breach, relieving La Palomina from its obligation to make payment. Appx. 495 Tr. 11:18-12:15; *supra* § II.

Under *Fatherly*, *Fernandes*, and *Coastal States*, where the appellate courts found that trial courts abused their discretion when the trial court failed to consider a prior counsel's inactions, actions, and failures. Here, the trial court should have taken into account Former Counsel's failure to file a response despite its knowledge of valid defenses that would protect La Palomina from entry of summary judgment. , the trial court here should have taken into account Former Counsel's failure to file a response, despite its knowledge of valid defenses, and protected La Palomina from Former Counsel's failure.

In fact, La Palomina is analogous to *Coastal States*, because La Palomina's Response demonstrates that absent Former Counsel's neglect,

La Palomina would have timely filed a response in opposition with enough evidence to raise a genuine issue of fact. 497 So. 2d at 917; *supra* § II.

Importantly, La Palomina's new counsel acted immediately upon the discovery of Former Counsel's failure to file a response. *See Coastal States*, 497 at 917 (finding the trial court abused its discretion in denying a motion for rehearing that was made immediately upon the discovery of counsel's mistake). In fact, the undersigned simultaneously filed its (1) Notice of Appearance, Appx. 351-352, (2) Motion for Leave to file a Response; Appx. 353-417 and (3) Response to Landlord's Motion for Summary Judgment, Appx. 418-478. La Palomina attempted to rectify its Former Counsel's error quickly and efficiently upon discovery.

Ultimately, this Court should find that the trial court abused its discretion in failing to consider La Palomina's Response because the trial court acknowledged that the error was on behalf of its Former Counsel. In doing so, the trial court should have rescued La Palomina from the mistakes of its Former Counsel, but it did not. As such, the trial court abused its discretion in failing to consider La Palomina's Response and the Order should be reversed.

2. Alternatively, the trial court should have granted a continuance that would render Appellant's response timely.

Alternatively, at a minimum, if the trial court was inclined to believe that a continuance would be more appropriate, the trial court had the power to *sua sponte* continue the hearing instead of granting the summary judgment.

Moreover, the trial court could have considered Appellant's Motion for Leave as a motion for continuance and continue the hearing a mere ten days, which would then render Appellant's Response timely under Rule 1.510(c).

The Motion for Leave would have been less prejudicial than a Motion to Continue for the Plaintiff; the Motion for Leave asked for any other relief the court deemed just and proper. In fact, the Plaintiff could have been given a choice by the lower court to either accept the late filed Response, or to get a postponement. Yet, the Court insisted on the semantic distinction between a Motion for Leave to file late and a motion for continuance, and gave La Palomina no chance.

II. THIS COURT SHOULD FIND THAT THERE IS A GENUINE ISSUE THAT PREVENTS ENTRY OF SUMMARY JUDGMENT AGAINST APPELLANT.

Appellant's response demonstrates a genuine issue as to whether (1) Appellant did in fact breach the Amended Lease and (2) the amount, if any, of damages.

Summary judgment is only proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. See Fla. R. Civ. P. 1.510(a). Rule 1.510 is to be construed and applied in accordance with the federal summary judgment standard. *Id.* “[C]ourts applying the new rule must be guided not only by the *Celotex* trilogy, but by the overall body of case law interpreting federal rule 56.” *In re: Amendments to Fla. Rule of Civ. Procedure 1.510*, Fla. LEXIS 682 at *12, 2021 WL 1684095 at *3 (Fla. Apr. 29, 2021).

The newly amended Rule 1.510 governs the entry of Summary Judgment. The movant is required to show there is “no genuine dispute as to any material fact” to be entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant must “make a showing sufficient to establish” the essential elements of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding for Summary Judgment, the court must view all the facts in the light most favorable to the nonmoving party. *Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir. 1996). The court must also resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Importantly, a trial court “may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, Summary Judgment

must be denied.” *Carlin Commc’n, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986). The moving party is required to inform the Court of the basis for its motion, identifying the portions on the record which it believes demonstrate the absence of a genuine issue of material fact. *Id.*

First, the trial court never even addressed the merits of La Palomina’s Response.

Notably, the trial court did not strike La Palomina’s Response. Appx 490 Tr. 6:21-22 (trial court: “I am not going to strike your response”). As such, La Palomina’s Response is part of the record and should be considered by this Court when reviewing whether summary judgment was proper. Because La Palomina’s Response is part of the record, summary judgment should have been denied because there is a genuine dispute as to whether the Landlord breached the Amended Lease first, relieving La Palomina of its obligations, and because the amount of damages is disputed.

