IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

CASE NO.: 4D22-2440
L.T. CASE NO.: CONO-20-021933 (71)

THE K COMPANY REALTY LLC d/b/a
LOKATION LLC,

Appellant,

v.

MARC-JEAN PIERRE, et al.,

Appellees.
_____/

INITIAL BRIEF OF APPELLANT, THE K COMPANY REALTY LLC D/B/A LOKATION LLC

Submitted by:
Sara Sandler Cromer, Esquire
WALTON LANTAFF SCHROEDER & CARSON LLP
Attorney for Appellant
6700 N. Andrews Avenue
Suite 404
Fort Lauderdale, FL 33309
scromer@waltonlantaff.com
dingram@waltonlantaff.com

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STATEMENT OF THE CASE AND FACTS

The subject appeal arises out of a failed real estate transaction in which the Plaintiff below, Marc-Jean Pierre ("Pierre") retained Defendant Violette Desantus ("Desantus") as the realtor to represent Pierre in his purchase of the property located at 7500 NW 5th Court, #207, Margate, FL 33063, Broward County (the "subject property"). R 15-16; 27. At the time of her representation of Pierre, Desantus was a licensed sales associate affiliated with The K Company Realty LLC d/b/a Lokation LLC ("Lokation"), a real estate brokerage. R 16; 193-94. On 01/08/20, Desantus and Defendant Erica Capita ("Capita") formed E&C Capital Investments Corporation ("E&C Capital") with Desantus serving as Vice President and Capita serving as President of the corporation. R 17; 18.

On 01/05/20, Pierre entered into an "As Is" Residential Contract for Sale and Purchase of the subject property with closing set for 02/12/20 (the "Pierre Sale Agreement"). R 17; 27. Under the Pierre Sale Agreement, the purchase price for the subject property is shown as $68,000 with an initial $1,000 deposit to be submitted to the Escrow Agent shown as Closing Team. R 27.

Desantus is listed as the Sales Associate and Lokation Real Estate is listed as the Broker. R 38. That same day, E&C Capital entered into an "As-Is" Residential Contract for Sale and Purchase of the subject property with closing set for 02/12/20 (the "E&C Capital Sale Agreement"). R 17; 40. Under the E&C Capital Sale Agreement, the purchase price for the subject property is shown as $64,000 with an initial $1,000 deposit to be submitted to the Escrow Agent shown as Closing Team. R 40. Desantus is listed as the Sales Associate and Lokation Real Estate is listed as the Broker. R 51. Desantus did not advise Pierre of the existence of the E&C Capital Sale Agreement which listed Desantus' company as the purchaser. R 19; 22. Both the Pierre Sale Agreement and the E&C Sale Agreement appear to include a Lokation logo on the first page. R 27; 40. Additionally, the E&C Capital Sale Agreement contained a cover sheet which appears to be transferring the E&C Capital Sale Agreement to the seller's agent. R 39; 195. While not on company stationary, this cover sheet does have a heading which suggests that the E&C Capital Sale Agreement came from Lokation. R 39; 195. The record does not include a similar cover sheet (or any cover sheet) for the Pierre Sale Agreement.

Pursuant to the Pierre Sale Agreement, Pierre made an escrow deposit of $1,000 to Closing Team via a personal check dated 12/10/19, which was deposited on 01/13/20. R 17; 208. On 01/15/20, Pierre obtained a cashier's check for $17,000 to serve as his total deposit for the purchase of the subject property.[1] R 17; 209. At the direction of Desantus, this check was made payable to E&C Capital Investments. R 17; 20; 22; 76; 78. Desantus did not disclose to Pierre that she was an owner of E&C Capital. R 21; 22. These funds, which had been received for closing, were not deposited with into an escrow account nor were the funds held by Lokation. R 17; 21; 22. In addition to the deposit amounts, Pierre also paid $295 for an inspection of the subject property as well as $150.00 as an application fee for Association approval.[2] R 17-18; 210; 212.

On 04/10/20, after three extensions of the closing date, Pierre advised Desantus that he would require the return of his deposits if

1. The Pierre Sale Agreement lists the balance due to close as $16,000. R 27. It would thus appear that this $17,000 deposit was $1,000 more than required by the contract.

2. Pierre also paid $2,919 to Oriole Gardens Association as an advance for Association dues. This money was ultimately returned to Pierre. R 18; 211.

the closing did not go forward. R 18. After a month of hearing nothing from Desantus and with closing having not occurred, Pierre made a formal demand for the return of his deposits. R 18. It was at this time that Desantus responded to Pierre, advising that the $17,000 Pierre had paid to E&C Capital to hold in escrow for the purchase of the subject property was no longer available as Desantus had used $7,000 of this money for personal use to pay for her mother's funeral expenses. R 18; 21; 22. The remaining funds remain in the capacity and control of E&C Capital and its officers, Desantus and Capita. R 21; 22.

On 07/08/20, counsel for Pierre issued correspondence to Desantus regarding her "wrongful retention" of the $17,000 escrow deposit received from Pierre as well as a claim for the additional funds Pierre had expended for the purchase of the subject property (i.e., the $1,000 initial deposit; the inspection fee of $295 and the Association application fee of $150), for a total amount of $18,445 which counsel asserted was due and owing to Pierre. R 213. The 07/08/20 correspondence to Desantus further provided notice that a lawsuit may be filed which would include a claim for civil theft and advising that such a cause of action would allow for recovery of

treble damages. R 213. Counsel demanded payment from Desantus of $55,335 (i.e. $18,445 x 3) by 08/08/20 for a release from further civil liability "for the wrongful retention of the money." R 213-14.

On 07/08/20, counsel for Pierre also sent correspondence to Lokation advising the company of the above described actions of its "former sales associate," Desantus, her "wrongful retention" of the $17,000 deposit, and Pierre's claim for the additional funds Pierre had expended for the purchase of the subject property. R 215. Counsel advised Lokation that the total amount due to Pierre was $18,445 and that notice had been provided to Desantus regarding the intent to file suit which included a claim for civil theft and the possibility of treble damages. R 215. The 07/08/20 letter to Lokation further advised:

> At all times material, Ms. Desantus' broker was the K Company Realty/Lokation, who is liable for the actions of their agents. Pursuant to Fla. Stat. 475.42, a sales associate cannot collect money in connection with any real estate brokerage transaction except in the name of the employer and with the express consent of the employer. In this case, Ms. Desantus collected $17,000 from Mr. Pierre, using the purchase and sale contracts of Lokation as the reason for the deposit and directed the deposit to be made to a company that was not her broker or the designated escrow agent in the contract. The K

> Company Realty, LLC dba Lokation is responsible for the actions of their agents.
> In addition to the using [sic] Mr. Pierre's funds, Ms. Desantus also attempted to substitute another company, presumably owned by her, as the buyer in the Purchase and Sale Agreement. As a result of Ms. Desantus' actions, the sale did not proceed as scheduled and Mr. Pierre's money has not been returned. A review of Ms. Desantus' record shows that she had been previously accused of theft and the K Company Realty, LLC/Lokation has failed in their duty of care of ensuring that their agents are honest and trustworthy.

