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

CASE NO.: 3D23-0284

MIAMI BEACH CLUB MOTEL CONDOMINIUM ASSOCIATION INC.

Appellant,

vs.

RDR SEASHORE, LLC

Appellee.

_____/

L.T. CASE NO. 2015-007512-CA-01 (Miami-Dade County, Florida)

MIAMI BEACH CLUB MOTEL CONDOMINIUM ASSOCIATION INC.'S ("MBC") REPLY BRIEF

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA CASE NO. 2015-007512-CA-01 (HONORABLE OSCAR RODRIGUEZ-FONTS)

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PREFACE

References to the original record on appeal will be marked as “R1” and will be followed by page and line numbers;

References to the supplemental record on appeal will be marked as “R2” and will be followed by page and line numbers;

The Transcript of the Summary Judgment Hearing on October 31, 2022 before the Honorable Oscar Rodriguez Fonts is located in the supplemental record on appeal at pages 6,086 to 6,171;

The Transcript of the Amended Motion For Rehearing on April 24, 2023 before the Honorable Oscar Rodriguez-Fonts is located in the supplemental record on appeal at pages 6003-6085;

The Order Granting Summary Judgment (January 17, 2023) is contained in the Amended Notice of Appeal R.1 pages 5679-5693).

References to Appellant’s Initial Brief, may be referred to as “IB”

References to Appellee’s Answer Brief may be referred to as “AB”

A. REPLY TO RDR's INTRODUCTION SECTION AND STATEMENT OF THE FACTS AND CASE

RDR starts it's AB arguing that demolishing the Armani Case is unreasonable. RDR concedes that "RDR built the Armani/Casa Residences over a portion of the land on which the driveway used to exist. R.5838." (AB at p. 4). If an easement exists, injunctive relief is not per se unreasonable because Courts have discretion to remove structures built in violation of deed restrictions. *Pelican Island Prop. Owners Ass'n, Inc. v. Murphy,* 554 So. 2d 1179, 1182 (Fla. 2d DCA 1989) ("Where structures have been erected in breach of a restrictive covenant, the court may order their removal, especially where it was erected with full knowledge of the restriction….")

Regardless, RDR confiscated a valuable property right. While there may be equitable defenses, there are no similar defenses to monetary damages at law. RDR concedes that "In the alternative, MBC requested an award of damages R.4333, 4342." (AB at p. 5). The uncontested value of the easement is over $10 million. *See* Appraisal Report (R1 5,011). More importantly, the requested relief is separate from whether or not an easement exists.

As to whether an easement exists, RDR puts front and center the lost agreement count. Contrary to RDR's assertion in the AB, MBC recognizes the Statute of Frauds is Florida law. However, Florida law is also that clear and convincing evidence of a lost agreement avoids the statue of frauds. In

any event, the lost agreement count is covered in less than one full page of the IB (pages 41-42) and is not the primary argument. With that said, the same facts relevant to same are also relevant to interpreting the Declarations.

The relevant facts are detailed in the IB, Section IV(A). Specifically, 1) the neighboring parcels were once jointly owned, and once operated as one property- The Red Lion Motel, 2) in 1980 and 1981 the Red Lion Motel was split into two condominiums by the original owner/developer, 3) parking spaces were created by the original developer that could only be accessed with each side (MBC and the Former Seashore) passing through the other side's property, 4) the access path was on a driveway on both the MBC and Former Seashore and the exact path was shown with arrows painted on the floor 5) it was the only path to access parking spaces the developer built (likely to satisfy County parking ordinances), and included a handicap ramp 6) the use/path was known to RDR prior to its purchase, and the parking spaces and easement were in use since creation of MBC, 7) no one objected to the well-known use before RDR eliminated it, and 8) MBC and Seashore Declarations reserve intended easements in Articles III and VI.

RDR did not submit affidavits contesting the contested fact that the spaces did not exist, a fact that was crucial to RDR's argument. Summary judgment cannot be granted without affidavits supporting the opposing facts.

Rodriguez v. Avatar Prop. & Cas. Ins. Co., 290 So.3d 560 (Fla. 2d DCA 2020) (facts must be supported by affiants with personal knowledge). *see also Everett v. Avatar Prop. & Cas. Ins. Co*., 310 So.3d 536 (Fla. 2d DCA 2021).

