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

CASE NO. 4D23-2073
LT CASE NO. 50-2017-CA-008607

PENELOPE COSTELLO, et al.,
Appellants,

v.

SOUTH PALM RESIDENCE, INC.,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

STOK KON + BRAVERMAN
Counsel for Appellants
1 East Broward Boulevard, Suite 915
Fort Lauderdale, FL 33301
P.954.237.1777
F.954.237.1737

YOSEF KUDAN, Esq.
Florida Bar No.: 1010261
Email: ykudan@stoklaw.com

TABLE OF CONTENTS

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

TABLE OF CITATIONS

Page(s):

Cases

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Statutes

Rules

Other Authorities

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

STATEMENT OF CASE AND FACTS

I. Nature of the Case

Appellant, Penelope Costello, appeals from the Trial Court's summary judgment orders on Appellee's, South Palm Residence, Inc., claims and Costello's counterclaims, final judgment, and orders denying Costello's rehearing motions.

Below, South Palm sued Costello to foreclose on Costello's and the other Appellants' interest in a cooperative association ("Unit 502") and Costello counterclaimed against South Palm for damages that South Palm caused her. The Trial Court incorrectly granted summary judgment in South Palm's favor because the Parties dispute the material facts about South Palm's compliance with its bylaws and other conditions precedent for foreclosing on Costello's co-op interests. The Trial Court also incorrectly granted summary judgment on Costello's counterclaims because it improperly resolved factual disputes to decide that Costello's claims accrued in 2011. Costello raised these issues, and others, on rehearing, and the Trial Court again erred by denying Costello's motions.

For the reasons explained below, the Court should reverse the Summary Judgment Orders and remand to the Trial Court to dismiss

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

South Palm's claims and for a trial on Costello's counterclaims.

II. Course of Proceedings

On August 2, 2017, the purported not-for-profit South Palm sued Appellants to foreclose on an alleged claim of lien on Costello's[1] interest in South Palm's cooperative association, Unit 502. R. at 25-44. South Palm sued as a not-for-profit corporation, R. at 25, although it is a for-profit corporation.

Appellants Philip Patouhas and Penelope Costello (individually and as public administrator of Mary Patouhas' estate), and Patricia and George Strahele answered, defended, and asserted counterclaims. R. at 61-64, 65-68, 69-74. Appellants' defenses included that South Palm did not have the right to sue them because South Palm was a for-profit corporation and could not sue as a not for profit. R. at 61, 70. And South Palm denied Appellants' beneficial enjoyment in Unit 502. R. at 62, 70. Appellants' counterclaims included claims that South Palm's breach of quiet enjoyment entitled them to have South Palm reimburse past payments and other damages and that South Palm's officers and directors breached their

[1] Costello is the Public Administrator for Mary Patouhas' estate. Philip Patouhas appeals the portion of the judgment foreclosing on his interest in Unit 502.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

fiduciary duties to Appellants. R. at 63, 72. South Palm (not for profit) replied to Appellants' defenses, R. at 101-21, and moved to dismiss their counterclaims, R. at 134-156.

South Palm (for profit) then moved for leave to amend its complaint to reflect that it is a for-profit corporation. R. at 122. Although South Palm has used the not-for-profit moniker many times—both before and after it filed this case—South Palm claimed that it was amending to correct a scrivener's error. R. at 122. South Palm used a different case caption in its motion and claimed that it was moving as a for-profit corporation before the Trial Court allowed the amendment. R. at 122. South Palm (not for profit) never sought leave to amend or to substitute South Palm (for profit).

Appellants opposed leave to amend because the original complaint was filed by a non-entity and the Trial Court thus did not have subject matter over the case. R. at 161-206. And for-profit South Palm's motion to amend was filed by a non-party and was thus a nullity. R. at 163. The Trial Court granted South Palm leave to amend. R. at 208.

Appellants moved to dismiss South Palm's amended complaint because South Palm never separately filed the proposed amended

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

complaint attached to its amendment motion and it attached no exhibits to its proposed amended complaint. R. at 226. Appellants reiterated their attack on the Trial Court's jurisdiction over the case. R. at 228-29. South Palm then filed its amended complaint and exhibits attached to a notice of filing and Appellants refiled their motion to dismiss. R. at 241-62, 263-82.

South Palm then again sought leave to amend to file a second amended complaint to which it would attach the exhibits. R. at 283-84. The Trial Court granted leave. R. at 306. Appellants again moved to dismiss raising the same arguments as earlier but also adding proof that South Palm did not make a scrivener's error when it claimed to be a not-for-profit corporation because it consistently claimed to be a not-for-profit. R. at 331-63.

South Palm asked the Trial Court for permission to amend its complaint for a third time to address issues Appellants raised in their motion to dismiss. R. at 370-71. South Palm then amended its motion. R. at 434-35. The Trial Court granted the motion. R. at 498. Appellants moved to dismiss the complaint arguing that the documents attached to the complaint showed that South Palm did not follow the proper process outlined in its governing documents

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

before seeking to foreclose on Appellants' interest. R. at 505-08. The Trial Court denied the motion. R. at 518.

Appellants amended their counterclaims. R. at 523-542. Appellants alleged claims for negligence, breach of fiduciary duties, breach of quiet enjoyment, violations of section 719.303, and failure to follow South Palm's governing documents and procedures when establishing assessments. R. at 527-41. The claims arise from South Palm's failure to maintain the co-op's property causing damage to Unit 502 and from South Palm's officer's attempt to force Costello to sell Unit 502 at a depressed value caused by the damage. R. at 524-26. South Palm first sought to dismiss Appellants' claims. R. at 594-603. Then South Palm withdrew its motion to dismiss and answered the counterclaims. R. at 1076-78, 1079-1096.

Appellants then answered South Palm's third amended complaint. R. at 553-73. Appellants' affirmative defenses included that South Palm did not follow its procedures for the claimed unpaid assessments, failure to perform conditions precedent, equitable estoppel, failure of consideration, good faith, laches, failure to mitigate damages, prior breach, ratification, waiver, and that Costello and Patouhas had no individual interest in the co-op so they had no

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

duty to pay the assessments. South Palm replied, R. at 574-80, and then moved for summary judgment on its claims. R. at 606-19.

South Palm requested leave to amend its complaint for a fourth time to reflect its amended claim of lien. R. at 866-97. The Trial Court granted the motion and deemed the complaint filed. R. at 928.

