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IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

SAM GERSHENBAUM,

CASE NO: 3D23-970

Plaintiff/Appellant,

v.

WIND CONDOMINIUM ASSOCIATION, INC.,

Defendant/Appellee.
_____/

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT
FOR MIAMI-DADE COUNTY, FLORIDA

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INTRODUCTION AND QUESTION PRESENTED

Dr. Sam Gershenbaum provides medical services through a single-shareholder professional corporation, "Sam Gershenbaum, D.O., P.A." He operates his surgical practice in commercial units at the Wind Condominum on the Brickell River, which he owns through his single-member entity Wind Enterprises, LLC.

In June 2018, a high-pressure air conditioning hose serving a third-floor unit in Wind Condominium ruptured. The water damaged Dr. Gershenbaum's offices and required him to suspend operations. Dr. Gershenbaum sued Appellee Wind Condominium Association, Inc., for negligence and for violating the Florida Condominium Act.

The Association moved for summary judgment arguing that Dr. Gershenbaum lacked standing to sue in his own name. The trial court granted the motion, finding that his entities were the real parties in interest. The trial court denied his motion to amend the complaint to add Wind Enterprises and his other entities as plaintiffs, reasoning that lack of standing at the inception could not be cured by amending the complaint.

This appeal presents these questions:

1) Did the trial court err by ruling that Dr. Gershenbaum lacks standing to sue the Association?

2) Did the trial court err in determining that amendment was futile?

STATEMENT OF THE CASE AND FACTS

In June 2018, an air conditioning hose serving Takuma Riordan's third-floor unit at Wind Condominium ruptured, damaging Dr. Gershenbaum's surgical practice below. (R. 72). Dr. Gershenbaum incurred repair expenses and lost revenue as a result. (R. 202). He sued Appellee Wind Condominum Association for negligence and statutory violations. (R. 15).

Dr. Gershenbaum provides services through Sam Gershenbaum D.O., P.A., which he owns. (R. 303). He owned the condo units through Wind Enterprises, LLC, of which Dr. Gershenbaum "is and always has been the sole member, manager, president, and owner." (R. 302). In 2019, he formed Brickell Riverfront Surgery, LLC, for which he serves as manager. (R. 244).

In October 2022 – more than four years after the July 2018 rupture – the Association moved for summary judgment arguing that Dr. Gershenbaum lacked standing. According to the Association, it

was Wind Enterprises and Brickell Riverfront Surgery Center, LLC who suffered damages, not him. (R. 70–80). According to the Association, dismissal was the only possible result because "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." (R. 75). "As the Plaintiff SAM GERSHENBAUM, *individually,* is not the owner of the Units and not the corporate entity that owned the personal property or business therein, the Plaintiff never had (and does not have) standing to make a claim for damages to the Units for negligence or for breach of statute." (R. 77).

In response, Dr. Gershenbaum moved to amend the complaint to add the relevant entities as additional plaintiffs. (R. 189–198). The Association opposed amendment, arguing that it would be futile because "standing is established at the inception of the lawsuit and may not be cured by subsequently obtaining standing." (R. 270-72).

In opposition to the motion for summary judgment, Dr. Gershenbaum argued that he had standing because he personally incurred repair expenses and a legal obligation to mitigate his damages, lost business revenue, and suffered from damage to office contents and supplies. (R. 201–202). Moreover, "the economic loss

flows through those business entities and impacts Plaintiff personally, thereby conferring standing upon Plaintiff." (R. 202).

The court granted the Condo Association's motion for summary judgment, concluding that "SAM GERSHENBAUM, *individually*, did not have standing, and never had standing, to file this lawsuit since its inception as he is not the real party in interest." (R. 345). on the ground that Dr. Gershenbaum lacked standing. (R. 342–347). The motion to amend was denied as futile. The court, relying on the rule that a "party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing," concluded that "the Plaintiffs cannot cure the standing deficiency by amending the complaint to add the proper parties." (R. 339–340).

