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

CASE NO. 4D23-1173

L.T. No. 502021CA009169XXXXMB

GENERAL AMERICAN HOLDINGS INC.,

Appellant,

vs.

340-350 ROYAL PALM WAY LLC,

Appellee.

On Review From a Final Judgment
of the Circuit Court of the Fifteenth Judicial Circuit
in and for Palm Beach County, Florida

APPELLEE'S ANSWER BRIEF

Jonathan P. Hart
Florida Bar No. 55982
jhart@shutts.com
Shutts & Bowen LLP
1100 CityPlace Tower
525 Okeechobee Boulevard
West Palm Beach, FL 33401
(561) 835-8500 (ph)
(561) 650-8530 (fax)
Counsel for Appellee

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STATEMENT OF THE CASE AND OF THE FACTS

This is a landlord-tenant dispute between Plaintiff-Appellant, General American Holdings, Inc. (the "**Tenant**"), and Defendant-Appellee, 340-350 Royal Palm LLC (the "**Landlord**"). R.000094-97. Tenant's First Amended Complaint asserts one count, alleging that Landlord breached the parties' commercial lease agreement (the "**Lease**") by failing to maintain the leased premises. *Id*.

During discovery, Landlord served interrogatories on Tenant, including the following:

> 1. For each alleged instance of breach of contract, as alleged in paragraph 19 of the Complaint, state (1) the date(s) of the alleged breach; (2) the date you provided notice to Landlord of the alleged issue; (3) the person to whom notice was provided and the method (letter, email, etc); and (4) the alleged damages you contend you suffered as a result of each alleged breach.
>
> ***
>
> 6. Explain the formula or method used to calculate any of the claimed damages in response to Interrogatory No. 1.

R.000411, 000414; Appendix to Appellant's Initial Brief ("**Appendix**"), A.2 at pdf pp. 106, 109.

In response to Interrogatory No. 1, Tenant explained in relevant part that "[t]he breaches alleged in the complaint are, in the Plaintiff's [Tenant's]

opinion, not 'separate' breaches, but rather a continuous failure by the landlord to maintain the premises as required under the lease" and that:

> The determination of damages will require expert testimony. However, the Plaintiff [Tenant] believes that the appropriate measure of damages is the difference in rental value between a Class "A" office building and the premises in its current condition.

R.000411; Appendix A.2 at pdf p. 106. In response to Interrogatory No. 6, which Tenant's Initial Brief does not expressly address, Tenant further stated that "[t]he formula ['used to calculate any of the damages in response to Interrogatory No. 1'] would be the difference between what the Plaintiff is paying and the fair market value of a comparable rental, which will most likely be provided by expert testimony." R.000414; Appendix A.2 at pdf p. 109. Tenant never claimed that it was seeking damages for each day it allegedly was unable to operate out of the leased premises. R.000411, 000414; Appendix A.2 at pdf pp. 106, 109.

Landlord later took the deposition of Tenant's corporate representative who testified that: (1) Tenant did not have an expert witness to calculate damages; (2) the corporate representative could not testify as to the difference in value of the premises and another space; and (3) Tenant had no one else who could provide that calculation. R.000425-

426.[1] During the deposition, Tenant's counsel stipulated that loss of time was not identified as a category of damages that Tenant was seeking in this action. R.000426 at 25:12-18; Appendix A.2 at pdf p. 121:25, lines12-18. Tenant never sought leave to amend its discovery responses.

After discovery concluded, on February 17, 2023, Landlord moved for summary judgment because Tenant had no evidence, and therefore could not prove, that the leased premises were worth less than a Class "A" office space. R.000314-320 ("**Summary Judgment Motion**"). Landlord did not address liability in its Summary Judgment Motion. *Id*.

On March 16, 2023, Tenant filed its response to the Summary Judgment Motion. R.000533-730. Tenant argued there was evidence that the leased premises were not maintained and that, "[w]here a Defendant fails to repair a premises and the premises becomes uninhabitable as a result, the tenant is entitled to the fair market rental value of the premises."