Patouhas and the Straehles moved to dismiss the complaint because they were no longer alleged to be owners liable for the assessments and South Palm did not comply with Rule 1.130. R. at 946-54. Costello separately moved to dismiss because the complaint did not allege 1) whether South Palm was suing her individually or as public administrator, 2) who owns Unit 502, and 3) because South Palm did not comply with Rule 1.130. R. at 955-62. South Palm responded, R. at 977-81, and the Trial Court denied the motion, R. at 982-83. Appellants defended alleging defenses of prior breach, failure to state a claim, no standing, setoff, and constructive eviction. R. at 986-94.

Appellants then filed amended affirmative defenses including failure to complete a condition precedent, admitted improper notice, failure to comply with Rule 1.130, failure to show muniment of possession, prior breach, breach of quiet enjoyment, constructive

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

eviction, and no subject matter jurisdiction. R. at 1049-75. South Palm replied. R. at 1167-76.

South Palm moved for summary judgment on its fourth amended complaint, R. at 1442-78, and on Appellants' counterclaims, R. at 1319-42.

Appellants then sought leave to amend their affirmative defenses. R. at 1530-43. The affirmative defenses included, failure of conditions precedent, failure to state a claim, failure to attach required documents to the complaint, prior breaches of the bylaws and Chapter 719, unclean hands, setoff, defective claim of lien, and interference with contractual rights. R. at 1591-99. South Palm replied. R. at 1967-83.

South Palm then renewed its summary judgment motions. R. at 2040-88, 2103-246. Costello opposed the summary judgment motions. R. at 2619-28, 2632-63. South Palm then asked the Trial Court to judicially notice documents that it said supported its summary judgment motion. R. at 2664-68. The Trial Court granted the request. R. at 2696-97.

The Trial Court granted South Palm's two summary judgment motions, granted South Palm a foreclosure judgment, and dismissed

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Costello's counterclaims. R. at 2699-712, 2713-28. The Trial Court entered a final judgment. R. at 2757-62.

Costello moved for rehearing arguing that the material facts were disputed, the Trial Court ignored Philip's affidavit, South Palm's factual positions were supported by inadmissible hearsay, and that South Palm failed to prove that Costello had a possessory document, a prerequisite to needing to pay assessments. R. at 2729-48, 2749-56. The Trial Court denied Costello's motions, R. at 2769, and Costello appeals, R. at 2805-07.

III. Factual Background

In 1959, South Palm incorporated as a for-profit corporation. R. at 2064-67. Yet South Palm filed this case as a not-for-profit corporation and South Palm has repeatedly represented that it is a not-for-profit corporation. R. at 25, 355-65.

Mary and John Patouhas bought a share in South Palm in 1970. R. at 2624. At the time, South Palm issued stock certificate 126, which did not specify the unit assigned to Appellant. R. at 2655. Then in 1972, Mary and John signed an affidavit saying that a stock certificate attached to the affidavit was evidence that they had the right to occupy Unit 502. R. at 2657. Following John's passing, Mary

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

surrendered stock certificate 126, R. at 2642-43, and South Palm's officers issued a new stock certificate listing Unit 502, R. at 2658.

Over the years, Mary and her family would visit the co-op a couple times a year. R. at 2659. Mary enjoyed visiting the co-op until the association started interfering with her enjoyment. R. at 2659-60. In 2011, Mary and Appellants visited the co-op and were surprised to discover that the air conditioning unit was shut off and wrapped in a tarp. R. at 2660. Mary and Costello stayed at a nearby hotel. R. at 2660. Appellants would not have planned to stay in Unit 502 if they knew that the A/C was shut off. R. at 2660.

Philip Patouhas climbed onto the roof to check out the A/C. R. at 2660. Philip unwrapped the discovered that there was a plastic pan under the A/C and then turned the A/C back on. R. at 2660-61. The A/C worked perfectly over the next month while the family stayed in Unit 502. R. at 2661.

Philip, who has more than thirty years' experience managing and maintaining property, also tested for a leak by putting red dye into the A/C pan. R. at 2659, 2661. No red dye leaked through. R. at 2661. Philip told South Palm about the red dye test and South Palm then removed Costello's A/C unit to prevent Costello from getting a

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

report by an A/C technician showing that Costello's A/C was fine. R. at 2661. Unit 502 had no water or other damage inside it, though some condensation was near a vent. R. at 2662.

About two years later, Philip called South Palm's property manager letting him know that he planned to come to the co-op to arrange Unit 502's sale. R. at 2661. South Palm's property manager told Philip that he should arrange to stay somewhere else because the A/C was turned off right after you left the last time. R. at 2661. He didn't tell Appellants at the time because, according to the property manager, they knew there was an issue with the A/C. R. at 2661.

Then, after Mary passed away in 2016, payments were not made for Unit 502. R. at 2075, 2094-95. South Palm sued for foreclosure, the Trial Court entered a foreclosure judgment, and Costello appeals.

SUMMARY OF ARGUMENT

The Summary Judgments must be reversed because 1) South Palm did not satisfy all conditions precedent to seeking foreclosure, 2) Costello was not Unit 502's statutory owner, 3) the Parties dispute Costello's counterclaim's accrual date, and 4) the Trial Court did not have jurisdiction over South Palm's foreclosure claims.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

First, South Palm did not satisfy the conditions precedent before filing its foreclosure action. A plaintiff must prove that it at least substantially satisfied all conditions precedent before it can recover. For contractual conditions, the plaintiff must show that it provided nearly equivalent compliance with the bargained-for condition. The court must dismiss a claim if the plaintiff did not comply with conditions precedent.

Here, South Palm's treasurer did not send two notices to Unit 502's owner before suing, as required by the bylaws. South Palm's notices were defective because they were sent by South Palm's property manager, without delegation, and not by its Treasurer. And South Palm sent the notices to the unit owner's relative, not to the unit owner.

Second, Costello was not Unit 502's statutory owner and thus did not have an obligation to pay assessments. Under Florida's cooperative act, only unit owners must pay assessments. For someone to be a unit owner it must hold a share in the cooperative, and a lease, or other muniment of possession, or muniment of title granted by the cooperative as the property's owner.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

South Palm failed to show that Costello was Unit 502's owner. Certificate 126 did not identify Unit 502 so it could not be both a share and a muniment of possession. The affidavit is insufficient under Florida law because it was not granted by the association. And Certificate 399 was issued without South Palm's Board's approval, as required by its bylaws and Florida law, and it was not recorded.