1. The record demonstrates evidence of an anticipatory breach, which would relieve Appellant from its obligations under the Amended Lease.

It is well “settled contract law in Florida that a breach by anticipatory repudiation allows the nonbreaching party to terminate his own performance.” *Aberdeen Golf & Country Club v. Bliss Constr.*, 932 So. 2d 235, 240 (Fla. 4th DCA 2005). A “nonbreaching party is relieved of its duty

to tender performance.” *Hospital Mortgage Group v. First Prudential Development Corp.*, 411 So. 2d 181 (Fla. 1982).

Here, there is a genuine dispute as to whether Landlord fulfilled its obligations under the Lease. In support of its Response, La Palomina filed a declaration detailing Landlord’s failure to fulfill its obligations under the Amended lease (“Declaration”).

Article 8, Section 1 of the Amended Lease states “Landlord shall keep the foundation, the outer walls, **and roof** of the building in which the Premises is located in good repair.” Appx 204. La Palomina’s Declaration specifically declares:

6. In October 2022 Hurricane Ian affected the State of Florida, including the Property.
7. As a result of Hurricane Ian damage, the Property’s roof began leaking, ruining equipment located therein.
8. La Palomina made GABLES MIRACLE MILE, LLC (the “Landlord”) aware of the roof damage, leaks, and equipment damage.
9. The Landlord made no effort to fix or remedy the roof despite La Palomina’s notice.

Appx. 477-478 ¶¶ 6-9.

As such, the record demonstrates that, at a minimum, there is sufficient evidence for a reasonable juror to conclude that Hurricane Ian caused roof damage that Landlord was aware of and failed to remedy. See Appx. 477-478 ¶¶ 6-9. Moreover, Landlord’s affidavit in support of its Motion does not make any mention of roof damage. See Appx. 190-196.

At minimum there is a genuine issue as to whether Landlord committed an anticipatory breach that would relieve La Palomina from its obligations. Even if Landlord had disclaimed roof damage, the trial court could not weigh conflicting affidavits at summary judgment and would have been required to deny summary judgment. See *Carlin Commc'n, Inc.*, 802 F.2d at 1356.

Thus, this Court should reverse the trial court's entry of summary judgment because a genuine issue of dispute exists.

2. The Response showed, at a minimum, a dispute as to the amount of damages, which could even be \$0.

The sole cause of action brought against La Palomina was for Breach of Lease. Appx. 13-19. The elements of a breach of contract action are "(1) a valid contract; (2) a material breach; and (3) damages." *Grove Isle Ass'n v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1094 (Fla. 3d DCA 2014). The movant must "make a showing sufficient to establish" the essential elements of its case. *Celotex Corp.*, 477 U.S. at 322.

It is well settled Florida law that a landlord "cannot collect accelerated rent from [tenant], relet the premises to a third party during the remainder of the lease term, and retain those rental proceeds as well." *Horizon Med. Grp., P.A. v. City Ctr. of Charlotte Cty., Ltd.*, 779 So. 2d 545, 546 (Fla. 2d DCA 2001); *Quintero-Chadid Corp. v. Gersten*, 582 So. 2d 685, 688-89 (Fla. 3d DCA 1991). "If the landlord goes back into possession and relets the

premises, he must give the tenant credit for the rents received.” *Id.* at 689. Ultimately, it is an error for a court to enter a judgment for the entire amount of future rents without provision for accounting to be made for the rents received from any reletting through the end of the lease term. *See Id.*

Here, summary judgment is improper because (1) Landlord had relet the premises for rent more than what it expected to collect from La Palomina, but it ignored it, (2) Landlord’s calculations were erroneous, (3) the trial court’s Order allows for the Landlord to obtain a windfall, (4) alternatively, the accelerated rent provision is an unenforceable penalty.

Importantly, La Palomina disputed Landlord’s calculation of damages. Appx. 423-430. In fact, Landlord’s calculation was inherently flawed and La Palomina presented a revised calculation. Appx. 426-430.

Specifically, Appellant identified that Landlord’s calculation (1) was insufficient to provide for damages, (2) includes erroneous fees and charges that are disputed, and, most importantly, (3) fails to account for the entirety of New Tenant’s rent.

First, the Landlord did not provide any support for its calculation. *See* Appx. 172-348. The Landlord does not even state that its calculation spreadsheet (the “Account Reconciliation”) was kept in the ordinary course

of business. Instead, the Calculation contains notes and seems to have been created for the purpose of litigation. See Appx. 344.