MBC's above points are also set forth in MBC's Amended Motion for Rehearing (R1 5,746-5,830), and its verified presentation. (R2 5,875-5,944). The Motion For Rehearing is also supported by the affidavits of Richard Weinstein, the vice president who owned at the time of original developer control (R1 5,779-80), and Jose Pacheco, an early owner who visited MBC prior to its conversion into a condominium (R1 5,777-78). These facts strongly support the argument that the original Declarations intended the specific easement at issue.

The Declarations are clear that Condominium Property is not limited to what is in the legal description. The ambiguity is because it is a catch all provision, without specifics. However, the Declarations are clear that the easements are not limited to those shown on the legal description. See Seashore Declaration at Article III(J) and VI(f) (R1 4,752, and 4,757-4,758) and MBC Declaration at Article III(J) and VI(f) (R1 4,680 and 4,687).

B. THE DECLARATIONS CREATE THE EASEMENT/THERE WAS ONLY ONE DEVELOPER OF BOTH THE SEASHORE AND MBC

MBC's primary position is that the MBC and Seashore Declarations create the easement at issue. MBC relies on Articles III and VI of both Declarations.

The argument is set forth in more detail in MBC's Initial Brief in pages 28-36.[1] ARTICLE III(J) defines MBC's Condominium Property as follows:

> "(J) Condominium Property means and includes the land in the Condominium, **whether or not contiguous**, and all improvements **and all easements and rights thereto, *intended for use in connection with the Condominium* and, *where the context so requires or admits***, "Condominium Property" or "the condominium" or "this Condominium" shall mean the property described on the "LEGAL DESCRIPTION being the property submitted to a condominium form of ownership by the Declaration." (Emphasis added).

Article III states ALL intended easements are preserved whether or not specifically delineated. It is a catch all provision whose scope should be determined by surrounding facts. RDR's argument that easements are limited to what is specifically delineated renders the catch all language meaningless. "[A] cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless." *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755

[1] RDR also cites in it's AB a section about owner alterations and nuisance and notes that Judge Thornton said *some of the counts* were close calls. Said arguments were abandoned. With regret, the earlier complaints used a "kitchen sink" approach, but the weaker arguments were abandoned. Judge Thornton decided that the case should not be summaried out in its entirety. As a result, Judge Thornton declined to partially summary out counts that he deemed to be close calls. Thereafter, counts were abandoned and **both Parties tried to work out a settlement to no avail, and the case sat largely by tacit agreement.** The pretrial mediation impassed, but likely only because of the pendency of the summary judgment motion. It is almost certain that if this Court reverses, a settlement will indeed resolve this case, but if not, MBC is prepared to go to trial as soon as possible.

(Fla. 3d DCA 2020) citing *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.,* 169 So. 3d 197, 203 (Fla. 1st DCA 2015).

Further, the Third DCA used catchall language to create what many consider the most important point of Condominium law. In *Kaufman v. Shere*, 347 So. 2d 627 (Fla. 3d DCA 1977), the Third DCA invalidated specific language of the Declaration, because of the catch all in the Declaration that adopted the Condominium Act "as amended from time to time." *Id.* Moreover, RDR's argument that "Finally, even if such an easement agreement had existed, the court deemed summary judgment proper given MBC's failure to present evidence of the agreement's contents. R.5849." (AB at p19). This is incorrect. Affidavits and pictures were submitted showing (through the arrows on the floor) the specific easement. (R1 5,746-5,830) and (R2 5,875-5,944) RDR improperly challenges MBC's evidence without a supporting affidavit.

Sweetwater Oaks Condo. Ass'n, Inc. v. Creative Concepts of Tampa, Inc., 432 So. 2d 654 (Fla. 2d DCA 1983) is the closest case. *Sweetwater* also deals with two adjoining communities built by one developer. Yes, the language is different, but the *Sweetwater* Court read language similar to here and held the developer intended the easement even though it was not specifically identified. Similarly, S*weetwater* rejected the argument RDR makes here-that the absence of a specific delineation was fatal. *See also*

Citgo Corp. v. Florida E. Coast Ry. Co., 706 So.2d 383, 386 (Fla. 4th DCA 1998) (language without specifics sufficient due to knowledge of the use).