[1] Landlord addressed whether the corporate representative or anyone else could provide the calculation since Tenant did note in response to one of the interrogatories that the calculation "will most likely" require expert testimony. R.000414. The testimony confirmed that no witness could provide the calculation either. R.000425-426.

R.000533-559.[2] Tenant, however, did not dispute that it has no evidence to prove the difference in rental value between a Class "A" office building and the premises in its current condition; nor did Tenant present any evidence to establish the "fair market rental value of the premises" or any other amounts on which the trial court, or jury, could quantify damages. R.000536-539.

The Court granted summary judgment in favor of Landlord because Tenant failed to present any evidence to prove it was damaged, which is an element of its claim. R.000861. The court explained that Tenant was bound by its interrogatory responses and could not avoid summary judgment by merely claiming there is evidence that the premises were not habitable on certain dates because Tenant never indicated that it was seeking loss of use damages. R.000860-862.

[2] Tenant did not cite any authority that would support recovery of damages for each day it allegedly was unable to operate out of the leased premises.

SUMMARY OF THE ARGUMENT

Tenant did not dispute that the trial court correctly granted summary judgment on the damage theory that Tenant identified during discovery. The sole issue on appeal is whether Tenant can avoid summary judgment by presenting evidence purporting to support of a new damage model, and by using a damage formula, that Tenant never disclosed during discovery.

The trial court properly ruled that summary judgment is warranted because: Tenant is bound by the damage theory that it claimed in its interrogatory responses, *see Mana v. Cho*, 147 So. 3d 1098, 1100 (Fla. 3d DCA 2014); Tenant admittedly has no evidence to support that damage theory; and Tenant cannot avoid summary judgment by presenting purported evidence related to a new damage model, which is different from the one to which Tenant is bound and cannot prove.

STANDARD OF REVIEW

The Court reviews the entry of a summary judgment *de novo*. *E.g., Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *Seven Kings Holdings, Inc. v. Marina Grande Riviera Beach Condo. Ass'n, Inc.*, 364 So. 3d 1108, 1113 (Fla. 4th DCA 2023).

ARGUMENT

The Trial Court Correctly Granted Summary Judgment Because Tenant Could Not Present Evidence To Prove Its Alleged Damages

A. The Applicable Standard on Summary Judgment

Summary judgment is required "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." Fla. R. Civ. P. 1.510(a); *see In re Amendments to Fla. R. of Civ. P. 1.510*, 317 So. 3d 72, 77 (Fla. 2021) (effective date of new summary judgment rule is May 1, 2021, and the amendments "govern the adjudication of any summary judgment motion decided on or after that date"). The moving party can show that no genuine dispute of material fact exists by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1985).

It is then up to the non-moving party to identify evidence in the record showing that a genuine issue for trial exists. *Id.* at 323 ("[T]he nonmoving party [must] make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (the

nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts.").

B. Tenant Cannot Present Evidence of the Damages It Actually Claimed and Cannot Avoid Summary Judgment Based on a New, Unpled Theory of Damages

The trial court properly granted summary judgment because Tenant could not present evidence, either from an expert or a fact witness, to establish the difference in rental value between a Class "A" office building and the leased premises in its current condition. R.000861.[3] Put differently, Tenant could not prove it was actually damaged by the alleged breach, an essential element of its single breach of contract claim. *See, e.g., Jedak Corp. v. Seabreeze Office Assocs., LLC*, 244 So. 3d 342 (Fla. 5th DCA 2018) ("Because Landlord did not incur any damages that were caused by the breach of these particular lease provisions, the lower court erred in granting summary judgment in favor of Landlord and in denying summary judgment in favor of Tenant. Accordingly, we reverse and

[3] Tenant inaccurately claims that Landlord moved for summary judgment because Tenant had not identified "an expert to testify as to damages." Initial Brief at 2. The record shows Landlord moved for summary judgment because Tenant did not have an expert *and* because neither its corporate representative nor any other fact witness could testify as to the damages Tenant allegedly incurred. R.000318-319.

remand this cause with directions that summary judgment be entered in favor of Tenant."). In fact, Tenant does not dispute that summary judgment on that damage theory was proper.