Third, South Palm and Costello dispute Costello's counterclaims' accrual date so the Trial Court erred by granting summary judgment. Summary judgment can be granted only if the material facts are undisputed. Summary judgment evidence and affidavits must set out facts showing that the evidence presented would be admissible at trial. Inadmissible hearsay, like double hearsay, is not admissible on summary judgment. A business record's proponent must show that it meets the exception's four requirements before a court can consider it on summary judgment.

Here, the Trial Court's factual background shows that the Parties dispute the accrual date. South Palm's evidence was also mostly inadmissible hearsay. South Palm's property manager recounted conversations with Costello or Philip and with other people and includes letters and other documents without trying to show that

South Palm regularly creates those documents in the ordinary course of business. Lastly, the Trial Court ignored that Philip's affidavit specifically contradicted South Palm's factual assertions. Philip swore that he did not see any damage to Unit 502 in 2011. South Palm has no undisputed evidence for when Costello's counterclaims accrued and the Trial Court erred by granting summary judgment.

Lastly, the Trial Court did not have jurisdiction over South Palm's claims. A party without legal capacity cannot sue. A court lacks jurisdiction over a party's claims until the party files a pleading. A motion is not a pleading.

Here, a nonexistent not-for-profit South Palm filed the initial complaint. Then, the for-profit South Palm moved to amend the complaint to list itself as the plaintiff. The Trial Court did not have jurisdiction over South Palm's claims because the initial complaint was a nullity filed by a non-existent entity and the motion to amend did not give the Trial Court jurisdiction over South Palm's claims or motion. For all these reasons, the Summary Judgments must be reversed.

ARGUMENT

I. Standard of Review

"Whether a court has subject matter jurisdiction is a question of law reviewed de novo." *Sanchez v. Fernandez*, 915 So. 2d 192, 192 (Fla. 4th DCA 2005) (citation omitted). A court's summary judgment is reviewed de novo with the appellate court reviewing the record in the light most favorable to the non-moving party. *Tarin v. Sniezek*, 942 So. 2d 458, 460 (Fla. 4th DCA 2006) (citations omitted). When a rehearing motion addresses legal issues, its denial is reviewed de novo. *Bank of Am., N.A. v. Eastridge*, 253 So. 3d 722, 728 (Fla. 5th DCA 2018) (citations omitted); *Florida Power & Light Co. v. Hayes*, 122 So. 3d 408, 411 (Fla. 4th DCA 2013) (quoting *Holl v. Talcott*, 191 So. 2d 40, 46-47 (Fla. 1966)) (a court's discretion to deny a rehearing motion targeted to a summary judgment "is narrowed and every disposition should be indulged in favor of granting the motion."); *Lafayette v. Moody*, 316 So. 3d 708, 714 (Fla. 4th DCA 2021) (quoting *Ford v. Robinson*, 403 So. 2d 1379, 1382 (Fla. 4th DCA 1981)).

II. The Trial Court erred when it awarded the summary judgments and denied rehearing.

The Trial Court should not have entered a summary foreclosure judgment. South Palm failed to establish that it met all the conditions

allowing it to foreclose on Unit 502 and that Costello was Unit 502's owner under Florida law. South Palm's evidence supporting summary judgment was inadmissible hearsay and Costello disputed the material facts.

Florida's new summary judgment standard, based on the Federal standard, is to allow a summary judgment as long as the material facts are not disputed. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.… The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard." Fla. R. Civ. P. 1.510.

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting former Fed. R. Civ. P. 56(c))). "A court view[s] the evidence in the non-movant's favor, but only to the extent that it would be reasonable for a jury to resolve the factual issues that way." *Perez v.*

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Citizens Prop. Ins., 345 So. 3d 893, 895 (Fla. 4th DCA 2022) (citation omitted; alteration in original).

A genuine dispute exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While under Florida's old standard "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised," under the new standard "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72, 76 (Fla. 2021) (citing *Anderson*, 477 U.S. at 248).

"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 for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Stated another way, the inquiry is 'whether the evidence presents a sufficient disagreement to require

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Mane FL Corp. v. Beckman*, 355 So. 3d 418, 425 (Fla. 4th DCA 2023) (quoting *Anderson*, 477 U.S. at 251-52). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) (quoting *Anderson*, 471 U.S. at 255).

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. *See Anderson*, 477 U.S. at 255. Under *Celotex* and the Federal Standard, which is now the standard in Florida, 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." *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018).

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

A. Appellee did not satisfy the conditions precedent to bringing a foreclosure action.

South Palm's bylaws requires its treasurer to send out two notices to a unit owner for unpaid assessments before it can foreclose on a unit. South Palm's notices here were defective because 1) they were not sent by the treasurer (and South Palm presented no evidence that the treasurer delegated its duty to the property manager), and 2) the notices were not sent to the unit owner. Because South Palm failed to satisfy a necessary condition precedent before suing to foreclose, the foreclosure judgment must be vacated.

A plaintiff must prove that it complied with the conditions precedent to suing before it can recover. *Citigroup Mortg. Loan Tr. Inc. v. Scialabba*, 238 So. 3d 317, 319 (Fla. 4th DCA 2018) (quoting *Liberty Home Equity Sols., Inc. v. Raulston*, 206 So. 3d 58, 60 (Fla. 4th DCA 2016)). A plaintiff who performs a condition precedent in a way that is nearly equivalent to the bargained-for condition has substantially complied with the condition and thus allowing recovery. *Id.* (quoting *Lopez v. JPMorgan Chase Bank*, 187 So. 3d 343, 345 (Fla. 4th DCA 2016)).[2] But if the Plaintiff did not comply with conditions

[2] Generally, an otherwise valid contract can be enforced even if the enforcing party breached the condition precedent if there is no

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

precedent, the court must dismiss the suit. *Raulston*, 206 So. 3d 60-61 (citing *Blum v. Deutsche Bank Tr. Co.*, 159 So. 3d 920, 920 (Fla. 4th DCA 2015)).

Here, South Palm's notices failed to meet the condition precedent in its bylaws requiring its treasurer to send two notices to the unit owner, Costello, before it could seek to foreclose. South Palm's property manager sent the notices, not its treasurer. And the notices were only sent to Costello's brother. The Judgment must be vacated and the case dismissed.