R 216. Counsel demanded payment in the amount of $18,445 due by 08/08/20 "to reimburse Mr. Pierre for money lost as a result of the actions of your agent." R 216.

After not receiving the amounts demanded from Desantus and Lokation, Pierre pursued legal recourse both civilly and criminally, filing the subject suit in County Court on 11/17/20 against Desantus, Lokation, Capita, and E&C Capital and filing a police report against Desantus regarding the theft of his funds. R 15; 19. The filing of the police report resulted in an arrest of Desantus and criminal action in Broward County Case No. 20004663CF10A (State Reporting No. 062020CF004663A88810). R 19; 23; 76.[3]

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3. On 01/03/23, a Judgment and Restitution Order was entered by the court in the criminal proceedings requiring Desantus to make restitution to the aggrieved party in the amount of

The civil action set forth six causes of action: Count I – Breach of Agreement (against Desantus and Lokation); Count II – Conversion (against Desantus, Capita, and E&C Capital); Count III – Unjust Enrichment (against Desantus, Capita, and E&C Capital); Count IV – Negligence (against Desantus and Lokation); Count V – Negligent Supervision (against Lokation); and Count VI – Civil Theft (against Desantus). R 19-25.

Of note, Count I for Breach of Agreement included the following allegation: At all times material to the transaction, Pierre relied on the representations of Desantus and Lokation that they were representing Buyer in the transaction. R 19

Further, the Complaint included the following allegation in Count II – Conversion: Desantus, Capita, and E&C Capital wrongfully asserted dominion over Pierre's property, inconsistent with Pierre's right to recover the sum due. R 20.

Count III – Unjust Enrichment asserted, in pertinent part:

- Desantus, Capita, and E&C Capital wrongfully asserted dominion over Pierre's property, inconsistent with Pierre's right to recover the sum due. R 21

$18,445. State of Florida v. Violette Desantus, Case No. 20004663CF10A, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

- Desantus, Capita, and E&C Capital have actual knowledge of the monies and benefits confirmed upon them. R 22

- Desantus, Capita, and E&C Capital have actual knowledge of the monies and benefits confirmed upon them. R 22

- Desantus, Capita, and E&C Capital accepted the monies and benefits conferred upon them and have refused to return these monies to Pierre despite the agreement and obligation to do so. R 22

Count IV for Negligence included the following pertinent allegations:

- Desantus and Lokation owe a duty of care to Pierre, who was a client which they were representing during his purchase of a property. R 23

- Desantus and Lokation breached their duty of care to Pierre by failing to return the closing deposit which was improperly received and retained. R 23

- Lokation is vicariously liable for the actions of their agents including Desantus, who was their agent at all times material. R 23

- Desantus and Lokation, failed to represent Pierre alone in the sale and Desantus had entered into another agreement for the same property and they failed to return his funds after the closing did not occur. R 23

Count V for Negligent Supervision included the following pertinent allegations:

- Desantus, at all times material hereto, was an agent affiliated with Lokation and was under the care and supervision of Broker. R 24

- Lokation, at all times material, was responsible for the supervision of Desantus to ensure compliance with all rules and regulations regarding representation of their clients. R 24

- Lokation was provided with notice prior to the filing of this action that Desantus took a closing deposit from Pierre and did not deposit it with the escrow agent or with Lokation as would have been minimally required pursuant to Florida Statute Section 475.42. Lokation was provided notice that Desantus had failed to return the closing funds to Pierre. R 24

- Lokation had a duty to Pierre to protect Pierre from the actions of their agent, Desantus, which has caused damage to Pierre. R 24

- Lokation has breached their duty to Pierre by failing to take further action to resolve the matter, has failed to indicate any investigation into the matter or ensure and facilitate that there was restitution. R 24

- Lokation is vicariously liable for the actions of their agents including Desantus. R 24

Finally, Count IV – Civil Theft, contained the following pertinent allegations:

- Desantus knowingly obtained Pierre's funds with the intent to deprive Pierre of his rights under the Pierre Sale Agreement as evidenced by the failure to deposit the $17,000 with the escrow agent or with her Broker, Lokation and delaying the sale resulting in possible loss of the $1,000 initial deposit. R 25

- Desantus' actions constitute civil theft within the meaning of Florida Statute Section 772.11. R 25

On 01/14/21, a Clerk's Default was entered against Capita and E&C Capital. R 57.

In its Answer and Affirmative Defenses filed with the trial court, Lokation asserted the following affirmative defenses:

- Lokation is not liable for any alleged misconduct on the part of Desantus because the alleged misconduct was unknown to Lokation, unsanctioned by Lokation, and amounted to intentional acts unauthorized, unexpected and outside the scope of Desantus' duties as a real estate agent. The alleged misconduct on the part of Desantus was not conducted within the real or apparent scope of Lokation's business. R 70

- Lokation is not liable for any alleged misconduct on the part of Desantus because the alleged misconduct was not necessary or appropriate to serve the interests of Lokation and was done to accomplish Desantus' own purposes as distinct from Lokation's business. R 70

- Prior to Desantus' association with Lokation, a background investigation was conducted and the investigation did not reveal any information that reasonably demonstrated unsuitability for the particular work to be performed. R 70

- Pierre is barred from asserting his claim against Lokation inasmuch as Pierre's alleged injuries and damages, if any, were caused by the acts, omissions and/or conduct of third parties over whom Lokation had no control, including but not limited to, Desantus, E&C Capital, and Capita. R 70

- To the extent that Desantus has any liability to Pierre, Lokation is not liable for the alleged conduct of an independent contractor. R 70

- Pierre has not stated a proper basis for recovery of attorney's fees, and any claim for attorney's fees must be stricken. R 70

On 03/17/22, the parties submitted their Joint Pre-Trial Stipulation. R 136. Included in same was a Statement of Disputed Issues and Facts for Determination which included the following:

- Was there a breach of the sale agreement due to the actions of Desantus and inaction of Lokation?

- Was Desantus, E&C Capital, and Capita enriched by the retainer of Plaintiff's funds?

- Did Desantus, E&C Capital, and Capita convert the funds provided by Plaintiff for the purchase of property for their personal use?

- Did Desantus and Lokation breach their duty of care to their client, Plaintiff, by failing to provide adequate representation to close on the sale of the property and in ensuring the funds were properly in an escrow account?

- Was Lokation negligent in the supervision of its agent, Desantus, regarding fulfilment of the sale contract and ensuring that their client's funds were properly accounted?

R 139.