Second, the Account Reconciliation contains erroneous charges and fees that La Palomina is not responsible for. Landlord has admitted that Landlord obtained possession of the Property on October 24, 2022. Appx. 193 ¶ 16. Despite Landlord’s possession, Landlord charged fees for cleaning, maintenance, and leaks that occurred when La Palomina was no longer in possession:

11/15/22	C-Rekey Locks	338.01
11/17/22	C-Clean-up Space	968.00
11/17/22	C-HVAC Maintenance	380.00
11/18/22	C-Pump out grease trap	700.00
12/09/22	C-Remove La Palomina Signage	535.00
12/15/22	C-Service since La Palomina Left	1,280.56
12/19/22	C-Grease Trap Clean-Out	1,150.00
03/24/23	C-HVAC Maintenance	372.00
03/31/23	C-HVAC Leak Repairs	320.00
04/14/23	C-Hood Cleaning	1,200.00
06/01/23	C-HVAC Leak Repairs	330.00

Appx. 344. Notably, the Landlord has failed to substantiate any of the damage amounts with receipts; Landlord’s affidavit is conclusory and devoid of factual support or receipts. Additionally, “removal of La Palomina’s signage” is not “damage,” and the Landlord would have been required to remove signage at the end of the Amended Lease. The fee for “service since La Palomina Left” is vague, and conclusory. If these services include services to maintain the premises, La Palomina is not responsible for any charges because La Palomina is not responsible for ordinary wear and tear.

See *Rizzo v. Naranja Lakes Condo. Assoc. Nos. One*, 498 So. 2d 451 (Fla. 3d DCA 1986).

The Landlord also seems to have duplicated charges including the December 2022 “Grease Trap Clean-Out and November 2022 “Pump Out Grease Trap.” Finally, the HVAC Maintenance and Leak Repairs not only supports La Palomina’s claim that the Landlord failed to maintain the Property, but also are maintenance charges for the roof, which La Palomina cannot be held responsible for – more so that La Palomina cannot be charged for because the charges are *after* Landlord regained possession. La Palomina raised all of these disputes in its Response, yet the trial court did not allow La Palomina to present argument.

Third, Landlord will be receiving \$1,158,044.68 in base rent from the New Tenant, whereas the Landlord – for the same period of time – would have only received \$805,705.08 from La Palomina. Accordingly, Landlord’s fails to setoff and if setoff were properly calculated, damages would have been **\$0**. See *Colonial Promenade v. Juhas*, 541 So. 2d 1313, 1315 (Fla. 5th DCA 1989) (“If, in fact, the lessor resumes possession of the premises and utilizes them for purposes other than recovery of the rental due him under the contract, then -- and only then -- is he foreclosed from suit for the balance because such would inequitably constitute a double remedy”).

Landlord's argument that it is entitled to accelerated rent, while it collects rent from New Tenant at the same time is without any legal support and contravenes well settled Florida Law.

Ultimately, La Palomina's Response has properly disputed the calculation of damages and this Court should reverse the Order.

3. Landlord's award constitutes an unenforceable penalty.

"A contract term which provides that a party must pay a penalty for breaching a contract is unenforceable." *Crosby Forrest Prods. v. Byers*, 623 So. 2d 565, 567 (Fla. 5th DCA 1993). "If damages are readily ascertainable on the date of the contract, a stipulated damages clause is a penalty and unenforceable." *Id.* "If they are not ascertainable the clause is for liquidated damages and enforceable if the amount is not grossly disproportionate to the damages that might reasonably be expected to flow from the breach." *Id.* "When the stipulated sum is held to be a penalty, as in this case, the party seeking to recover for the breach must allege and prove his actual damages." *Stenor v. Lester*, 58 So. 2d 673, 676 (Fla. 1951).

Here, Landlord has attempted, and succeeded, in limiting the setoff that can be applied without any legal basis. Because the entirety of the New Tenant's rent was not set off, the accelerated rent provision acts as a penalty. Therefore, this Court should find that the acceleration of rent, as interpreted

by Landlord, was actually an unenforceable penalty provision, and thus the set off should kick back in, resulting in \$0 damages.

III. EVEN IF THIS COURT FINDS LA PALOMINA'S RESPONSE SHOULD NOT HAVE BEEN CONSIDERED, THIS COURT SHOULD FIND THAT LANDLORD FAILED TO SATISFY ITS BURDEN AND ESTABLISH DAMAGES IN THE AMOUNT OF THE FINAL JUDGMENT.