Instead, Tenant argues that the trial court erred in granting summary judgment because a jury could find that Tenant suffered damages when it allegedly could not use the property. Initial Brief at 7.[4] But as the trial court explained, that argument is insufficient to avoid summary judgment because Tenant "never indicated that it was seeking loss of use damages in its interrogatory responses or otherwise." R.000861. The trial court properly applied the law.

Tenant is bound by its pleading, as clarified in discovery, which frame the issues to be litigated in this case. *See, e.g.*, *Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC*, 986 So. 2d 1244, 1252 (Fla. 2008) ("'Florida law clearly holds that a trial court lacks jurisdiction to hear and to determine matters which are not the subject of proper pleading and notice,' and '[t]o allow a court to rule on a matter without proper pleadings and notice is

[4] There was no evidence submitted to establish that the premises were actually uninhabitable; rather, Tenant merely identified approximately 30 days where there were alleged issues with the air conditioning, smells, and leaks. R.000535-536.

violative of a party's due process rights.'") (alteration in original; emphasis omitted); *Tracey v. Wells Fargo Bank, N.A., as Tr. for Certificateholders of Banc of Am. Mortg. Sec., Inc.*, 264 So. 3d 1152, 1155 (Fla. 2d DCA 2019) ("[P]leadings function as a safeguard of due process by ensuring that the parties will have prior, meaningful notice of the claims, defenses, rights, and obligations that will be at issue when they come before a court.") (citing, *e.g.*, *Pro-Art Dental*).

Consistent with those principles, in *Mana v. Cho*, 147 So. 3d 1098, 1099-1100 (Fla. 3d DCA 2014), the Third District Court of Appeal determined that plaintiff was bound by the damages asserted in response to an interrogatory, which "limited the damages [that plaintiff Mana] was seeking" in his complaint. Mana's complaint alleged that two real estate brokers that Mana hired acquired certain properties for their own benefit rather than for Mana and, as a result, Mana sought damages for "the value of lost business opportunities." *Id*. at 1099. In his response to interrogatories, however, Mana stated that: "[Mana's] measure of damages is the difference between the fair market value of the subject properties at the time of the statutory breach and the fair market value of the properties at the time of trial. The amount shall be provided following completion of

appraisals." *Id*. The trial court later ordered Mana to produce personal financial information, which the opposing party argued was relevant to damages for lost business opportunities (as alleged in the complaint but later limited in the interrogatory response), and Mana petitioned for a writ of certiorari to quash the order. *Id.* at 1098-1100.

The Third District quashed the order, explaining:

> Discovery is limited to those matters relevant to the litigation **as framed by the parties' pleadings**. …
>
> ***The Respondents' argument may have been meritorious if Mana was seeking damages for the loss of the business income for the proposed project that did not come to fruition due to the Respondents' alleged actions; however, as set forth in Mana's interrogatory response, by which he is now bound, he is not***. Rather, Mana is seeking damages for "the difference between the fair market value of the subject properties at the time of the statutory breach and the fair market value of the properties at the time of trial. The amount shall be provided following completion of appraisals." Mana's personal financial information has no bearing on the property value of the four vacant parcels, and is therefore irrelevant to the litigation.

Id. at 1100 (citation omitted; first emphasis in the original; subsequent emphasis added). Here, too, Tenant is "bound" by its interrogatory responses, which clarified and limited the alleged damages that Tenant claimed it suffered as a result of the alleged breach of contract and

explained the formula that Tenant planned to use to calculate any of its claimed damages. R.000411, 000414; Appendix A.2 at pdf pp. 106, 109. Any other damage model, and information relevant to that model, were irrelevant to the litigation and to resolution of the Summary Judgment Motion and were not properly before the court for consideration.

Tenant argues that *Mana* is distinguishable because Tenant produced a spreadsheet identifying alleged issues with the premises and therefore "Landlord was aware that discovery showed that the premises was uninhabitable at times and that Tenant considered that lack of habitability as part of its damages." Initial Brief at 11. Tenant's argument misses the point. Landlord was obviously aware that Tenant alleged that Landlord failed to maintain the premises—that was the entire basis of the lawsuit.

