

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISCRICT

CASE NO. 3D23-2046
L.T. CASE NO. 2021-CA-00591K

SAFE HARBOUR PROPERTIES LLC, et al
Appellants,

v.

DAVID D. VILLONE AND KIM C. VILLONE
Appellees.

ON APPEAL FROM AN ORDER OF THE
CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

**ANSWER BRIEF OF APPELLEES DAVID D. VILLONE AND KIM C.
VILLONE**

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PREFACE

The Circuit Court of the Sixteenth Judicial Circuit in and for Miami-Dade County, Florida shall be referred to herein as the “Trial Court” or “Lower Court.”

Citations to the Record on Appeal shall be designated by the term “R.” followed by the page number(s).

I. STATEMENT OF THE CASE AND FACTS

A. Appellees File An Unlawful Detainer Action Against Appellants

On December 24, 2020, Appellee filed a one (1) count complaint for unlawful detainer against Appellants in County Court, bearing Case Number 20-CC-000283-K. (R. 12-29) In response, Appellant filed a three (3) Count Amended Counterclaim on February 18, 2021. (R. 89-114). On August 17, 2021, due to the Amended Counterclaim, the County Court transferred the case to Circuit Court. On September 8, 2021, the Circuit Court Case was opened bearing Case Number 21-CA-000591-K. (R. 157)

B. Counts I and III of Appellants' Counterclaim is Dismissed

On February 9, 2022, the Court held a hearing on Appellees' Motion to Dismiss Counts I and III of Defendants Amended Counterclaim. (R. 305) On March 11, 2022, the Court entered an Order dismissing Count I (Emergency Action for Temporary Injunction) because Appellants counsel announced during the hearing that Count I was being voluntarily withdrawn. (R. 305) The Court's March 11, 2022 Order also dismissed Count III (Declaratory Relief), finding that Count III of the Amended Counterclaim was "superfluous because it encompassed the same issues as Count II and resolution of Count II will provide, full adequate and

complete relief.” (R. 305) Thus Counts I and III of Appellants’ Amended Counterclaim were dismissed in March of 2022. (R. 305)

C. Motion for Summary Judgment as to the Remaining Count II of the Amended Counterclaim Adverse Possession

On or about May 23, 2023, after the close of discovery, Appellees filed their two-part Motion for Summary Judgment as to the only remaining count of the Amended Counterclaim (Count II for Adverse Possession under Color of Title) and for summary Judgment as to the only count of the Complaint (Chapter 82--Unlawful Detainer). (R. 431-448) The hearing was held on September 5, 2023. **Appellants failed to timely file a Response in Opposition** to said Motion for Summary Judgment. (R. 553) Thereafter, on October 17, 2023, after more than one (1) month of deliberation (R. 580), the Lower Court entered an Order granting Final Summary Judgment against Appellants as to Count II for Adverse Possession Under Color of Title and dismissed Count II for Adverse Possession with prejudice. (R. 581-82) Via that same Final Summary Judgment Order, the Lower Court also granted Summary Judgment as to Count I of Appellees’ Complaint for Unlawful Detainer. (R. 581-82).

D. The Lower Court Granted an Ore Tenus Motion to Strike Appellants’ Memorandum in Opposition to the Motion for Summary Judgment

The Summary Judgment entered on October 17, 2023 also granted Appellees' Ore Tenus Motion to strike Appellants' Memorandum in Opposition because it was filed only four (4) days before the September 5, 2023 hearing, finding that the Appellants' Memorandum in Opposition was filed in "**flagrant violation** of the 20 day time requirement set forth in Rule 1.510(c)(5) and the only fair and appropriate remedy is to strike said memorandum." (R. 581-2)

The Lower Court further found: "As far as the Plaintiff's Motion for Summary Judgment is concerned, the Court agrees with the position and arguments advanced by the Plaintiffs. Despite Defendants' insistence that their adverse possession claim is made 'under color of title' that position is meritless because the record evidence, including the deposition transcripts make it clear that there is no deed or other written instrument" to the subject land that could "support a claim of adverse possession under color of title." The Lower Court went on to state: "Furthermore, even if Defendants had advanced an adverse possession claim 'without color of title' (and they have advanced no such claim) such a claim would be equally specious because it is undisputed that Defendants failed to meet any of the legal conditions set forth in Fla. Stat. §95.18, so as to bring a proper claim for adverse possession 'without color of title.'" (R. 581-2)

E. Appellant took Appeal of the Final Summary Judgment Despite the Fact that the Issue of Damages as to Count I for Unlawful Detainer Remains Outstanding

Appellants appealed the Final Summary Judgment as an appealable interlocutory order even though it is not truly ‘Final’ because judicial labor remains on the issue of damages as to Count I for Unlawful Detainer. Appellants did not file any motion for reconsideration or rehearing on the Final Summary Judgment.