Under Article XI, Section 3, of South Palm's bylaws, if a member fails to pay its assessments for thirty days, South Palm's treasurer must send a notice the member, and then send another notice if the assessments are not paid after sixty days.[3] Only then, after waiting

---

prejudice. *Scialabba*, 238 So. 3d at 319-20 (quoting *Raulston*, 206 So. 3e at 61. But "lack of prejudice" is an avoidance to an affirmative defense that must be pled. *Scialabba*, 238 So. 3d at 323. *But see Denton v. HSBC Bank USA, N.A. as Tr. for Registered Holders of First NLC Tr. 2007-1 Mortgage-Backed Certificates, Series 2007-1*, 290 So. 3d 72, 75 (Fla. 4th DCA 2020) (calling *Scialabba*'s prejudice holding dicta and instead holding that whether "lack of prejudice" is an avoidance depends on whether the affirmative defense asserts prejudice or not). Here, South Palm did not plead lack of prejudice as an avoidance.

[3] In the event an assessment or any other sum or charge required to be paid by a member is not paid within thirty

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

another thirty days, can South Palm foreclose to recover the assessments. ("any of such above defaults shall entitle the corporation to judgment for possession and the right to sell or lease the member's interest in and to said member's apartment.").

South Palm's own evidence shows that it did not comply with its bylaws' conditions requiring the treasurer to send the notices. South Palm relies on its property manager's affidavit to show that it

---

> (30) days from the date it first becomes due and payable, the Treasurer of the corporation shall send a notice for payment to such member. This notice will include a $20.00 penalty to be added to the initial assessment amount. If payment is not made within sixty (60) days from the date it first becomes due and payable, the Treasurer will send another notice for payment to the member in default.
>
> If any member shall be in default of any payment of assessment or any other sum or charge required to be paid within ninety (90) days from the date it first becomes due and payable, for which assessment the above two notices have been given by the Treasurer…, the corporation through its Board of Directors may consider said member as a tenant at sufferance in the apartment building and the Directors may, without further notice or demand for the assessments, institute proceedings in forcible entry and detainer or other suitable action, and any of such above defaults shall entitle the corporation to judgment for possession and the right to sell or lease the member's interest in and to said member's apartment.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

sent the notices. R. at 2076. That affidavit and its exhibits show that South Palm's treasurer did not send the notices. R. at 2076. South Palm tries to explain this away by saying that nothing in the bylaws prevents its treasurer from delegating the notice task to the property manager. R. at 2047. Although the bylaws' plain language requires the treasurer to send the notices and nothing in the bylaws allows for delegation, South Palm presented no evidence that its treasurer did delegate his/her duty to send notices to South Palm's property manager.

Even if the property manager's notices could satisfy the notice condition, South Palm failed to fulfill the condition because it did not send the notices to Costello and only sent them to Appellant Philip Patouhas. The letters show that they were sent to Philip at 183 Grace Church Street because he allegedly told the property manager to send all official correspondence to him. R. at 2075-76, 2078-79. South Palm argued, correctly, that Philip is not the unit owner and lacks standing to raise affirmative defenses. R. at 2045. It cannot then also claim that a notice sent to him was a notice to the unit owner, Costello, as Mary Patouhas' estate's public administrator. This is especially so when Philip swore that the conversation did not happen.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

R. at 2662 ("This is disputed as I was in the process of Divorce and my ex wife would go through the mail and remove items *so I would not have additional mail sent to my home address*") (emphasis added). Nor does South Palm show how Philip would have the authority to change the address for Unit 502. And, unlike South Palm's notice of intent to impose a claim of lien, R. at 33, the notices required by the bylaws were not sent to Unit 502 or Costello's address. South Palm's failure to comply with its bylaws renders its foreclosure action defective. § 719.303, Fla. Stat. (2023) [4] ("Each…association shall be governed by, and shall comply with the provisions of…the association bylaws….").

South Palm, recognizing these deficiencies, argued—and the Trial Court accepted—Article XI, Section 4, allowed it to foreclose without sending the notices. Reading Section 4 plainly and in context with the rest of Article XI, shows that South Palm's argument is misplaced.

---

[4] This brief cites, quotes, and refers to the 2023 Florida Statutes, although other versions may have been in effect at the time the Parties took particular actions. The current statutory version is not materially different from the versions in effect during the periods relevant to Appellant's arguments.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Textual interpretation looks to reach a fair reading of the text by "determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323–24 (Fla. 2022) (quoting *Ham v. Portfolio Recovery Assocs.*, 308 So. 3d 942, 947 (Fla. 2020)). A court reaches a fair reading by looking at context to figure out a word's meaning. *Lab. Corp.*, 339 So. 3d at 324 (citing *Deal v. United States*, 508 U.S. 129, 132 (1993)). Context—the primary way to determine a word's meaning—requires courts to consider "the entire text, in view of its structure and of the physical and logical relation of its many parts." *Lab. Corp.*, 339 So. 3d at 324 (quoting Scalia & Garner, *Reading Law* at 167).

Section 4 authorizes South Palm to bring deficiency and other actions against a member and is not separate authority to bring a foreclosure without first complying with Section 3's notice requirement. Section 4 allows South Palm to "pursue any other legal remedy allowable by Florida law…, which remedy shall specifically include a right to a personal actions against the member to collect any monies due, and the member shall be responsible to pay all costs

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

of collection incurred by the Corporation, including a reasonable attorney's fee." R. at 2087.

Section 4 does not exempt South Palm from first complying with Section 3's notice requirements before seeking another legal remedy. Section 3 anticipates South Palm filing either an "action for forcible entry and detainer," "other suitable actions," or seeking a "judgment for possession and the right to sell or lease the member's interest." R. at 2086. "[A]ny other legal remedy" is either an "other suitable action," bringing Section 4 under Section 3's notice requirements, or it clarifies that South Palm may seek any remedy allowed under Florida law for the listed actions. And South Palm could only seek a judgment for possession and to sell a member's interest under section 719.108, which is what South Palm filed. *See* §719.108(5), Fla. Stat. (2023) ("Liens for rents and assessments may be foreclosed by suit brought in the name of the association, in like manner as a foreclosure of a mortgage on real property.").

Reviewing the undisputed facts in the light most favorable to Costello, South Palm failed to substantially comply with the bylaw's condition precedent requiring that the treasurer send notice to the unit owner. The Summary Foreclosure Judgment thus must be

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

reversed and because South Palm's own evidence shows that it did not comply with the conditions precedent, the Court should remand for the Trial Court to dismiss South Palm's foreclosure claims under Rule 1.510(f).[5]

B. Costello was not the unit's statutory owner and did not have to pay assessments.

Costello could only be required to pay assessments and South Palm could only have a right to foreclose if Costello was a unit owner. Costello never had "a lease or other muniment of title or possession" and was thus not a unit owner under Florida law. Without an obligation to pay assessments, South Palm's foreclosure action and judgment are unfounded.