Dr. Gershenbaum filed a motion for reconsideration explaining that the rule against acquiring standing applied to substitution under Rule 1.260, not amendment under Rule 1.190. (R. 296–299). Because there had been no death, incompetency, transfer of interest, or other event implicating Rule 1.260, the rule did not apply. Alternatively, Dr. Gershenbaum had standing because his business entities had authorized him to sue in a representative capacity and had ratified his actions on their behalf. (R. 299-300). Dr.

Gershenbaum provided an affidavit explaining that, in his capacity as manager, sole member, and/or president of every relevant entity, he was authorized to sue in his own name in a representative capacity. Moreover, each entity ratified his actions taken to date. (R. 302-04). The Association argued that the motion was improper, without addressing its merits. (R. 305).

The trial court denied the motion. (R. 349). Dr. Gershenbaum timely appealed. (R. 309–310).

SUMMARY OF ARGUMENT

The trial court erred by holding that Dr. Gershenbaum lacked standing to prosecute the suit. As the sole member of the LLC that owned the units and of the professional association through which he provided his services, he suffered harm whenever they did. Moreover, although it was the Association who bore the burden to disprove representative status under Rule 1.210, here Dr. Gershenbaum has adduced proof that those two entities – as well as the subsequently-formed Brickell Riverfront Surgery Center L.L.C. – authorized him to sue on their behalf in his own name, and ratified his actions. The Court should reverse the order granting summary judgment and remand for further proceedings.

In the alternative, the Court should reverse the order denying leave to amend the complaint, and remand with directions to allow Dr. Gershenbaum to name the entities. Contrary to the Association's argument below, there is no rule against amending a complaint to add the proper plaintiffs where the originally named plaintiff lacks standing. The Association's argument relies on inapposite concepts relating to the substitution of parties under Rule 1.210, not the amendment of complaints under Rule 1.190. If Dr. Gershenbaum needed to name the various entities he used, the lower court abused its discretion by denying him leave to amend to do so.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo. *Ibarra v. Ross Dress for Less, Inc.*, 350 So. 3d 465, 467 (Fla. 3d DCA 2022). "Standing is a pure question of law and therefore must be reviewed de novo." *Ransom v. Grant-Van Brocklin*, 326 So. 3d 164, 165 (Fla. 3d DCA 2021).

This court reviews an order denying leave to amend a pleading for abuse of discretion. *Jain v. Buchanan Ingersoll & Rooney PC*, 322 So. 3d 1201, 1204 (Fla. 3d DCA 2021). Leave to amend "shall be given freely when justice so requires" under Florida Rule of Civil Procedure

1.190(a). Accordingly, "It is an abuse of discretion to deny amendment unless it clearly appears . . . amendment would be futile." *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 868 (Fla. 2d DCA 2010).

ARGUMENT

I. Dr. Gershenbaum had standing both because he suffered economic harm and because he represented his business entities in the litigation.

Standing exists when a party has a sufficient stake in a dispute to justify asking a court to entertain it. *Kumar Corp. v. Nopal Lzines*, 462 So. 2d 1178, 1182 (Fla. 3d DCA 1985). While we recognize the legal fiction of business entities as distinct "persons," Dr. Gershenbaum was the human who suffered economic harm to his property and livelihood. Thus, he has a sufficient stake in the dispute to confer standing.

Even if this were insufficient, the Association has failed to show that Dr. Gershenbaum lacks standing as a representative of the entities he controls. A "party may have standing to maintain a suit not only when the party itself has the required interest in the controversy but also where the party represents another person who has the required interest." *Pirate's Treasure, Inc. v. City of Dunedin*,

277 So. 3d 1124, 1129-30 (Fla. 2d DCA 2019). "Because Florida Rule of Civil Procedure 1.120(a) permits an action to be prosecuted by someone representing the real party in interest in a dispute, the courts have held that 'where a plaintiff . . . is maintaining the action on behalf of the real party in interest, its action cannot be terminated on the ground that it lacks standing.'" *Id.* at 1130 (quoting *Kumar*, 462 So. 2d at 1183).