On January 19, 2024, Appellants’ filed a Motion to Stay the Damages trial as to Count I for Unlawful Detainer. The Motion was denied via Order rendered on April 10, 2024 and the cause is set for jury trial.

II. STANDARD OF REVIEW

In the context of a Motion for Summary Judgment, a trial court’s decision to strike ‘new evidence’ or a late-filed Opposition to a Motion for Summary Judgment is reviewed for an abuse of discretion. *See e.g., State Farm Mutual Automobile Ins. Co. v. Advanced X-Ray Analysis, Inc.*, 368 So. 3d 1049 (Fla. 3d DCA 2023); *see also Full Pro Restoration v. Citizens Property Ins. Co.*, 373 So. 3d 1189 (Fla. 3d DCA 2020). However, the standard of review on an “order entering final summary judgment is reviewed *de novo*. *See Volusia Cnty. V. Aberdeen at Ormond Beach, L.P.*, 760 so. 2D 126, 130 (Fla. 2000).

III. SUMMARY OF THE ARGUMENT

The Lower Court's Order granting summary judgment as to Count I of the *Complaint*, and dismissing with prejudice Count II of the *Counterclaim* for Adverse Possession, is warranted under Florida law. Appellants waived any argument as to standing, produced no record evidence in opposition on the issue of standing, and failed to even file a timely response to Appellees' Motion for Final Summary Judgment (Appellees Memo in Opposition was filed one (1) business day before the Motion for Summary Judgment hearing in violation of Florida Rule of Civil Procedure 1.510(c)(5).

IV. ARGUMENT

A. It Is Unequivocally Clear that Appellees Have Standing

Appellees are record title owners of the subject real property and thus do not lack standing to bring an action for possession/unlawful detainer against Appellants. "Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation." *E.g., Peregood v. Cosmides*, 663 So. 2d 665 (Fla. 5th DCA 1995); *see also Equity Resources, Inc. v. County of Leon*, 643 So. 2d 1112 (Fla. 1st DCA 1994). The "interest

cannot be conjectural of merely hypothetical. *See Id.* Furthermore, the claim should be brought by, or on behalf of, the real party in interest. *Kumar Corporation v. Nopal Lines Ltd.*, 462 So. 2d 1178 (Fla. 3d DCA 1985).

Appellants themselves admit that Appellees are record title holders of the subject real property. Appellees brought an action against Appellants for possession of said real property, because Appellants had been storing fishing traps, steel containers and vehicles on the “upland” (non-submerged) portion of Appellees’ real property. Thus, it is clear that Appellees have standing because they have a (i) legally cognizable interest (they are record title holders), an injury in fact (the unauthorized use and detention of the land by Appellants), causation, and redressability (in the form of an action for possession under Chapter 82, Florida Statutes).

On appeal, Appellants, at length, argue facts that are not in the record and were never established because no counter-vailing evidence of the so called adverse possession of the subject land since 1990 was ever produced. Appellants arguments are all red-herrings, facts are being injected into this record on appeal which were not accepted by the Lower Court, and which were in fact found to be false through the deposition testimony of record, and which also weren’t adduced at the summary

judgment stage because no affidavits or other record evidence was filed by Appellants in response to the Motion for Summary Judgment.

B. The Lower Court Correctly Found that Plaintiffs Adverse Possession Counterclaim is Not Made Under Color of Title

The Lower Court correctly found that Appellants Adverse Possession Counterclaim cannot be said to be made under ‘color of title.’ The Lower Court even went a step further and found that even if the Counterclaim were brought ‘without color of title’ there still wouldn’t be anything in the record to support such a claim. Appellants Count II Counterclaim repeatedly stated that the cause of action is brought Under Color of Title ‘pursuant to Fla. Stat. §95.16. *See Counterclaim Paragraph 41.* However, the lower court found that the record completely belied this assertion.

Under Florida law, the phrase “color of title” references a “claim of title exclusive of any other right” that is founded on a **written instrument** of conveyance. *See Fla. Stat. §95.16.* [B]ut color of title means more than a purported instrument of conveyance; the circumstances surrounding its [the deed’s] execution and delivery require consideration.” *See Frazier v. Goszczyński*, 161 So. 3d 542 (Fla. 5th DCA 2014).

As the *Frazier* court put it: “We believe that color of title requires that the deed of conveyance be accepted by the grantee in good faith and with the belief that it constitutes a legitimate conveyance of title.”