The issue, however, is what damages Tenant claimed as a result of Landlord's alleged failure to maintain the premises, and the formula used to calculate those damages. The record shows that the only damages identified by Tenant was the difference in rental value between a Class "A" office building and the leased premises in its current condition. R.000411, 000414; Appendix A.2 at pdf pp. 106, 109. Tenant never put Landlord on

notice that it was seeking damages for each day it allegedly had to close its office.

Tenant now argues that the "determination of damages would involve a simple calculation of the number of days the premises was uninhabitable times a daily rental rate based on the lease." Initial Brief at 7.[5] That model, was never appropriately raised in the trial court. In its Summary Judgment Response, Tenant argued that if the premises become "uninhabitable" the "tenant is entitled to the fair market rental value of the premises"—not damages for loss of use. R.000539. Beyond that, Tenant's counsel stipulated during the Corporate Representative deposition that loss of use

[5] Tenant also claims that its corporate representative testified that inability to work in the leased premises was part of its damages. Initial Brief at 5 (citing R.000566). The corporate representative, however, never testified that Tenant was seeking damages for each day that it was allegedly unable to work in the leased premises, nor did the corporate representative testify that the damages could be calculated based on the number of days the premises were allegedly uninhabitable. Rather, the corporate representative reiterated Tenant's position that "the landlord owner of the building said it was a Class A space, it was not. . . . I don't know what the delta is between what your building was and a Class A space." R.000566 at 20:1-8.

damages was not identified as a category of damages being sought. R.000426; Appendix A.2 at pdf p. 121:25.[6]

Moreover, permitting Tenant to belatedly raise this new damage theory would have resulted in trial by ambush and would have severely prejudiced Landlord because Landlord never prepared a defense for this undisclosed theory. *See Dep't of Health & Rehab. Servs. v. J.B.*, 675 So. 2d 241, 243 (Fla. 4th DCA 1996) ("Civil trials are not to be ambushes for one side or the other.") (citing *Binger v. King Pest Control,* 401 So. 2d 1310 (Fla. 1981); *Grau v. Branham,* 626 So. 2d 1059 (Fla. 4th DCA 1993)).[7/8]

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[6] It is not surprising that Tenant never sought damages for loss of use until it was left with no other option to avoid summary judgment. The maximum monthly base rent owed under the Lease was $8,218.41. R.000141. At best, Tenant identified approximately 30 days where there were alleged issues with the premises. R.000535-536. Thus, under Tenant's new damage theory, the amount in dispute would have been less than $10,000.00. A claim for $10,000 likely could have been resolved with little or no litigation, which is further reason why the Court should not permit litigants to pursue an entire case under a substantial damage model only to later pivot after the close of discovery when they cannot prove that theory.

[7] There are numerous factual issues that would have been addressed during discovery if Tenant had disclosed the new damage theory, including whether Tenant actually had to vacate the property or merely chose to out of convenience. This discovery, however, was not pursued because the parties litigated the case based on Tenant's discovery responses, and it would be patently unfair to have forced Landlord to proceed to trial on a theory that was never disclosed during discovery.

(cont.)

Landlord had numerous dispositive legal defenses to Tenant's new "loss of use" damage theory, which would have been addressed during summary judgment had Tenant identified this damage model during discovery, including[9]:

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[8] The cases that Tenant relies on do not change the analysis. They are readily distinguishable factually and/or legally. *See* Initial Brief at 9, 12 (citing *Riverwood Condominium Ass'n, Inc. v. Litecrete, Inc.*, 69 So. 3d 983, 985-86 (Fla. 3d DCA 2011), which applied Florida's former summary judgment standard to determine issues arising from a setoff defense that was properly pled); *Perma Builders, Inc. v. JBM Associates, Inc.*, 472 So. 2d 1381, 1382-83 (Fla. 4th DCA 1985), where there was no issue concerning whether damages were properly claimed; that was an appeal of a final judgment after trial, in which this Court upheld the damage award because it determined the award was adequately supported by the trial court's findings and application of the governing law); *Medical Equipment Rental Co. v. Tarr*, 467 So. 2d 459, 459-60 (Fla. 4th DCA 1985) raised issues concerning the interpretation and application of an alleged liquidated damages contractual provision, under Florida's former summary judgment standard); *Adams v. Dreyfus Interstate Dev. Corp.*, 352 So. 2d 76, 77-78 (Fla. 4th DCA 1977), another case in which there was no issue concerning whether damages were properly claimed; rather, the Court was deciding whether there was a reasonable basis in the evidence to sustain a jury's verdict and concluded there was; holding that an appellate court cannot set aside a jury's award because the court might disagree with the amount or because it might have ruled differently on the same proof)).

[9] Prior to Tenant limiting its damage model in discovery, Landlord had asserted numerous defenses in its answer based on various provisions of the Lease. R.000167-171.

- Pursuant to Section 8.14 of Lease, Landlord is not in default of the Lease unless Landlord failed to cure an alleged default within 30 days after receiving written notice from Tenant. R.000120. Thus, the mere fact that Tenant allegedly had to close its office for a single day would not constitute a breach or entitle Tenant to any damages under the Lease;[10]
- Pursuant to Section 23.4 of the Lease, Tenant agreed that Landlord is not liable for damages arising out of any failure to furnish HVAC or other services and agreed that interruption or failure shall not entitle Tenant to abatement of rent. R.000129. Yet, Tenant asserts that it should have been entitled to pursue damages for vacating the premises as a result of issues with the air conditioning. Initial Brief at 5.

[10] This is why Landlord asked in Interrogatory No. 1 that Tenant identify (1) the dates of the alleged breaches; (2) the date Tenant provided notice to Landlord of the alleged issue; and (3) the person to whom notice was provided and the method. R.000411. Tenant avoided giving that detailed information by claiming there were not separate breaches. Tenant's new damage theory, that it should be compensated for each day it allegedly had to close, is inconsistent with that response because Tenant would be seeking damages for approximately 30 separate breaches.

- Pursuant to Section 4.5 of Lease, "Tenant's obligations to pay rent are covenants independent of the Landlord's obligations under this Lease." R.000106. Tenant's new damages theory would be contrary to this provision because Tenant is seeking to abate rent based on Landlord's alleged failures.

Tenant likely recognized these numerous dispositive defects, which may explain why it never raised the new damage theory until it had no other option to avoid summary judgment.

Tenant elected the damages it would pursue, and the formula it would use to calculate those damages, for Landlord's alleged failure to maintain the leased premises. The parties litigated the case based on that damage theory, and only after discovery closed, and after it became apparent that Tenant could not prove its chosen damage theory, did Tenant raise an alternative theory. Florida law does not condone such tactics, which subvert due process, unnecessarily prolong litigation, increase the expense of litigation, and would result in a classic trial by ambush.

CONCLUSION

The Court should affirm the trial court's judgment.

Dated: November 1, 2023

Shutts & Bowen LLP
Counsel for Appellee
1100 CityPlace Tower
525 Okeechobee Boulevard
West Palm Beach, FL 33401
(561) 835-8500 (ph)
(561) 650-83530 (fax)

/s/ Jonathan P. Hart
Jonathan P. Hart (FBN 55982)
jhart@shutts.com

CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2023, this answer brief was efiled through the Florida Courts E-Filing Portal, which will send an electronic copy of the filing to counsel listed below.

Bernard A. Lebedeker
REID BURMAN LEBEDEKER XENICK PEPIN
250 South Australian Ave., Suite 602
West Palm Beach, FL 33401
bal@reidburmanlaw.com
Attorneys for Appellant

/s/ Jonathan P. Hart

CERTIFICATE OF COMPLIANCE

I hereby certify that this answer brief complies with the font and word count requirements of Fla. R. App. P. 9.045(b) and 9.210(a)(2)(B). The brief was prepared in Arial, 14-point font and consists of 3,502 words.

/s/ Jonathan P. Hart