Only unit owners with exclusive possession over a unit are liable for cooperative assessments. *See* § 719.108(1), Fla. Stat. (2023) ("unit owner, regardless of how title is acquired…, shall be liable for all rents and assessments coming due while the unit owner is in

[5] South Palm also argued that failure to comply with a condition precedent is not a defense to a foreclosure because it argued that a unit owner's obligation to pay assessments is only conditioned on its status as a unit owner and the assessment was imposed lawfully. R. at 2048. That argument, although correct, does not excuse South Palm from complying with conditions precedent before bringing a foreclosure action for properly imposed unpaid assessments.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

exclusive possession of a unit."). A "unit owner" is an association shareholder with "a lease or other muniment of title or possession of a unit that is *granted by the association* as the owner of the cooperative property." § 719.103(27), Fla. Stat. (2023) (emphasis added). A muniment of title includes possession and the right to possess. *Temple Terrace Assets Co. v. Wason*, 163 So. 72, 76 (Fla. 1935).

Here, South Palm failed to prove that Costello was a statutory unit owner because it presented no evidence that Costello held a lease or other muniment of title or possession granted by South Palm.

South Palm relied on two stock certificates and an affidavit to support its claim that Costello was the unit owner and to show the Trial Court that she held a muniment of possession. R. at 2043, 2655. The original stock certificate fails because it did not identify any unit as required by South Palm's bylaws. The replacement stock certificate is not a lease or other muniment of title or possession because it was issued ultra vires. And the affidavit does not help South Palm because the affidavit was the Patouhas's and not a muniment of title or possession *granted by* South Palm.

First, Certificate 126 identifies no corresponding unit giving

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Costello the right to exclusive possession for that unit. R. at 2655. Under the bylaws, a unit owner only had exclusive possession and occupancy rights if the share listed a unit number. R. at 2085, Art. X, § 4. And neither Certificate 126 nor Certificate 399, alone, are sufficient evidence because under section 719.103(27) the lease or other muniment of title or possession must be held together with the share. ("'Unit owner'…means the person *holding* a share in the cooperative association *and* a lease or other muniment of title or possession") (emphasis added). The Certificates are just the "share in the cooperative association…," and a person is not a "unit owner" with just a share.

Next, the affidavit is not a qualifying muniment of title or possession because it was not granted by South Palm. R. at 2074. Rather than South Palm signing the affidavit, John P. and Mary C. Patouhas signed it two years after Certificate 126 was issued to them. R. at 2074.[6] The affidavit fails to meet the "granted by the association" statutory requirement.

[6] South Palm also did not include the full affidavit in its summary judgment evidence. The second page is Certificate 126. Instead, South Palm attached Certificate 399 as the second page.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Lastly, Certificate 399 does not qualify because it was issued without authority and because it was not recorded. Under South Palm's bylaws, Article IX, generally, stock certificates in South Palm may be issued only after action by South Palm's board. R. at 2084-85. And section 607.0621, Florida Statutes (2023), likewise requires board approval before issuing shares. The bylaws also require board approval before South Palm's corporate seal can be affixed to a stock certificate or before South Palm issues a replacement stock certificate. R. at 2080, 2083 Art. III ("All stock certificates…shall be affixed with the corporate seal"); Art. V ("In the case of loss or destruction of a certificate of stock, no new certificate shall be issued therefore except upon satisfactory proof to the Board of Directors…."); Art. VIII, § 2.5 ("The Secretary…shall keep in safe custody the seal of the corporation, and *when authorized by the Board of Directors*, affix the same to any instrument so requiring it….") (emphasis added). And the bylaws only allow the board to issue a new share or approve putting an apartment number on a stock certificate for a new purchaser. R. at 2085 Art. X, § 4. Thus to grant a muniment of possession to Costello, South Palm's board could only issue a lease or occupancy agreement.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

The Trial Court agreed that the board can only issue a new share to new owners. R. at 2719-20. And, without a board approved stock certificate listing a unit, Costello never exclusively possessed or occupied Unit 502. R. at 2085 Art. X, § 4 ("The purchaser of an apartment, following approval by the Board of Directors…, entitles said party to the exclusive use and occupancy of the apartment stipulated on the stock certificate."). Certificate 126 did not list an apartment and Certificate 399 was not board authorized.

South Palm presented no evidence that its board authorized Certificate 399 and has thus failed to present evidence that Costello had an obligation to pay. Nor did South Palm present any evidence that its board authorized the inclusion of Unit 502 on Certificate 399, as required by the bylaws. R. at 2084-85 Art. IX, §1; Art. X, § 4. Nor do the bylaws empower the officers to issue a new share or to add the apartment number to a stock certificate even if they had authority to issue a share. *See* R. at 2083 Art. VIII, § 2. For example, South Palm's Articles of Incorporation include no officer duties, R. at 2064-67, and its president can only "see that all orders and resolutions of the Board of Directors are carried into effect." R. at 2083. South Palm showed no such resolutions authorizing Certificate 399's issuance. And the

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

board in 1970 declined to include Unit 502's number on Certificate 126.

Lastly, under section 719.105(1)(a), Florida Statutes (2023), the evidence showing membership in a cooperative must be recorded and include a legal description. Certificate 399 was not and does not. R. at 2732.

South Palm also argued that all it needed to show was that Costello held a share and possessed Unit 502. R. at 2053. The Trial Court Agreed. R. at 2719-20. They misread the statute. Looking at section 719.103 in context shows that muniment of title or possession is one phrase setting out lease alternatives. 719.103(13)(c) ("'Cooperative documents' means:…The document recognizing a unit owner's title or right of possession to his or her unit."); *Temple Terrace Assets*, 163 So. at 76; MUNIMENT, Black's Law Dictionary (11th ed. 2019) ("A document (such as a deed or charter) evidencing the rights or privileges of a person, family, or corporation.").

South Palm's reading goes against the series-qualifier canon stating, "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

modifier normally applies to the entire series." *Beach Towing Services, Inc. v. Sunset Land Associates, LLC*, 278 So. 3d 857, 861 (Fla. 3d DCA 2019) (quoting A. Scalia & B. Garner, Reading Law: *The Interpretation of Legal Texts* § 19 at 147-51 (2012)). Therefore, in the absence of some other indication, such as a determiner, the modifier reaches the entire enumeration. *Id.* "Also pertinent here, under the canon of noscitur a sociis, which means 'it is known by its associates,'" words that are grouped in a list should be given related meanings. *Id.* (quoting Reading Law § 31, 195).