RDR also writes in its AB at p.5 that "Practically, the easement MBC seeks would access three parking spaces located at the southern rear corner of the MBC Property, which spaces *indisputably* did not exist at the time MBC was established in February 1981." In addition, as RDR acknowledges in the AB at p1, "MBC alleged that the new building makes three parking spaces and a handicap ramp at the rear of MBCs property less accessible...." Disabled access is very important. Regardless, the reason for the easement is irrelevant and the relevant inquiry is whether it was created and intended by the original developer (it was).

RDR did not submit an affidavit or any proof that the parking spaces did not exist at the time of creation. RDR's statement that "the spaces indisputably did not exist" at the time of MBC's creation is false. Jose Pacheco swears that "…..I swear that the parking spaces…at Miami Beach Club **were there when the Miami Beach Club was created by the developer from the Red Lion Motel complex in March of 1981**…I also swear that the use of the path/ easement…was **in use from prior to the creation of the Miami Beach Club** and there were arrows painted on the floor showing the path…" (Emphasis added). (R. 5,777-5,7778).

RDR also states in the AB at p.2-3 that "The Seashore Club was condominiumized…*by a* separate owner…" Ironically, RDR also writes "The **original developer** condominiumized the **parcels**, splitting a northern portion…from the southern." (AB at p.2). In short, RDR slips in its AB and states MBC and Seashore had the same developer. Geftman owned both Seashore and MBC developer entities and transferred same for both to one entity (BOP, Inc), which later sold to RDR and RDR's predecessor.[2]

Developer entities are not dispositive per Chapter 718. *See Bishop Associates Ltd. Partnership v. Belkin*, 521 So.2d 158 (Fla. 1st DCA 1988) (10 entities deemed a single developer due to common control); *Phipps Plaza Condo. Ass'n Inc. v. Unit Owners Voting For Recall*, Arb. No. 14-04-1394, 2015 WL 3993298, at *2–3 (Fla. DBPR 2015) (Condominium Bureau looks to human controlling entities to determine developer). RDR claims the above cases are distinguishable because they deal with developer turnover. This is a distinction without a difference. The issue is who is or was the developer or subsequent developer, and to determine that, per the Condominium Act, the entity used is disregarded.

[2] RDR asserts that Seashore was created "on April 3, 1979, and from that date…was owned by the Seashore Club unit owners." AB at 28. RDR ignores that the developer controlled the Seashore Board when MBC was created. See IB at p. 13, 21, and 27 for record cites.

RDR also attempts to distinguish the transcript admission in another case between the Parties that RDR is the successor developer. Yes, the issue in the prior MBC/RDR case was whether RDR was obligated to pay attorneys' fees. This Court agreed with RDR that the answer was no because there is no separate right to attorneys' fees in a developer dispute. However, all developers are bound by the Declaration and entitlement to attorneys' fees is a separate issue. RDR now argues it is not bound by the Declaration, but previously sued to enforce the MBC Declaration. RDR conceded that the Right Of First Refusal was later released by the original developer (**another agreement lost at the time RDR filed suit, but later found)** so the only remaining appellate issue was attorneys' fees because MBC prevailed in that case. *See* Transcript of hearing. (Page 26, lines 3-8 of the transcript located at R1 5,000). RDR's argument here that it is not bound by the Declaration is contrary to the argument it made in the companion case.

C. STANDING TO ENFORCE THE DECLARATIONS

RDR is the successor developer as it has admitted, and as the facts show. *See* Transcript and Assignments of original developer rights for MBC and Former Seashore to RDR from BOP, Inc (R1 4,987-89 and R1 4,990). As a result, the Seashore Declaration can also be enforced by MBC against the successor developer to the Seashore (RDR). MBC is an intended third-

party beneficiary to the Seashore Declaration because the Seashore developer intended future MBC owners to use property on the Seashore to access parking spaces on the MBC, as there was no other method of vehicular access. *See generally Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n, Inc.*, 169 So.3d 145, 150 (Fla. 4th DCA 2015), cited with approval by *Gardens of Kendall Condo. v. Valores Agregados, LLC*, 187 So.3d 252 (Fla. 3d DCA 2016) (mortgagees, even though not parties to the Declaration may enforce it because they are third-party beneficiaries).

RDR distinguishes the above cases because they cover mortgagees. However, the holding is that one does not have to be a party to enforce the Declaration, if one is an intended third party beneficiary. If it is accepted that the Seashore/MBC developer created the easement, (which is the only rational conclusion given the above facts) it is clear the people who were supposed to use the easement (MBC) are intended third party beneficiaries.