Admittedly, Appellants Adverse Possession Counterclaim couldn't possibly be made under color of title because, as set forth in the uncontested Motion for Summary Judgment, Appellants failed to attach or produce any deed or any other written instrument or decree whatsoever to support the claim for adverse possession under color of title. As Appellee wrote in its uncontested Motion for Summary Judgment, and as confirmed by the deposition testimony of the Appellants, "indeed, there is no deed or other written instrument in existence that would support Defendant's fallacious allegation that their adverse possession claim is made 'under color of title.

In sum, the uncontested Motion for Summary Judgment, and the deposition testimony cited therein, satisfied the Lower Court that there wasn't a single iota of evidence to support Appellants' contention that its adverse possession claim was brought under color of title, **or even without** color of title.

C. The Lower Court Did Not Abuse Its Discretion in Striking Appellants Unsworn Memorandum in Opposition to Summary Judgment.

The Lower Court Did Not Abuse Its Discretion in Striking Appellants Unsworn Memorandum in Opposition to Summary Judgment—which was

filed one (1) business day before the Hearing on the Motion for Summary Judgment.

Florida Rule of Civil Procedure 1.510(c)(5) states that the nonmovant's response to a motion for summary judgment and its supporting facts, must be served at least twenty days before the time fixed for the hearing. *See Full Pro Restoration*, 373 So. 3d 1189 at 1193. "The trial court correctly noted that the language of this section of the rule is mandatory." *See Id.*

Finally, the trial court did not abuse its discretion by striking Appellants Memorandum in Opposition. Fla. R. Civ. P. 1.510(c)(5)(e) provides that if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may give that party an opportunity to properly support or address the fact, or the court could consider the fact undisputed for purposes of the motion, or issue any other appropriate order. Indeed, the Lower Court gave Appellants the opportunity to make oral argument at the summary judgment hearing, and gave Appellants the opportunity to refute the record evidence adduced by Appellees at the hearing, and yet, the Court still found against Appellants after more than one (1) month of deliberation. It is clear from the record that Appellant "had an adequate opportunity to engage in discovery and...further discovery was not likely

to present any material facts relevant to the trial court's disposition of the issues." See *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281 (Fla. 3d DCA 2007).

Here, Appellants filed their Memorandum of Opposition one (1) business day prior to the hearing scheduled on the Motion for Summary Judgment in violation of the rules of procedure. Here, Appellants failed to file any affidavits in support of their opposition, and failed to adduce or provide any record evidence to the Court, via deposition transcripts of record or otherwise, that the claim for adverse possession under color of title was viably made as a matter of fact and law. Whats more, the Lower Court still gave Appellants an opportunity to refute or contest the record evidence, and yet still, the Lower Court was clearly convinced, based on the deposition testimony of record, that the Plaintiff's claim of Adverse Possession, **admittedly**, could not be made under color of title, and more so, the adverse possession claim could not even be viably asserted as a claim 'without' color of title.

Appellants Initial Brief, like its pleadings and motions in the Lower Court, are fraught with confusion, red herrings, and irrelevant issues that detract from the law and actual record facts of the case. The Lower Court was led to the only sensible conclusion it could make, namely, that Appellants admitted that no written muniment of title could support an

adverse possession claim under color of title, and that Appellants had been using Appellees land to rent it out to others and store their personal property all in derogation of Appellees rights to possession of said land as record title holders.

CONCLUSION

The trial court did not err in dismissing Appellants frivolous adverse possession claim under color of title. The record evidence clearly convinced the lower court that Appellants had no written instrument or other written muniment of title that could allow their Adverse Possession claim to survive ‘under color of title.’ Contrary to what Appellant argues, the mere fact that Appellants were in alleged adverse possession of the land since 1990 (this alleged fact was clearly refuted) does not somehow confer a cause of action for adverse possession under color of title.

The trial court did not err in striking Appellants Memorandum in Opposition to the Motion for Summary Judgment because it was filed one (1) business day before the hearing on the Motion. Yet despite this, Appellant was still given a full and fair opportunity to argue the motion and contest the facts.

The trial court did not err in finding that Appellants had standing (or in otherwise striking Appellants standing argument) because Appellees are

record title holders of the subject land, have suffered Appellants unlawful possession/detention of their land, and the Court clearly provided redress for same and issued a writ of possession disposing Appellants from the subject real property.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of May 2024, a true and correct copy of the foregoing was furnished to all parties and their counsel of record via the Florida Court E-filing portal to: Matthew Valcourt, Esq at mvalcourt@valcourtlaw.com.

By: /s/ Philippe Revah
Phil Revah, Esq. (FBN 118393)

CERTIFICATE OF COMPLIANCE

I certify that this Answer Brief complies with the font requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure as it has been prepared in Arial 14-point font.

By: /s/ Philippe Revah
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