On 04/01/22, Pierre filed his Motion for Summary Judgment seeking summary judgment as to all counts asserted in the Complaint. R 218-31. In seeking summary judgment as to Count I for breach of agreement, Pierre asserted that Lokation owed a

fiduciary duty to Pierre as Lokation was vicariously liable for the actions of its agent. R 225. In seeking summary judgment as to Count IV for negligence and Count V for negligent supervision, Pierre asserted that Lokation was liable because of its failure to supervise the actions of Desantus and because it ignored the notice received of Desantus' actions. R 228-29. The Motion for Summary Judgment also included the following allegations related to Desantus' conduct and actions:

- "Accordingly, by taking the cashier's check from Plaintiff and depositing it into her company's account, Desantus, by and through her company converted Plaintiff's Earnest Money Deposit, which was delivered in a discrete, identifiable sum, and which was placed into the business account of E&C Capital Investments. Desantus converted the Earnest Money Deposit, committed civil theft and violated F.S. § 718.202." R 226-27

- "Because Desantus caused the Plaintiff to provide the funds to E&C Capital Investments without advising that it would not be in escrow and then taking the funds and using them for her personal use, the Court should grant final summary judgment in Plaintiff's favor on their claim for conversion." R 227

- "In this case, it is clear that Desantus did not deposit the Plaintiff's funds with the title company, her broker or any other escrow account. Instead, she knowingly and intentionally mingled the funds into her business account and then used the funds for her personal use. It is clear that her use of the funds . . . were personal in nature and unrelated to the Plaintiff or the purchase of the Subject Property was

intentional, criminal and continues to be compounded due to her failure to repay any of the amounts." R 230

- "The facts are clear that Desantus' theft of funds, for which she was arrested and for which charges are still pending, are clear evidence of the criminal nature of her actions." R 230

- "Based upon the foregoing, the evidence is clear and convincing evidence that Desantus committed civil theft when she appropriated the Plaintiff's money for her own use." R 230.

Pierre submitted an Affidavit in support of his Motion for Summary judgment in which he attested to the same events alleged in his Complaint. R 177-80. Additionally, Pierre attested that "Desantus offered to return the remaining $10,000.00 but has not done so." R 179. The Motion for Summary Judgment and the filings and exhibits submitted in support of the Motion (including the Affidavit as to Time, Effort and Cost and the Affidavit as to Reasonable Attorney Fees) did not provide a basis for awarding attorney's fees against Lokation. R 161-217. The only filings submitted which provided a basis for fees were the 07/08/20 correspondence issued by Pierre's counsel to Desantus and Lokation which advised that Florida Statute Section 772.11, pertaining to civil theft, provided a basis for attorney's fees. R 213; 215. The Complaint filed by Pierre does not include a claim for civil

theft against Lokation. Similarly, while the Complaint does request attorney's fees against Lokation, no contractual or statutory basis is provided for same.

Following Pierre's filing of the Motion for Summary Judgment, the trial court held a Case Management Conference on 04/06/22. R 156. Counsel for Desantus failed to appear for this Case Management Conference and, as a result, on 04/08/22, the trial court entered final judgment for Pierre as to Count I for breach of contract as to Desantus; Count II for conversion as to Desantus, Capita, and E&C Capital; Count III for unjust enrichment as to Desantus, Capita, and E&C Capital; Count IV for negligence as to Desantus; and Count VI for civil theft as to Desantus. R 234. On 05/19/22, the trial court entered an agreed order which vacated the 04/08/22 final judgment as to Count VI for civil theft; the remainder of the final judgment remained as issued. R 264.

In response to Pierre's Motion for Summary Judgment, Desantus submitted an Affidavit in opposition to the Motion in which she asserted that: at the time Pierre issued the deposits provided for escrow, Pierre advised Desantus that if the real estate transaction fell through, Desantus could borrow the money and

repay Pierre at any time, place, or manner within her discretion; she was acting as any reasonable prudent real estate professional in taking care of her duties to assist Pierre in the real estate transaction; that it was not until after the real estate transaction fell through and Pierre advised Desantus that she was able to utilize the deposit money for whatever purpose she saw beneficial that Desantus utilized the funds; during her real estate agent relationship with Pierre, Desantus acted professionally and prudently as any other real estate agent would have acted; and that she did not act negligently. R 242-46.

Jonathan Lickstein, the Managing Broker for Lokation, also submitted an Affidavit in opposition to Pierre's Motion for Summary Judgment. R 249-51. Mr. Lickstein attested to, *inter alia*, the following:

- Desantus joined Lokation as an independent contractor on 12/26/18 on which date she executed an Independent Contractor Agreement that set out the terms of her engagement with Lokation. R 249

- "Desantus did not have the consent of Lokation to collect any moneys directly from [Pierre] in connection with the contemplated real estate transaction, nor was Lokation ever advised that Desantus collected moneys from [Pierre]." R 250

- Lokation was not privy to the alleged actions on the part of Desantus described in Pierre's Complaint. Specifically, Lokation had no knowledge of: a. the 01/05/20 E&C Capital Sale Agreement; b. the 01/05/20 Pierre Sale Agreement; c. the existence of E&C Capital; d. Any payment by Pierre to E&C Capital; e. any communications, or lack thereof, between Pierre and Desantus; f. Desantus' alleged improper utilization of funds paid by Pierre to E&C Capital. R 250

- "The alleged misconduct described in the Complaint was unknown to Lokation, unsanctioned by Lokation, and amounted to intentional acts unauthorized, unexpected and outside the scope of Desantus' employment. The alleged misconduct on the part of Desantus was not conducted within the real or apparent scope of Lokation's business." R 250-51

- "The alleged misconduct on the part of Desantus described in [Pierre's] Complaint was not necessary or appropriate to serve the interests of Lokation and was done to accomplish Desantus' own purposes as distinct from Lokation's business." R 251

- Lokation was first made aware of Pierre's allegations when it received correspondence from Pierre's counsel on 07/08/20. R 251

- "Lokation does not permit, sanction or condone the alleged actions described in the Complaint." R 251

- "Lokation did not benefit in any way from the alleged actions of Desantus described in the Complaint. Lokation was not paid a commission or any other fee with respect to the actions alleged in the Complaint." R 251

Additionally, Mr. Lickstein's Affidavit attached the Independent Contractor Agreement referenced in the Affidavit, which states, in pertinent:

- The K Company is a licensed real estate broker in Florida and performs acts designated within Chapter 475, Florida Statutes. R 253

- "Employment Status. Broker retains Associate as an independent contractor to assist Broker in the performance of real estate-related activities. With respect to the clients and customers for whom service is performed within the scope of this Agreement, Associate will be construed to be an agent of Broker; otherwise, Associate will not be deemed a servant, employee, joint venture or partner of Broker for any purpose. . . ." R 253

- "Associate Responsibilities. Associate will . . . conduct his/her business in a reputable manner and in conformance with all laws, rules, regulations and codes of ethics that are binding upon or applicable to real estate licensees. . . . Associate will not commit any act that violates Florida real estate license law." R 253

- "Broker Supervision. Associate will be deemed to be working under Broker's supervision only to the extent required by Chapter 475, Florida Statutes. . . ." R 254