Landlord has failed to satisfy its burden as movant even if this Court declines to consider La Palomina's response because Landlord's calculation of damages is insufficient to meet the Landlord's burden and fatally flawed.

Appellee admitted that it has obtained a new tenant, Maman Coral Gables, LLC ("New Tenant"). Appx. 195 ¶ 27; See 433-476. Yet, the Order allows for damages and recovery of rent through 2029, when Landlord now has the New Tenant and will be collecting rent from New Tenant in an increased amount and beyond 2029. Even without considering the Response, the record shows an unexplained contradiction between the right to collect new rent and the damages.

It is the moving party's affirmative duty to prove each and every element of its claim, including damages and its calculation.

Even considering only the Landlord's calculation spreadsheet ("Calculation"), the Calculation is fatally flawed because it fails to (1) take into account New Tenant's Tenant Allowance, (2) properly account for the New

Tenant’s additional rent payments under the New Tenant Lease. If the trial court considered the evidence of a new tenant, which was in the record, and, incidentally, had allowed Appellant’s counsel to talk about, the trial court would have determined \$0 in total damages. Without damages, the Motion should have been denied.

Moreover, Landlord’s calculations are inherently flawed as Landlord calculates the New Tenant’s rent payments as only the “extent of what La Palomina was supposed to pay.”

Tenant Allowance Commissions
03/01/24 - 12/31/24
01/01/25 - 02/28/25
03/01/25 - 12/31/25
01/01/26 - 02/28/26
03/01/26 - 12/31/26
01/01/27 - 02/28/27
03/01/27 - 12/31/27
01/01/28 - 02/29/28
03/01/28 - 12/31/28
01/01/29 - 02/28/29

Only to the extent of what La Palomina was supposed to pay

Appx. 344. There is no legal basis for a limitation on La Palomina’s setoff, in fact, any setoff in the manner the Landlord attempts would create a windfall and contravene established Florida law. See *Juhas*, 541 So. 2d 1313, 1315 (Fla. 5th DCA 1989) (prohibiting double remedies). Upon examining the New Tenant Payment Section of the Reconciliation Spreadsheet, Landlord has only credited La Palomina as if New Tenant’s base rent was *identical* to that of La Palomina. However, Landlord’s calculations ignore the realities of the New Tenant and its lease, wherein base rent *begins* nearly \$4,000 more than

La Palomina's ending rate and is increased by 103.5% per year. A proper recalculation results in Landlord recovering *in excess* of La Palomina's base rent alone via the New Tenant.

This Court should reverse the Order because, even without taking into account the Response, the Landlord failed to carry its burden and establish that there was no genuine issue of fact that Landlord was entitled to damages.

CONCLUSION

Ultimately, this Court should find that the trial court erred in entering the Final Partial Summary Judgment in favor of Landlord because:

(1) La Palomina's response should have been considered by the trial court because the trial court has a duty to rescue parties from its lawyer's errors;

(2) The record demonstrates a genuine issue of material fact preventing entry of summary judgment as to whether (i) Landlord anticipatorily breached the Amended Lease relieving La Palomina from its obligation of payment, and (ii) the amount of damages; and

(3) The Landlord failed to satisfy its burden on summary judgment.

Respectfully submitted,

Barakat + Bossa, PLLC
2701 Ponce de Leon Blvd.,
Suite 202
Coral Gables, Florida 33134
Tel (305) 444-3114
Fax (305) 444-3115

/s/Angelique Gulla
Angelique Gulla, Esq.
Florida Bar No. 1018032
Giacomo Bossa, Esq.
Florida Bar Number 97817
agulla@b2b.legal
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed and served on July 23, 2024, via the Court's e-Filing Portal to Ricardo A. Reyes, counsel for Appellee, rar@tobinreyes.com; rreyesjr@tobinreyes.com, with a mailing address of 225 N.E. Mizner Boulevard, Suite 510 Boca Raton, Florida 33432, via the E-Service List in the Florida Courts E-Filing Portal.

By: **/s/Angelique Gulla**
Angelique Gulla, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I prepared this Initial Brief in Arial, 14-point font in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure. I HEREBY CERTIFY that I prepared this Initial Brief in compliance with Rule 9.100(g) of the Florida Rules of Appellate Procedure and that the total words in this Initial Brief do not exceed 13,000 words or 50 pages.

By: **/s/Angelique Gulla**
Angelique Gulla, Esq.