"Possession" in section 719.103(27) must be read to be like "lease" because lease is a prepositive modifier for "muniment of title or possession," especially considering that a lease, muniment of title, and a muniment of possession can all be "granted by the association as the owner of the cooperative property." Reading "possession" as a standalone, ignores the textual clues and interpretive canons showing what "possession" means in the statute.

Without summary judgment evidence that Costello had a lease or other muniment of possession or title, South Palm failed to show that Costello was a unit owner obligated to pay assessments. Without such an obligation, South Palm could not sue to foreclose for unpaid

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

assessments. The Judgment must be reversed.

C. The Trial Court should not have granted summary judgment dismissing Costello's counterclaims because the material facts are disputed.

i. Factual disputes prevent summary judgment.

The Trial Court erred when it granted summary judgment because the parties dispute the date that Costello's counterclaims accrued. According to South Palm, Costello's counterclaims accrued in 2011. Costello's evidence shows that the counterclaim accrued in 2016. The Trial Court improperly ignored Costello's evidence to find that undisputed facts by making improper credibility determinations. Because the evidence shows that any damage to Unit 502 occurred within four years from Costello's counterclaim and amended counterclaim, the Trial Court's summary judgment must be reversed.

Under Rule 1.510(c)(4), a summary judgment affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant…is competent to testify on the matters stated." This requirement prevents courts from relying on hearsay when deciding a summary judgment motion and ensures that the case has an admissible evidentiary basis rather than supposition or belief. *Florida Dept. of Fin. Services v. Associated*

Indus. Ins., 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (citing *Pawlik v. Barnett Bank of Columbia County*, 528 So. 2d 965, 966 (Fla. 1st DCA 1988)); *Johns v. Daniels*, 186 So. 3d 620, 622 (Fla. 5th DCA 2016). Inadmissible hearsay cannot support a summary judgment. *See Sentz v. Bonefish Grill, LLC*, 48 Fla. L. Weekly D2197 (Fla. 4th DCA Nov. 15, 2023).

Before a court can admit a business record under section 90.803(6), Florida Statutes (2023), the proponent must show "(1) that the record was made at or near the time of the event; (2) that it was made by or from information transmitted by a person with knowledge; (3) that it was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record." *Bank of New York v. Calloway*, 157 So. 3d 1064, 1069 (Fla. 4th DCA 2015).

The proponent can establish this foundation with record-custodian (or others with knowledge) testimony supporting the elements, through stipulation, or through a certification. *Id.* (citation omitted). When relying on records created by a different business, the proponent must also show that those records meet the business records exception. *See id.* at 1071 (citations omitted). Incorporating

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

the other business' records is important to show trustworthiness but it is not enough. *Id.* at 1072. The proponent must show that the creating business had an incentive for accuracy or it must independently confirm that the records are accurate. *Id.*

Even if a hearsay record qualifies under the business record hearsay exception, hearsay in that record must also be admissible under some other exception before a court can admit it. § 90.805, Fla. Stat. (2023); *Rivera v. Bank of New York Mellon*, 276 So. 3d 979, 982 (Fla. 2d DCA 2019) (quoting *Knight v. GTE Fed. Credit Union*, 310 So. 3d 959, 962 (Fla. 2d DCA 2018)). Hearsay is not admissible just because it is in a business record. *Id.* And a party's own statement within its record is still hearsay. *See Carter v. State*, 226 So. 3d 268, 271 (Fla. 4th DCA 2017).

Here, the Trial Court erred by granting summary judgment. First, The Trial Court's factual background shows that the material facts are disputed. Second, South Palm supported its facts with hearsay. Lastly, the Trial Court improperly ignored Philip's affidavit.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

The Trial Court's "Undisputed Facts" section shows that the material facts are disputed. First, the Trial Court (inaccurately[7]) recounts Silvestri's (South Palm's former property manager) claim that Unit 502 was damaged in 2011. R. at 2700-01. Then the Trial Court says that Philip says that there was no damage in 2011.[8] R. at 2701. The Trial Court ignored that the facts are disputed to grant summary judgment.

The Silvestri affidavit abounds in hearsay. Silvestri recounts at least five times that he claims he told Appellants about issues with Unit 502. R. at 2126-28 (3, 6, 13). Silvestri also says that "he was advised," "recommended to," and the "contractor noted." R. at 2126,

---

[7] The Summary Judgment says that Silvestri "discovered water forming on the ceiling…," and that "another technician took photographs of the roof and air conditioner…." R. at 2700-01. Silvestri actually said that "there was some water damage to the ceiling," and that "[d]uring that [second] inspection the Affiant took photographs." R. at 2126, 2128. These Trial Court inaccuracies, along with its reference to a "foreclosure on a condominium unit," R. at 2700, 2714, calls into question the Trial Court's attention to the issues raised in South Palm's motions.

[8] The Trial Court also says that "Mr. Patouhas suggests any correspondences mailed to his address by [South Palm] were diverted to another mailing address during his divorce." R. at 2701. He said no such thing. Instead, Philip's affidavit says that he disputes that he told Silvestri that the should send mailing to his address *because* he would not receive it. R. at 2627 ("I would not have additional mail sent to my address.").

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

2128. And the letters attached to Silvestri's affidavit are incomplete or inaccurate and Silvestri's affidavit does not support any hearsay exception allowing their introduction. The February 4 letter includes a proposal that appears to have been sent on February 8. R. at 2140. Nor does the affidavit show how the reports are admissible. Even if the reports are South Palm's records, Silvestri has identified no information showing how the reports themselves were the creating businesses' business records.

The pictures that Silvestri claims he took do not save the summary judgment order. Philip's affidavit flatly contradicts Silvestri's claim that the damage (even if the pictures are legible enough to show anything) existed in 2011. Philip was in Unit 502 after the alleged inspection and saw that there was no damage. R. at 2628 ("Affiant was there in the winter of 2011 and there w[as] no damage to the interior premises whatsoever").