Rule 1.120(a) explicitly provides that Dr. Gershenbaum had no duty to assert his representative status, rendering dismissal on that ground improper. *Kumar*, 462 So. 2d at 1185 n.10. But he need not rest on the Association's failure to carry its burden, as he has also made any necessary affirmative showings. The record shows that he was the managing and sole member of Sam Gershenbaum, D.O., P.A., through which he provided medical services. He was the sole member of Wind Enterprises, which owned the units. And to the extent an entity formed after the loss has any relevance to this action, he was the manager and president/owner of Brickell River Surgery Center, acting with the agreement of the only other member. (R. 302-04).

Dr. Gershenbaum enjoyed the authority to conduct the affairs of his entities. Fla. Stat. § 605.04074. The entities, in turn, authorized him to sue on their behalf and ratified his actions. (R. 302-03). Whether in his individual capacity or as representative of his entities, Dr. Gershenbaum had standing to sue the Association. *Kumar*, 462 So. 2d at 1185 (explaining that "a principal may subsequently ratify its agent's act, even if originally unauthorized, and such ratification relates back and supplies the original authority."). This Court should reverse and remand.

II. If it was legally necessary for Dr. Gershenbaum to name his LLCs as parties, the trial court erred by holding it would be futile to permit him to do so in an amended complaint.

Assuming only for argument that Dr. Gershenbaum lacked standing, it does not follow that the complaint could not be amended to name the entities he controlled. If Dr. Gershenbaum's entities needed to be named parties, the trial court erred by applying the "standing at the inception" rule to conclude that amendment was futile. *Eastern Invs., LLC v. Cyberfile, Inc.*, 947 So. 2d 630, 632 (Fla. 3d DCA 2007) (reversing where plaintiff's lack of standing could "easily be remedied" by an amended complaint).

The "standing at the inception" rule pertains to substitution of parties under Rule 1.260. Because a substituted plaintiff stands in the shoes of the original plaintiff, the substituted plaintiff "acquires the standing (if any) of the original plaintiff at the time the case was filed." *People's Tr. Ins. Co. v. Island Roofing & Rest., LLC*, 320 So. 3d 817, 819 (Fla. 2d DCA 2021) (citations omitted). This rule applies when a party initiates a foreclosure before acquiring the necessary interest; if the original plaintiff lacked standing, so will a substituted plaintiff who subsequently acquires the note. *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351, 353-54 (Fla. 1st DCA 2014). Only if the original plaintiff had standing to foreclose can the later acquiror substitute into the litigation. *Spicer v. Ocwen Loan Servicing, LLC*, 238 So. 3d 275, 278-79 (Fla. 4th DCA 2018).

Here, contrary to the trial court's reasoning, Dr. Gershenbaum was not "obtaining standing." (R. 339). Indeed, if he lacked standing and then acquired it, there would be no need to add any party! But there was no change to his legal interests or those of his entities. No one was a successor party to anyone else. The relevant facts did not change; at most, at technical defect in the complaint was corrected. The trial court erred by applying the "inception" rule here. If the Court

finds that an amended complaint was legally required, it should reverse and remand with directions to grant the motion to amend. *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60, 67 (Fla. 3d DCA 1985) (describing amendment and relation back where "the new and former parties have an identity of interest so as not to prejudice the opponent by the addition").

CONCLUSION

It would serve no purpose to add the names of Dr. Gershenbaum's entities to the caption of the complaint, and Florida law does not require it here. If it did, though, the law would require the lower court to grant leave to amend to do so. The Court should reverse and remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this initial brief has been furnished via through the Florida courts eportal to:

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This 13th day of November, 2023.

/s/ Gray Proctor

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Bookman Old Style 14-point font in compliance with Florida Rule of Appellate Procedure 9.045(b) and contains fewer than 13,000 words in compliance with 9.210(a)(2).

/s/ Gray R. Proctor