- "Property of Others. In accordance with Florida law, Associate will deliver to Broker by the end of the next business day following receipt any funds or other items that a consumer has entrusted to Associate in connection with a real estate transaction." R 254

- "Escrow: The K Company Realty, LLC does NOT maintain an escrow account. All escrow services are provided by our affiliate title company, Florida Title & Escrow Services, LLC. Agents must reference our policy and procedures manual and follow the instructions for escrow deposits." R 257

On 05/10/22, Lokation submitted its Response in Opposition to Motion for Summary Judgment. R 259-63. The Response

argued that Pierre failed to: meet his burden of proving that there were no genuine issues of material fact; conclusively establish the elements of the claims against Lokation for negligence and negligent supervision; establish any duty on the part of Lokation or breach of any duty which caused Pierre's damages; establish that Desantus' alleged actions were committed within the scope of her employment with Lokation; and establish that the alleged actions furthered Lokation's interest. R 259-62. Lokation further argued that, through the Affidavit of Mr. Lickstein, Lokation had presented evidence showing genuine issues of material fact regarding whether Desantus' alleged conduct was committed within the course and scope of her employment and/or Lokation's business. R 261-62. Lokation thus asserted that a jury must be able to consider whether Pierre established the elements of his claims for negligence and negligent supervision and whether facts presented by Lokation negated Pierre's contentions. R 262.

On 06/10/22, the trial court entered its order granting Pierre's Motion for Summary Judgment as to Count I against Desantus and Lokation; Count II for conversion against Desantus, Capita, and E&C Capital; Count III for unjust enrichment against Desantus,

Capita, and E&C Capital; Count IV for negligence against Desantus and Lokation; and Count V for negligent supervision against Lokation. R 266. The trial court denied Pierre's Motion as to Count VI for civil theft against Desantus. R 266. The trial court further ruled that all defendants are jointly and severally liable and awarded attorney's fees to Pierre's counsel. R 266-67. The trial court provided an itemization of Pierre's damages and awarded Pierre a total of $27,950.67 (inclusive of attorney's fees and costs). R 267. The trial court's 06/10/22 Order did not provide a basis for awarding attorney's fees to Pierre. R 266-68.

On 06/21/22, Lokation filed a Motion for Reconsideration.[4] R 269-77. The Motion submitted facts to the trial court to support Lokation's position that Desantus, Capita, and E&C Capital had engaged in a scam in an attempt to steal Pierre's money. R 269-70. In doing so, Lokation submitted new evidence to the trial court,

4. As the 06/21/22 Motion was submitted after the trial court's 06/10/22 final order, the Motion should be considered one for rehearing pursuant to Florida Rule of Civil Procedure 1.530. "Nomenclature does not control, and motions for either "rehearing" or "reconsideration" aimed at final judgments shall be treated as rule 1.530 motions for rehearing, while motions aimed at nonfinal orders shall be treated as motion for reconsideration." Seigler v. Bell, 148 So. 3d 473, 479 (Fla. 5th DCA 2014).

namely an Agreement to Assign Contract for Sale and Purchase (the "Assignment"). R 269. Lokation argued that the Assignment purported to assign E&C Capital's rights and obligations under the E&C Capital Sale Agreement to Pierre and contemplated payment of an additional assignment fee to E&C Capital. R 269-70. Lokation further argued that the Assignment contained an acknowledgment by Pierre that he was "not relying upon or being represented by a Real Estate Brokerage in this transaction." R 270; 277. The Motion then set forth numerous facts to support Lokation's position that it was not affiliated with Capita, E&C Capital, the Assignment, or Desantus with regard to her dealings on behalf of E&C Capital. R 270. The Motion asserted that, at the time of the subject scam, Desantus was not acting as a realtor but rather as a principal of E&C Capital. R 271. The Motion further asserted that Lokation did not have knowledge of the subject scam, was not involved in the subject scam, did not receive any part of Pierre's stolen funds, and did not benefit from the scam in any way. R 270.

Lokation then reiterated its position that there was evidence of factual disputes regarding whether Desantus' actions alleged in the Complaint were 1) conducted within the real or apparent scope of

Lokation's business; 2) necessary or appropriate to serve the interests of Lokation; and 3) done to accomplish Desantus' own purposes as distinct from Lokation's business. R 271. Additionally, Lokation asserted that the theft of the subject funds was completed by E&C Capital, a corporation with which Lokation had no affiliation. R 271-72.

Finally, Lokation requested the trial court reconsider its award of attorney's fees as there was no written contract between Pierre and Lokation and no statute which would have provided a basis for Pierre's entitlement to same. R 274.

Attached to Lokation's Motion was the Assignment which identified the property located at 7500 NW 5th Court, Margate, FL 33063 as the "subject property" and further stated the property's legal description as "Oriole Gardens 29 Condo Unit 207." R 277. The Assignment listed E&C Capital as the Assignor and 7500 NW 5 Court Margate FL 33063 as the Assignee. R 277. However, the signature block listed Capita as the Assignor and Pierre as the Assignee. R 277. The Assignment provided: "Whereas Marc-Jean Pierre (Buyer) has entered into a Purchase and Sales Agreement with E&C Capital Investments LLC (Seller) for the purchase of

Subject Property, and whereas Buyer wishes to assign its rights, interests and obligations in the Purchase and Sales Agreement, it is hereby agreed between Assignor and Assignee as follows: . . . " R 277. The Assignment stated that the Assignee is to pay the Assignor a non-refundable assignment fee of $4,000 with a total amount of $68,000 due at closing. R 277. The Assignment further stated: "Assignee acknowledges they are conducting a transaction dealing directly with Assignor for the purchase of Subject Property. Assignee is not relying upon or being represented by a Real Estate Brokerage in this transaction." R 277. The Assignment was signed on 01/09/20 by Pierre, listed as the Assignee, and by Capita, listed as the Assignor. R 277.

On 08/05/22, the trial court denied Lokation's Motion for Reconsideration and ratified the court's 06/10/22 final judgment. R 278. This appeal followed. R 284-90.

SUMMARY OF ARGUMENT

The trial court committed reversible error in entering final summary judgment in favor of Pierre where the record is clear that there are genuine issues of material fact as to whether Desantus was acting within the scope of Lokation's authority; whether

Desantus' actions were to further a purpose or interest of Lokation; and whether Lokation owed any duty to Pierre. Further, the trial court committed fundamental error in finding all defendants jointly and severally liable when the alleged liability of Lokation was founded in Lokation's own negligence or Lokation's vicarious liability for the acts of Desantus only. The trial court's award of attorney's fees against Lokation was also in error as there was no statutory or contractual basis for same. Finally, the trial court erred in denying Lokation's Motion for Rehearing where Lokation provided the trial court with clear errors of law evident on the face of the record and further provided the trial court with newly discovered evidence where the new evidence would have probably changed the result of the proceedings.

Based on the numerous errors committed by the trial court, this court should reverse the 06/10/22 final summary judgment and remand this matter to the trial court.