Regardless, MBC needs only the MBC Declaration to prevail because the easement is set forth in the MBC Declaration, and RDR is bound by it as the successor developer. RDR acknowledges in its AB at p. 17 that "The court also adopted RDR's argument that, even if the MBC Declaration had identified the Seashore Property as an encumbered estate, the developer of MBC did not own the Seashore Property and lacked any authority to

encumber it. R.5844." Similarly, RDR acknowledges that "The court also adopted RDR's argument that, even if the MBC Declaration had identified the Seashore Property as an encumbered estate, the developer of MBC did not own the Seashore Property and lacked any authority to encumber it. R.5844."

The developer of each condominium has the power to encumber the Condominium Property. This is not limited to before creation because of Fl. St. § 718.111 (10). (The Seashore Developer was in control of the Seashore long after MBC was built). *See* Footnote 2 for record cites. RDR focuses on the fact that the developing entities for Seashore and MBC were different. However, as stated, developer entities are not dispositive for the purpose of determining who the developer is for Condominium Act purposes, and it clearly was the same human family owning both.

Indeed, if RDR is correct, a developer may never be able to create an easement in two neighboring properties that were once a single parcel. As this Court recently held, "…Hoffenberg owned both parcels…thus Hoffenberg's attempt to create an easement over his own property was *void ab initio" AFP 103 Corp. v. Common Wealth Tr. Services, LLC*, 48 Fla. L. Weekly D401 (Fla. 3d DCA Feb. 22, 2023), *opinion withdrawn and superseded on reh'g*, 48 Fla. L. Weekly D2071 (Fla. 3d DCA Oct. 25, 2023).

The *AFP* opinion was superseded on more narrow grounds after a rehearing. However, this argument may be precisely one of the reasons the developer here created two different entities. Otherwise, there was a risk of the easements being declared *void ab initio* if he declared an easement over two neighboring properties, which until condominiumized were one single parcel. In short, if RDR is correct, it may be impossible to create easements under these circumstances because if one is created on land the developer owns all of, it is arguably *void ab initio* and if a separate entity is created, according to RDR, it has no power to bind the other entity.[3]

D. RDR'S PROPOSED SUMMARY JUDGMENT ORDER WAS ADOPTED BY THE COURT, AND IGNORES ONE OF MBC'S CRUCIAL AND INDEPENDENT ARGUMENTS, AND THUS, WITHOUT REGARD TO ALL ELSE, REVERSAL IS REQUIRED PER AMENDED RULE 1.510

At the outset, it is acknowledged that wholesale adopting proposed orders is not fatal in all circumstances. However, in certain cases, this Court has held that "Because the trial judge adopted the law firm's proposed order word for word, without allowing objection by [plaintiff's] counsel, and made

[3] Undersigned attended the University of Miami Cluster Housing Seminar, which is attended by most of the top condominium attorneys in Florida. The presenters of this topic were exasperated by *AFP*'s original holding, and discussed options to avoid it. Virtually all agreed with the eventual dissent in the *AFP* rehearing opinion, and in any event, the majority on rehearing decided *AFP* on more narrow grounds and explicitly limited AFP to it's facts.

no factual findings or legal conclusions to guide the parties in preparing their orders, we conclude that independent judgment does not appear to have been exercised as *Perlow* and our precedent require.". *Larkins v. Mendez, 363 So. 3d 140, 147 (Fla. 3d DCA 2023)* (citations omitted).

Even assuming arguendo that there was independent judicial judgment, that judgment did not comply with Rule 1.510, Florida Rules of Civil Procedure because Fl. St. § 718.111 (10) was ignored. RDR's suggestion at page 20 of its AB that this argument is withdrawn is not correct. Originally, the argument was based on the text of Rule 1.510 that could be read to require the Court to announce the ruling from the bench.

Indeed, the Rule's text seems to require the Court to orally announce the ruling. However, that portion of the argument (requiring an oral ruling) was withdrawn because of dicta in recent cases suggesting it could be alternatively in the order. However, MBC argued in the Amended Motion For Rehearing at paragraphs 28-32, and 49 and during the hearing that Trial Court's order does not address the Fl. St. § 718.111 (10) argument (R1 5,752-53, and R1 5,757-58). Thus, in this case whether it could alternatively be in the order was academic because it is not alternatively in the order.