The pictures alone do not show the date they were taken, nor does Silvestri explain what the pictures are showing and where. *See Richardson v. State*, 338 So. 3d 1106, 1115 (Fla. 1st DCA 2022) (citing *Dolan v. State*, 743 So. 2d 544, 545 (Fla. 4th DCA 1999)) (to authenticate a picture using the pictorial method the proponent must

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

present evidence that the picture "fairly and accurately reflect the events or scene"). All Silvestri says is that the pictures attached to his affidavit are "[t]rue and correct copies," not that they fairly and accurately show Unit 502's condition. R. at 2128. Nor does Silvestri even say that the pictures show Unit 502. He just says that he "took photographs," but not of what or where. R. at 2128.

Silvestri's affidavit also fails to establish that the records attached as exhibits are admissible under the business records exception. For all exhibits, Silvestri does not say that they were kept in the ordinary course of a regularly conducted business activity or that it was South Palm's regular practice to make those records. Nor does Silvestri explain how the double hearsay within his affidavit and Exhibits B and C is admissible under any hearsay exception.

And all Silvestri's statements are for the truth of the matter asserted. Silvestri's affidavit is intended to show that Unit 502 was damaged in 2011. And because Unit 502 was damaged in 2011, Costello's counterclaims accrued then.

With all these infirmities, South Palm's evidence supporting an accrual date for Costello's claims in 2011 collapses and leaves the Summary Judgment on Costello's counterclaims foundationless.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

But the Trial Court rescued South Palm by improperly ignoring Philip's affidavit. To do so, the Trial Court ignored what Philip swore to. The Trial Court questioned how Philip's thirty years as an attorney, or his legal acumen makes him competent to testify about the unit's condition. R. at 2707. But Philip's affidavit actually says, "I am an attorney…and have also been involved with the management and maintenances of commercial and residential real estate for 30 years." R. at 2624. Philip's thirty years managing and maintaining commercial and residential real estate is what supports his competency to testify about Unit 502's condition.[9]

And the Trial Court then used its doubts about Philip's qualifications to conclude that his affidavit was "comprised solely of his opinions and observations without reference to any evidence in support thereof." R. at 2708 (citing *Rich v. Narog*, 366 So. 3d 1111, 1120 (Fla. 3d DCA 2022). That mischaracterizes Philip's affidavit and the law. Philip swore that he took specific steps to inspect Unit 502's A/C and specifics about what he saw. R. at 2624-28. In *Rich*, the

[9] South Palm did not file a motion to exclude Philip's testimony as improper expert testimony.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

court disregarded what it called a self-serving affidavit because it did not have specifics showing how it came to its conclusions.

Here, however, Philip either included specifics or could not prove a negative. R. at 2624-28. Philip went up to the roof to inspect the A/C and did a red dye test to check for leaks and found none. R. at 2625-26. After he removed the tarp and turned the A/C back on it worked perfectly. R. at 2626. At that time, when he inspected Unit 502, it had no damage. R. at 2627, 2628. There was some condensation near a vent, but, as is general knowledge to anyone living in South Florida, when it is humid outside A/C vents get condensation. Philip's affidavit includes enough specifics to show that it is not just conclusory or would force Philip to present specific facts to prove a negative. *See Camara v. Mastro's Restaurants LLC*, 952 F.3d 372, 375 (D.C. Cir. 2020) (the summary judgment standard does not require a party to prove a negative). By rejecting Philip's affidavit, the Trial Court improperly weighed the evidence to resolve the disputed facts before deciding the summary judgment motion. *Strickland*, 692 F.3d at 1154 (quoting *Anderson*, 471 U.S. at 255).

And to the extent that the Trial Court is correct that *Rich* allows a court to ignore an affidavit with conflicting evidence, this Court

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

should reject that conclusion. Testimony is evidence. *Franklin v. Nationwide Mut. Fire Ins.*, 566 So. 2d 529, 532-33 (Fla. 1st DCA 1990). Rejecting Philip's affidavit because he based it on his observations that Unit 502 was not damaged cannot comply with the summary judgment standard. The Trial Court's *Rich* interpretation would require Costello to take pictures in 2011, before Unit 502 was damaged to show that any damage happened later. Without that, how could Costello ever prove that Unit 502 was not damaged in 2011?

Because the material facts establishing the accrual date for Costello's counterclaims are disputed and because South Palm's evidence was inadmissible on summary judgment, South Palm failed to carry its burden and the Summary Judgment must be reversed.

ii. South Palm breached its duties to Costello.

South Palm confuses the applicable duty it owed Costello. It is true that cooperative associations ordinarily do not owe fiduciary duties to their shareholders—their officers and directors do. But Costello pleaded that South Palm's fiduciary duties arose separately from its corporate status and from specific acts that it took. And Costello pleaded that South Palm breached duties to her that sound

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

in negligence and otherwise breached South Palm's governing documents. Costello's claims should proceed to trial.

South Palm, relying on *Collado v. Baroukh,* 226 So. 3d 924, 928 (Fla. 4th DCA 2017), argued that Costello could not show that South Palm owed it a duty because section 719.104(8)(a) (now subsection (9)(a)) limits *fiduciary* duties to an association's officers and directors. South Palm presented no argument or caselaw showing how section 719.104 removes an association's negligence-type duties because it has a separate corporate existence. Nor could it. When an association is negligent, it is improper to sue its officers *See, e.g.*, *Vazquez v. Lago Grande Homeowners Ass'n*, 900 So. 2d 587, 593 n.7 (Fla. 3d DCA 2004).

Nor did South Palm deal with Costello's allegations that its fiduciary duties arose not from section 719.104 but from the trust Costello placed in South Palm and from the duties South Palm undertook. R. at 530-31. It only sought summary judgment for statutory fiduciary duties. And South Palm only moved for substantive summary judgment on Counts I and II. The Court thus does not have an alternative basis to affirm the judgment on the other counts.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

III. A nonexistent entity filed the initial complaint, South Palm never properly substituted into the case leaving the Trial Court jurisdiction over the case below.

There is no not-for-profit corporation named South Palm Residence, Inc. Yet the attorney who filed the initial complaint claimed that it was filed by that nonexistent entity. Under Florida's Not For Profit Corporation Act, only not-for-profit corporations organized under the act have the authority to sue. The claimed not-for-profit South Palm was not organized under the act and thus had no authority.

After Costello pointed out this problem, South Palm (for profit) moved for leave to amend the complaint to change the party suing to itself claiming that the "not" in "not for profit" was a scrivener's error. South Palm did so despite repeatedly drafting and filing papers calling itself a not for profit. R. at 355-65. The for-profit South Palm was never substituted as a plaintiff and its motion to amend was not a pleading sufficient to establish the Trial Court's jurisdiction over this case. The Judgment thus was void.