ARGUMENT

I. Standard of Review

"The standard of review of a summary judgment is *de novo*." Dalrymple v. Franzese, 944 So. 2d 1240, 1242 (Fla. 4th DCA 2006).

The appellate court reviews *de novo* the legal issue of whether conduct falls within the comparative fault statute. Philip Morris USA Inc. v. Boatright, 217 So. 3d 166, 171 (Fla. 2d DCA 2017). With regard to the award of attorney's fees, when the issue before the appellate court is with regard to entitlement of fees (as opposed to the amount of fees), the standard of review is *de novo*. Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A., 971 So. 2d 955, 956 (Fla. 5th DCA 2007). The standard of review applied to a trial court's ruling on a motion for rehearing is abuse of discretion. Jockey Club III Ass'n, Inc. v. Jockey Club Maint. Ass'n, Inc., 306 So. 3d 185, 194 (Fla. 3d DCA 2020).

II. The Trial Court Committed Reversible Error in Granting Pierre's Motion for Summary Judgment Where the Record Clearly Shows Genuine Issues of Material Fact

In April of 2021, the Florida Supreme Court adopted an amendment to Florida Rule of Civil Procedure 1.510 in which the federal summary judgment standard was adopted.[5] In re

5. The amendment became effective on 05/01/21 and "govern[s] the adjudication of any summary judgment motion decided on or after that date, including in pending cases." In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d at 77. Thus, the new rule applies here where Pierre's Motion for Summary

Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d 72 (Fla. 2021). Pursuant to the amended rule, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). The new standard for summary judgment focuses "on 'whether the evidence presents a sufficient disagreement to require submission to a jury.'" In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d at 75 (citations omitted). Further, under the new standard, "'the substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried.'" Id. (citations omitted). Thus, in determining whether there is a genuine issue of material fact under the new rule, the correct test "is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' . . . Under our new rule, 'when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts

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Judgment was filed on 04/01/22, heard by the trial court on 05/31/22, and decided on 06/10/22.

for purposes of ruling on a motion for summary judgment." Id. at 75-76 (citations omitted). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (An issue of fact is "genuine" for summary judgment purposes "if the evidence is such that a reasonable jury could return a verdict for the non-moving party," and an issue of fact is "material" for summary judgment purposes if it "might affect the outcome of the suit under the governing law."). In addition, the new rule 1.510 altered the movant's burden:

> [T]hose applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under . . . the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove *X* to prevail [at trial], the moving party at summary judgment can either produce evidence that *X* is not so or point out that the nonmoving party lacks the evidence to prove *X*." . . . "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial."

Id. at 75. Here, as it was the Plaintiff who moved for summary judgment, and where it is the Plaintiff's burden of persuasion to prove all elements of his causes of action at trial, it was the Plaintiff's burden to establish that there were no genuine issues of material fact as to the elements of his causes of action in order to

succeed on the Motion for Summary Judgment. As the non-moving party, Lokation "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" In re Amendments to Fla. R. Civ. P. 1.510, 309 So. 3d 192, 193 (Fla. 2020) (citations omitted). However, inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970).

In this matter, the Complaint filed by Pierre raises three causes of action against Lokation: Count I for breach of agreement; Count IV for negligence; and Count V for negligent supervision. R 19-24. In order to be successful on these counts, Pierre must prove that Lokation, as the principal, was vicariously liable for the acts of its agent, Desantus. See Trevarthen v. Wilson, 219 So. 3d 69 (Fla. 4th DCA 2017).

> General principles of vicarious liability establish that a principal is responsible for the wrongful acts of its agent if the agent was either acting "(1) within the scope of [its authority], or (2) during the course of [the agency] and to further a purpose or interest of the [principal]." . . . Additionally, a principal may be still be liable for the acts of its agent which were outside the scope of the agent's authority if the principal subsequently ratifies the actions. A principal may ratify an agent's actions which would have otherwise been outside the scope of its

> authority by accepting the benefit of the agent's actions. . . . In other words:
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> > "[w]hen an agent acts for his principal, and the principal accepts the fruits of the agent's efforts, the principal must be deemed to have adopted the methods employed, and he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the means by which they were acquired."

Id. at 72 (citations omitted).

Florida courts have concluded that a determination of either basis set forth in Trevarthen for establishing vicarious liability is generally an issue of fact. See Dieas v. Assoc. Loan Co., 99 So. 2d 279 (Fla. 1957) ("The issue of whether the employer 'could be supposed from the nature of [the agent's] employment to have authorized or expected the servant to do' the things which form the basis of this cause of action, should have been submitted to a jury for determination."); Woods v. City of Miami, 646 So. 2d 836 (Fla. 3d DCA 1994) ("Whether an employee's act was committed within the scope of his employment or in furtherance of the employer's interest generally presents a question for the jury when there are varying inferences and conclusions to be drawn. . . . 'Concerning scope of employment, only where the facts are completely settled and the inferences to be drawn from the facts lead to but one

conclusion can it be said that the issue is one which may be decided by the court as a matter of law.'") (citations omitted); Gonpere Corp. v. Rebull, 440 So. 2d 1307 (Fla. 3d DCA 1983) ("Whether the employee's act was committed within the scope of his employment or in furtherance of the employer's interest presents a question for jury determination. . . . Also for jury decision is the issue concerning whether the employer could have expected the conduct."); Dye v. Reichard, 183 So. 2d 863 (Fla. 4th DCA 1966) ("In cases such as this no decisive test can be given as to what constitutes an act which would be construed within and about the employer's business. Under such circumstances the question as to whether or not an act was committed by a servant in the service of his employer or for his own purpose is one for the jury in considering all the circumstances."); Columbia By the Sea, Inc. v. Petty, 157 So. 2d 190 (Fla. 2d DCA 1963) ("'Was the agent's act in the course of his employment, and while about the master's business? No decisive test can be given, but in all cases the question whether the act was committed by the servant in the service of his employer, or for his own purpose is one for the jury, in view of all the circumstances.'") (citations omitted).

This Court has concluded that a determination of whether a principal has ratified an agent's actions so as to be found vicariously liable is also an issue of fact. See Trevarthen v. Wilson, 219 So. 3d 69 (Fla. 4th DCA 2017) ("In sum, the Brokerage Firm's receipt of commissions on the alleged wrongful real estate deals, as well as its possible knowledge that [real estate agent] was wrongfully using Appellant's funds to purchase real estate, raised issues of fact precluding summary judgment on Appellant's vicarious liability claim against the Brokerage Firm.").

Here, the record is replete with facts which preclude summary judgment as to Lokation's vicarious liability for the acts of Desantus where genuine issues of material fact exist regarding whether Desantus' acts were committed within the scope of her employment with Lokation and whether Desantus was acting in furtherance of Lokation's interests:

- Desantus served as the real estate agent for the purchase of the subject property for both Pierre and E&C Capital even though she is Vice President of E&C Capital. R 17; 38; 51. E&C Capital then entered into the Assignment with Pierre thereby assigning Pierre E&C Capital's rights under the E&C Capital Sale Agreement while allowing E&C Capital to profit from the $4,000 assignment fee. R 277. These transactions were clearly to the benefit of E&C Capital and served E&C Capital's interests.