RDR acknowledges Fl. St. § 718.111 (10) for the first time in the AB. RDR writes "Next, MBC argues that a reasonable jury could have concluded

that an easement was created pursuant to Fl. St. § 718.111 (10) as that section does not require a recorded instrument specifically delineating the easement…But MBC cites no case law to support this proposition, which is not surprising given that the case law specifically requires an easement to be written. That a condominium board can create an easement over common elements or on its own property does not support MBC's leap in logic that no writing for such an easement is required." AB at p40.

RDR's position that MBC's argument that there need not be a writing to satisfy Fl. St. § 718.111 (10) is wrong and in any event, irrelevant. RDR's argument is irrelevant because this issue was not addressed below. RDR is also wrong because there is literally no case law on whether or not there must be a writing. RDR is arguing because in each case where Fl. St. § 718.111 (10) was at issue for one reason or another, (and not this specific reason) there was a written easement. Perhaps, but that is merely part of the facts of those cases, no Court holds whether or not it was required.

Further, the language of 718 often states that a writing is required, where one is required. See e.g. Section Fl. St, § 718.3026 (requiring certain contracts to be in writing). "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." *Le Scampi Condo. Ass'n, Inc. v. Hall,* 200 So. 3d 187,

190 (Fla. 2d DCA 2016). At least arguably, because writings are required for certain contracts explicitly by the Condominium Act, the fact that Fl. St, § 718.111(10) does not explicitly require a writing means the Board can act through board meetings and minutes, as is authorized in the Declarations.

Further, the second aspect to the Fl. St. § 718.111 (10) argument is that the developer could have bound the Seashore owners so long as it remained in control of the Seashore, as it did long after it created MBC and Seashore. See above at page 10 for record cites. Regardless, even if this Court might disagree and conclude the Declaration language is insufficient, and Fl. St. § 718.111 (10) can only be used if there is an explicit writing with specific delineation, Fl. St. § 718.111 (10) was not addressed in the order or orally by the Court. Therefore, Amended Rule 1.510 mandates reversal.

RDR attempts to avoid same by arguing in its AB (p.22) that "*Substantially,* the trial court correctly rejected MBC's argument that section 718.111(10) does not require a record instrument specifically delineating the easement." Similarly, RDR argues that""The court found "there was never actually a created or identifiable easement in this case" and that MBC did not present any "new arguments or any evidence for the [c]ourt to reconsider." R.6046–47" AB at p. 21. However, the Trial Court's order does not contain a single reference to Fl. St. § 718.111(10) and the above cannot be sufficient

to substantially comply with the Rule, as that would be an evisceration of the intent of Rule 1.510.

E. Conclusion

Reversal is required if this Court agrees with only one of MBC's arguments. Most importantly, the Declarations contain a sufficient catchall provision to create the easement. Florida law is that the intent of the catchall should be determined by the facts. RDR submitted no affidavits challenging the facts in MBC's affidavits and the *uncontested facts* show the developer intended the easement.

In addition, the developer had the power to create the easement at any time during developer control, by reserving this catchall of intended easements in both the Seashore and MBC Declarations. Regardless, Fl. St. § 718.111 (10) is an independent argument and the statute is not referenced at all in the Summary Judgment Order. RDR's argument that this Court should ignore same because the Court "substantially" addressed it fails both because it was not substantially addressed, and also because, such an interpretation of 1.510 would eviscerate Rule 1.510's intent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to Ryan Hopper and David Weinstein of Greenberg Traurig Tampa, (whose physical address is 101 East Kennedy Boulevard, Suite 1900 Tampa, FL 33602) and also to Alexandra Bach Lagos of Greenberg Traurig Miami, (whose physical address is 333 SE 2nd Ave #4400, Miami, FL 33131). Service was effectuated by email at the following e-mail addresses: Ryan Hopper hopperr@gtlaw.com and dunnla@gtlaw.com, David Weinsten weinsteind@gtlaw.com and thomasm@gtlaw.com and Alexandra Bach Lagos Alexandra.Lagos@gtlaw.com ; and cohenpa@gtlaw.com this 8th day of January 2024.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Motion complies with the applicable font (14-point Arial) and contains 3,646 words, and 15 pages (not counting the preface, table of contents or table of authorities or certificates of service and compliance). .

By: ***/s/ Stuart J. Zoberg***

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