Generally, a party need not allege its capacity to sue. Fla. R. Civ. P. 1.120(a). A defendant challenging a plaintiff's existence or capacity to sue must do so "by negative averment" in a motion to dismiss or

answer. *Id.*; *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 399 n.1 (Fla. 4th DCA 1982) (citing *Wittington Condo. Apts., Inc. v. Braemar Corp.*, 313 So. 2d 463, 466 (Fla. 4th DCA 1975)). A non-active entity cannot sue without explicit permission from the legislature. *Keehn*, 420 So. 2d at 400; *Underwriters at LaConcorde v. Airtech Services, Inc.*, 493 So. 2d 428, 429 (Fla. 1986) (Boyd, J., concurring) ("It is axiomatic that the capacity to sue in the courts of Florida attaches only to natural or legal persons."); *The Florida Bar*, 353 So. 2d 95, 97 (Fla. 1977) (legislative act grants capacity to sue). An unincorporated association cannot sue without statutory authority establishing capacity. *Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B.*, 770 So. 2d 1267, 1269 (Fla. 3d DCA 2000).

Under section 617.0302(2), Florida Statutes (2023), a not-for-profit corporation has the power to sue if only it is organized under chapter 617. ("Every corporation not for profit *organized under this* chapter…shall have power to…[s]ue and be sued and appear and defend in all actions and proceedings….") (emphasis added); *see also* § 617.1502, Fla. Stat. (2023) ("A foreign corporation conducting its

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

affairs in this state without a certificate of authority may not maintain a proceeding in any court in this state…").

For subject matter jurisdiction purposes, "pleadings" are a "declaration, complaint, petition, cross-bill, or counter-claim…." *Lovett v. Lovett*, 112 So. 768, 775-76 (1927); *In re Estate of Hatcher*, 439 So. 2d 977, 980 n.2 (Fla. 3d DCA 1983). Pleadings invoking a court's jurisdiction include complaints, petitions, counterclaims, crossclaims, and third-party complaints. Fla. R. Civ. P. 1.100(a). A "motion to dismiss is not" a pleading. *Green v. Sun Harbor Homeowners' Ass'n, Inc.*, 730 So. 2d 1261, 1263 (1998).

A court lacks jurisdiction over a party's claims until a pleading brings that party into the case. *Garcia v. Stewart,* 906 So. 2d 1117, 1122-23 (Fla. 4th DCA 2005). Just because there was "no *pleading* concerning this claim" the Court held "the trial court was without subject matter jurisdiction when it entered the order distributing funds." *Id.* (emphasis added). In *Garcia*, the association filed its post-judgment motion to disburse funds when it was not a party to the lawsuit, and its motion was not a "pleading" that invoked the court's jurisdiction to adjudicate its rights. *Id.*

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

Here, South Palm (not for profit), sued without statutory authorization because it was not properly organized and no other statute authorized it to sue. South Palm (for profit) was never a party to the lawsuit, and its non-pleading motion to amend did not invoke the Trial Court's subject matter jurisdiction to adjudicate its claims.

Costello attacked South Palm's (not for profit) capacity to sue in their answers. R. at 61, 70. Then after South Palm (for profit) moved to amend the complaint, Costello challenged its motion to amend because the motion was filed by a different entity. R. at 161-205. And South Palm's argument that the "not" in "not for profit" was just a scrivener's error fails because it wrote "not" in the caption and in its allegations, R. at 25, 26, and because it listed itself as a not for profit many other times, R. at 332, 337, 355-65. South Palm (not for profit) being a non-existent entity did not have capacity to file the lawsuit and the initial complaint was a nullity. *See Keehn*, 420 So. 2d at 400; *Asociacion De Perjudicados*, 770 So. 2d at 1269.

South Palm (for profit) moved for leave to amend before it filed a pleading. South Palm (for profit) changed the case caption and named and labeled itself as the plaintiff, even though no order allowed that amendment. R. at 122. The Trial Court did not have

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

jurisdiction to decide the motion because South Palm (for profit) did not file any pleading before its motion. Without that pleading, the Trial Court did not have jurisdiction to consider the motion for leave to amend, leaving the order allowing amendment and the later proceedings void.[10] *Garcia,* 906 So. 2d at 1123.

CONCLUSION

For these reasons, the Trial Court's Summary Judgments must be reversed and remanded for the Trial Court to dismiss South Palm's claims and hold a trial on Costello's counterclaims, and award attorney's fees and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via the Florida Courts E-Filing Portal on February 2, 2024 to: Joy Mattingly, Esq. (kmattingly@beckerlawyers.com; cofoservicemail@beckerlawyrs.com), Becker & Poliakoff, P.A., 1 East Broward Boulevard, Suite 1700, Ft. Lauderdale, Florida 33301; James K. Parker, Esq.

[10] Had the not-for-profit South Palm sought leave to amend, Appellants likely would have challenged that filing as a nullity filed by a non-existent entity. But the (non-existent) original party never sought leave to amend or to substitute in the correct, existing party.

STOK KON + BRAVERMAN
ONE EAST BROWARD BOULEVARD, SUITE 915 • FORT LAUDERDALE, FLORIDA 33301 • (954) 237-1777 • FAX: (954) 237-1737

(jparker@boydlawgroup.com; jdibiasio@boydlawgroup.com; service mia@boydlawgroup.com; pcrespo@boydlawgroup.com), Boyd, Richards, Parker, Colonnelli, P.L., 100 2nd Street, Suite 2600, Miami, Florida 33131; Christopher Perez-Gurri, Esq. (chris@gpglawfirm.com; alan@gpglawfirm.com; jeanine@gpglawfirm.com, 1326 SE 3rd Avenue, Ft. Lauderdale, Florida 33316.

RESPECTFULLY SUBMITTED,

STOK KON + BRAVERMAN
By: */s/ Yosef Kudan*
YOSEF KUDAN, ESQ.
Florida Bar No. 1010261
1 East Broward Blvd, 915
Fort Lauderdale, FL 33301
Tel. (954) 237-1777
Fax (954)237-1737
Email: service@stoklaw.com;
ykudan@stokaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rule 9.045 and 9.210 of the Florida Rules of Appellate Procedure. This Initial Brief has fewer than 13,000 words.

By: */s/ Yosef Kudan*
Yosef Kudan, Esq.
Florida Bar No. 1010261