- Pierre's down payment for the subject property in the amount of $17,000 was paid directly to E&C Capital at the direction of Desantus. R 76; 209.

- Desantus utilized a portion of the $17,000, which had been deposited into her own company's bank account, for personal use and the remaining funds continue to be held by Desantus' company, E&C Capital. R 18; 21; 22.

- Lokation's Independent Contractor Agreement which Desantus signed on 12/26/18 contains the following provision: "in accordance with Florida law, Associate will deliver to Broker by the end of the next business day following receipt any funds or other items that a consumer has entrusted to Associate in connection with a real estate transaction." R 250. Here, nothing in the record suggests that Desantus ever submitted the $17,000 deposit money to Lokation as required by the Independent Contractor Agreement. In fact, to the contrary, Pierre specifically alleges that Desantus did not place the $17,000 into an escrow account or submit the money to be held by Lokation. R 17; 25; 219. Rather, the money was paid directly to E&C Capital. Thus, at the time of receiving the $17,000 deposit, Desantus was not complying with the Lokation Independent Contractor Agreement raising issues of fact regarding: 1) whether Desantus was acting within the scope of her employment with Lokation; and 2) whether Desantus was acting in Lokation's interest versus the interest of E&C Capital – a company Lokation had no affiliation with.

- In his Affidavit filed in opposition to Pierre's Motion for Summary Judgment, Jonathan Lickstein, the Managing Broker for Lokation, attested, in pertinent part that:

    - Desantus did not have the consent of LoKation to collect any monies directly from Pierre in connection with the contemplated real estate transaction, nor was LoKation ever advised that Desantus collected monies from Pierre. R 250

- The alleged misconduct described in the Complaint was unknown to Lokation, unsanctioned by Lokation, and amounted to intentional acts unauthorized, unexpected and outside the scope of Desantus' employment. The alleged misconduct on the part of Desantus was not conducted within the real or apparent scope of Lokation's business. R 250-51

- The alleged misconduct on the part of Desantus described in Plaintiff's Complaint was not necessary or appropriate to serve the interests of Lokation and was done to accomplish Desantus' own purposes as distinct from Lokation's business. R 251

- LoKation does not permit, sanction or condone the alleged actions described in the Complaint. R 251

- Lokation was unaware of the existence of E&C Capital. R 250. Further, nothing in the record suggests that Lokation was in any way affiliated with E&C Capital.

As to application of vicarious liability through ratification, here, there is no evidence in the record to support a finding that Lokation received a commission – or any benefit for that matter – for the Pierre Sale Agreement or the E&C Sale Agreement. In fact, Pierre does not even make such an allegation. Even if Pierre had alleged a benefit to support ratification, the Affidavit of Lokation's Managing Broker, Jonathan Lickstein, states: "Lokation did not benefit in any way from the alleged actions of Desantus described in

the Complaint. Lokation was not paid a commission or any other fee with respect to the actions alleged in the Complaint." R 251.

Further, while the record is not clear as to whether Pierre seeks to bring a negligence cause of action against Lokation for Lokation's own acts or failures to act, the record presents genuine issues of material fact as to whether Lokation owed a duty to Pierre or even knew of its alleged representation of Pierre:

- In his Affidavit, Jonathan Lickstein attests that Lokation had no knowledge of the Pierre Sale Agreement and had no knowledge that Desantus collected monies from Pierre with regard to the subject real estate transaction. R 250.

- While Lokation is listed as the broker in the Pierre Sale Agreement, the escrow agent to whom Pierre was instructed to deposit his initial $1,000 (Closing Team) was not the escrow agent affiliated with Lokation (Florida Title & Escrow Services, LLC). R 27; 208; 257.

- Similarly, Pierre's down payment for the subject property in the amount of $17,000 was paid to E&C Capital Investments, not to Florida Title & Escrow Services, LLC and was otherwise not held by Lokation. R 17; 21; 209.

- The Assignment provides an acknowledgment by Pierre that he was not "relying upon or being represented by a real estate brokerage" in the transaction involving the subject property. R 270.

- The $1,000 deposit was paid to Closing Team on 12/10/19 (R 208) – i.e., before the existence of the 01/05/20 Pierre Sale Agreement wherein Pierre learned of Lokation's alleged representation of him. The $17,000 deposit was paid to E&C

Capital on 01/15/20 (R 209) – i.e., after Pierre signed the Assignment in which he acknowledged he was not being represented by a broker. Thus, at the time Pierre made his initial $1,000 deposit, he was not aware that Lokation was allegedly representing him. In fact, the initial $1,000 deposit was not even paid to Lokation's affiliate escrow agent. R 208; 257. Further, at the time Pierre paid the $17,000, he had signed the Assignment in which he specifically acknowledged that he was not being represented by a broker. R 277. These facts clearly negate Pierre's argument that he relied on and believed that Lokation was representing him in the subject real estate transaction.

In addition to the above record evidence, the Joint Pre-Trial Stipulation also supports the conclusion that there are genuine issues of material fact which should have precluded entry of summary judgment. The Joint Pre-Trial Stipulation contained, *inter alia,* the following Disputed Issues and Facts for Determination:

- Was there a breach of the sale agreement due to the actions of Desantus and inaction of Lokation?

- Did Desantus and Lokation breach their duty of care to Pierre by failing to provide adequate representation to close on the sale of the property and in ensuring the funds were properly in an escrow account?

- Was Lokation negligent in the supervision of its agent, Desantus, regarding fulfilment of the sale contract and ensuring that Pierre's funds were properly accounted?

R 139. No discovery was conducted between the filing of the Joint Pre-Trial Stipulation and the filing of Pierre's Motion for Summary

Judgment which would have provided conclusive answers to the above issues. The record is clear that the same "disputed issues and facts for determination" listed in the Joint Pre-Trial Stipulation still remained at the time the trial court heard and ruled on Pierre's Motion.

The above Florida law and record evidence make it abundantly clear that there were several genuine issues of material fact which required the trial court to deny Pierre's Motion for Summary Judgment. It is clear that Pierre did not meet the substantive evidentiary burden of proof he would have needed at trial to support his causes of action against Lokation. Namely, Pierre was unable to establish that there were no genuine issues of material fact as to Lokation's alleged vicarious liability and Lokation's own alleged negligence. Even so, while the burden did not shift to Lokation to establish genuine issues of material fact, Lokation submitted evidence which negated Pierre's claims. Based on the evidence in the record, it is clear that questions remain as to whether Desantus was acting within the scope of Lokation's authority; whether Desantus' actions were to further a purpose or interest of Lokation;

and whether Lokation owed any duty to Pierre.[6] The existence of these disputed issues and facts should have been submitted to a jury.

III. The Trial Court Erred in Finding the Defendants Jointly and Severally Liable Where the Causes of Action Against Lokation Were Based in Negligence

The trial court's error in granting summary judgment in favor of Pierre is compounded by the trial court's application of joint and several liability. The trial court erred in finding the defendants jointly and severally liable where Lokation's alleged liability is based solely on its own acts of negligence or its vicarious liability for the acts of Desantus. If Lokation was found liable for its own negligence, the comparative fault statute should have applied. See Fla. Stat. Sec. 768.81(3) ("Apportionment of damages.--In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability."). If Lokation was

6. It is Lokation's position that the record clearly shows that Lokation did not ratify the acts of Desantus. No evidence has been presented which shows that Lokation received a commission for the Pierre Sale Agreement or the E&C Sale Agreement or that Lokation otherwise benefitted from these contracts. In fact, Pierre has not made any allegation which would support a finding of ratification by Lokation of Desantus' acts.

found liable based on its vicarious liability for the acts of Desantus, then Lokation should have only been deemed liable for the fault attributed to Desantus. See Dabasse v. Reyes, 963 So. 2d 288, 291 (Fla. 2d DCA 2007) ("'Thus, the vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor. The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor.'") (quoting Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 467-68 (Fla. 2005)).

Pursuant to the trial court's ruling, Lokation is being deemed liable for the acts of Capita and E&C Capital. In addition to the fact that Lokation has no affiliation with these parties, there are no allegations or support in the record to conclude that Lokation should be held vicariously liable for their acts. The trial court's 06/10/22 order of final summary judgment finding joint and several liability amongst all defendants is thus in error and should be reversed.

Lokation concedes that this issue was not raised in its Motion for Rehearing, however, Lokation did assert in its affirmative defenses that Pierre's alleged damages were caused by third parties over which Lokation had no control. R 70. Further, Lokation's failure to raise this issue with the trial court does not preclude this Court from considering it on appeal as the trial court has granted relief that is not authorized by law and, as such, the error is fundamental in nature and may be heard for the first time on appeal. See Keyes Co. v. Sens, 382 So. 2d 1273 (Fla. 3d DCA 1980) (where defendant employer was found vicariously liable for the acts of its defendant employees, it was fundamental error to enter a verdict or judgment against defendant employer for compensatory damages in excess of amount of damages found against defendant employees).

IV. The Trial Court Erred in Awarding Attorney's Fees Where There is No Contractual or Statutory Basis for Same

While Pierre's Complaint and Motion for Summary Judgment both request an award of attorney's fees as to the counts asserted against Lokation, no basis is presented for same. "Generally, the law is clear that attorney's fees are not considered to be a 'loss' or

damages, and to be recoverable must be expressly provided for by statute, rule, or contract." Hubbel v. Aetna Cas. & Sur. Co., 758 So. 2d 94, 97 (Fla. 2000). See also, Price v. Tyler, 890 So. 2d 246 (Fla. 2004) ("'Attorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery.'") (citations omitted). Pierre did not cite to any statute, rule, or contractual provision in his request for attorney's fees. The only statutory basis for fees asserted by Pierre was with regard to Count VI for civil theft against Desantus. Aside from the fact that this cause of action was not asserted against Lokation, the trial court did not grant Pierre's summary judgment on this count. R 266.

In Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A., 971 So. 2d 955 (Fla. 5th DCA 2007), Martha Hinkley, the broker with My Place Realty, Inc., challenged the trial court's award of attorney's fees and costs to Gould-Cooksey, the closing agent under a contract for sale and purchase of real estate. Gould-Cooksey had interpleaded a brokerage commission after a dispute arose between My Place Realty and one of its licensed real estate associates. Id. at 956. The Fifth DCA reversed the trial

court's ruling as there was no basis in contract or statute for the attorney's fee award. Id. at 956-57. Specifically, in seeking attorney's fees, Gould-Cooksey relied on a provision in the sale and purchase agreement entitled "Escrow Agent." Id. at 957. The appellate court declined to apply this provision as the broker and the sales associate were not parties to the sale and purchase agreement and, therefore, the contract could not support the trial court's award of attorney's fees to Gould-Cooksey. Id. The court further declined to find a basis for fees in the interpleader statute related to real estate transactions as the statute only addressed an award of fees in situations involving commission entitlement between the owner and broker – a factual scenario not present before the court. Id. The appellate court thus concluded that, because the broker and the real estate sales associate were not parties to the applicable contract and because there was no statutory basis for fees, the trial court erred in awarding attorney's fees and costs. Id. See also, Sanchez v. Braun & May Realty, Inc., 795 So. 2d 1006 (Fla. 4th DCA 2001) (even though brokerage was listed in purchase and sale agreement as the broker for the

transaction, brokerage was not a party to the contract and therefore not liable for attorney's fees).

Neither the Pierre Sale Agreement nor the E&C Capital Sale Agreement provide a basis for attorney's fees against Lokation. Neither Lokation nor Desantus are parties to either agreement. The Pierre Sale Agreement lists the parties as Dodson, Debrohene Best Echoe LLC (Seller) and Marc-Jean Pierre (Buyer) (R 27) and the E&C Capital Sale Agreement lists the parties as Dodson, Debrohene Best Echoe LLC (Seller) and E&C Capital Investments (Buyer). R 40. In both agreements, the Attorney's Fees; Costs provision applies only to the "parties" to the agreement, i.e., the Buyer and the Seller. R 33; 46. Thus, as in Hinkley and Sanchez, the sale and purchase agreements at issue before this Court provide no basis for an award of attorney's fees. Similarly, Pierre does not cite to any statutory basis to support an award of attorney's fees against Lokation. As such, this Court should reverse the trial court's Final Summary Judgment awarding attorney's fees against Lokation.

V. The Trial Court Erred in Denying Lokation's Motion for Rehearing Where the Final Summary Judgment Conflicts With Governing Law and Where Newly Discovered Evidence Will Probably Change the Result of the Proceedings

Florida Rule of Civil Procedure 1.530 provides that "[o]n a motion for rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment."

> The grounds for rehearing under rule 1.530 are broad. Under rule 1.530, a party may move for rehearing of final orders in order "to give the trial court an opportunity to consider matters which it overlooked or failed to consider." . . . As this Court has explained, under rule 1.530,
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> > [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.
>
> These broad grounds include the contention that the final order conflicts with the governing law and is otherwise simply wrong on the merits.

Balmoral Condo. Ass'n v. Grimaldi, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) (citations omitted). See also, Hollywood, Inc. v. Clark, 15 So. 2d 175, 180 (Fla. 1943) ("A prime function of a petition for rehearing is to present to the court some point which it overlooked

or failed to consider, which renders the decree inequitable and erroneous. . . . Such a petition is also available for correction of error of law apparent on the face of the record, and for obtaining the court's permission to introduce newly discovered evidence.").

The Florida Supreme Court has made clear that, especially when the final judgment at issue is one granting summary judgment, the trial court has even more narrow discretion when considering a motion for rehearing:

> The granting or denial of rehearing is a matter within the sound discretion of the trial court, but it is never an arbitrary discretion. . . . As indicated above, when the motion is filed by one against whom a summary judgment has been entered, the discretion not to grant is narrowed and every disposition should be indulged in favor of granting the motion. Only after it has been conclusively shown that the party moved against cannot offer proof to support his position on the genuine and material issues in the cause should his right to trial be foreclosed.

Holl v. Talcott, 191 So. 2d 40, 46-47 (Fla. 1966). See also, Dalrymple v. Franzese, 944 So. 2d 1240, 1243 (Fla. 4th DCA 2006) (""the parties against whom a summary judgment has been entered should be accorded liberal treatment on rehearing.").

Here, the Motion for Rehearing set forth clear errors of law in the trial court's 06/10/22 final summary judgment apparent on the

face of the record and sought to provide the trial court with the opportunity to correct these errors. In seeking rehearing, Lokation submitted several issues to the trial court which had been overlooked in addition to case law which supported Lokation's position that 06/10/22 order conflicts with the governing law. Specifically, the Motion asserted: 1) the trial court's ruling was contrary to Florida law as to master/servant and principal/agent liability; 2) there were disputed issues of material fact regarding whether Desantus' acts fell within the course and scope of her employment with Lokation; 3) it was undisputed that Lokation did not benefit from the conduct of Desantus, Capita, and E&C Capital; 4) the theft of the funds was committed by E&C Capital which Lokation has no affiliation with; and 5) there was no basis in the record for the award of attorney's fees against Lokation. R 269-74. The merits of the above issues have been briefed in Sections II and IV of this Initial Brief and are incorporated herein.

Additionally, in support of its Motion for Rehearing, Lokation presented the trial court with newly discovered evidence, namely the Assignment. "A motion for rehearing based on newly discovered evidence should be granted when . . . it appears that new evidence

is such that it will probably change the result of the proceedings." Nastasi v. Thomas, 88 So. 3d 407, 411 (Fla. 4th DCA 2012).

The Assignment, which is with regard to the subject property, purports to assign E&C Capital's rights and obligations under the E&C Capital Sale Agreement to Pierre and, in doing so, contemplates payment of an additional assignment fee to E&C Capital in the amount of $4,000. R 277. The full amount due from Pierre under the Assignment is $68,000 – i.e., the exact purchase price under the Pierre Sale Agreement. Considered another way, in seeking a $4,000 assignment fee, it is clear that the purchase price under the Assignment is $64,000 – i.e., the exact purchase price under the E&C Capital Sale Agreement. It is thus clear that the Assignment sought to assign the E&C Sale Agreement (with a purchase price of $64,000) to Pierre for the same amount Pierre had agreed to pay for the subject property under the Pierre Sale Agreement all the while allowing E&C Capital to profit $4,000. The fact that Desantus was the real estate agent representing both Pierre and E&C Capital in their competing Sale Agreements *and* that Desantus serves as Vice President of E&C Capital – the entity that would profit from the Assignment – supports Lokation's

position that Desantus' acts with regard to the subject real estate transaction were all within her capacity as Vice President of E&C Capital and were all to further the interests of E&C Capital. At the very least, such evidence presented a genuine issue of material fact that the trial court should have considered in determining Lokation's vicarious liability for the acts of Desantus. Specifically, the Assignment raises issues concerning: 1) whether Desantus' acts were within the scope of her employment with Lokation (as opposed to E&C Capital); 2) whether Desantus' acts were in the interests of Lokation (as opposed to E&C Capital); and 3) whether Lokation benefitted from Desantus' acts (as opposed to the benefitting party being E&C Capital, which Lokation has no affiliation with).

Moreover, the Assignment includes the following language:

> ASSIGNEE acknowledges they are conducting a transaction dealing directly with ASSIGNOR for the purchase of SUBJECT PROPERTY. ASSIGNEE is not relying upon or being represented by a REAL ESTATE BROKERAGE in this transaction.

R 277. This language clearly shows that: Pierre understood there was no broker involved in the transaction regarding the subject property; Pierre did not rely on a broker for the transaction

regarding the subject property; and Pierre was not being represented by a broker in the transaction regarding the subject property. Again, the Assignment presented evidence of a genuine issue of material fact with regard duties owed (or not owed) to Pierre by Lokation; Pierre's reliance on Lokation; and Lokation's involvement in the subject real estate transaction.

It is thus clear that, pursuant to Nastasi v. Thomas, the Motion for Rehearing should have been granted based on the newly discovered Assignment which, upon consideration by the trial court, would have probably changed the trial court's ruling on Pierre's Motion for Summary Judgment in that, as outlined above, it was evidence of numerous genuine issues of material fact.

CONCLUSION

Here, the record is clear that there are several genuine issues of material fact which require submission to a jury. Pierre failed to meet the burden of proof he would have needed at trial to support his causes of action against Lokation and, as such, the trial court erred in entering final summary judgment.

Additionally, it was fundamental error for the trial court to declare the defendants jointly and severally liable as said relief is

contrary to the law. The trial court further erred in awarding attorney's fees against Lokation where there is no contractual or statutory basis for same in the record.

Finally, the trial court erred in denying Lokation's Motion for Rehearing where Lokation presented the trial court with errors of law apparent on the face of the record in addition to newly discovered evidence which would have probably changed the outcome of the proceedings.

It is thus respectfully submitted that the final summary judgment entered below be reversed and this matter remanded to the trial court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing is being served via e-mail to: **Ria Sankar Balram, Esq.,** Ria Balram Law Group, PLLC., 3301 North University Drive, Coral Springs, FL 33065 at legalassistant@balramlaw.com; mail@balramlaw.com; ria.balram@balramlaw.com; and **William J. Anderson, Esq.,** 101 NE 3rd Avenue, Suite 1500, Fort Lauderdale, FL 33301 at bill@williamanderson.biz this **23rd day of February, 2023.**

Counsel for Appellant, THE K COMPANY
REALTY LLC d/b/a LOKATION LLC
Walton Lantaff Schroeder & Carson LLP
6700 North Andrews Avenue, Suite 404
Fort Lauderdale, FL 33309
Telephone: (954) 463-8456
Facsimile: (786) 693-8333

By: */s/ Sara Sandler Cromer*
SARA SANDLER CROMER, ESQUIRE
FLORIDA BAR NO.: 059479
Primary Email: scromer@waltonlantaff.com
Secondary Email: dingram@waltonlantaff.com

CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED that the foregoing Brief complies with the word count limit requirement set forth in Fla. R. App. P. 9.210(a)(2) and is submitted in Bookman Old Style 14-point font pursuant to Fla. R. App. P. 9.045(b).

/s/ Sara Sandler Cromer
SARA SANDLER CROMER, ESQUIRE
Florida Bar No.: 59479