

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

Case No. 4D24-0930

L.T. Case No. CACE 21-004569

ELIEZER TABIB,

Appellant,

v.

DROR LEVY and SUZAN LEVY,

Appellees.

ANSWER BRIEF

On Appeal from a Judgment on the Pleadings

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INTRODUCTION

In this appeal from a judgment on the pleadings, appellant Eliezer Tabib sued Dror Levy, a manager of one of Tabib's companies, as well as Dror's wife Suzan Levy and their adult son Liel Levy. Tabib did so in his individual capacity and as an officer of Bha-Ku, an administratively dissolved Florida Corporation. Tabib's complaint stemmed from a property that he alleged was purchased by Dror with Bha-Ku funds—a property that Dror and Suzan used as their homestead residence.

The trial court granted Dror's and Suzan's motion to dismiss the original complaint without prejudice, denied Dror's and Suzan's motion to dismiss the first amended complaint, and granted the motion for judgment on the pleadings filed before the trial court entered its uniform trial date setting pretrial deadlines for a trial period to commence approximately eight months later. The court's order found Bha-Ku to be an indispensable party, found Liel to be an indispensable party, dismissed the first amended complaint without prejudice. Notably, Tabib did not respond to the motion for judgment on the pleadings and his counsel failed to appear at the hearing.

After the order was entered, Tabib moved for rehearing. He asked the

trial court to reconsider its ruling and to permit him to file a second amended complaint. That court declined the request.

On appeal, Tabib argues—for the first time—two issues: (1) the trial court erred by letting the Levys deny that Liel lived with them while arguing that he was an indispensable party; and (2) the trial court was required to hold an evidentiary hearing because his counsel’s failure to appear at the hearing was founded on excusable neglect. Not only are these arguments unpreserved for appellate review, they can be dispensed with on other grounds argued below.

Tabib also argues that rule 1.210 authorized him to bring the proceeding in Bha-Ku’s stead and the pleading requirements for a shareholder derivative action need not be complied with, as well as that he should have been permitted additional leave to amend his complaint. Tabib’s misreading of the rule and his disregard for the requirements for a shareholder derivative action require affirmance. Further, the trial court did not abuse its discretion in denying additional leave to amend where the proposed second amended complaint did not clear up the existing deficiencies and Tabib’s plan to serve Liel by substitute service of process was destined to fail.

Additionally, Tabib's own actions have mooted this appeal. He and Bha-Ku filed counterclaims to Dror's third-party complaint against Bha-Ku before Tabib filed his notice of appeal. And, as Tabib readily admits in his initial brief, (IB:10), Bha-Ku's third-party counterclaims in which he joined are virtually identical to Tabib's claims in the amended complaint. Tabib chose his remedy and this appeal should be dismissed.

Dror and Suzan therefore ask the Court to affirm the judgment on the pleadings in all respects. Alternatively, they request the Court to dismiss this appeal as moot.

STATEMENT OF THE CASE AND FACTS

I. BACKGROUND.

Eliezer Tabib was principal, founder, and sole shareholder of Bha-Ku, an alleged administratively dissolved Florida Corporation. (R:27-28). He was also the founder of Marco Destin, Inc. (R:27). Tabib and Dror Levy had a long-standing business relationship, wherein Dror worked for Marco Destin, Inc. and Tabib also relied on Dror to act regarding Bha-Ku in Tabib's absence. (R:28). Tabib, individually and as an officer of Bha-Ku, sued Dror Levy and Suzan Levy. He did so based on his own investigations of what he alleged to be Dror's "wrongful actions" pertaining to Tabib's

financial accounts and Levy's purchase of a home at 5120 SW 111 Terrance in Davie, Florida (the Property). (R:28). Tabib claimed that Dror purchased the Property with improperly and fraudulently obtained Bha-Ku funds without Tabib's consent. (R:28-29).

II. THE INITIAL COMPLAINT.

The initial four-count Complaint, filed on March 4, 2021, included: Count I for the imposition of a constructive trust on property owned by Dror and Suzan to be placed in Tabib's name; Count II for unjust enrichment against Dror and Suzan for funds allegedly transferred from a Bha-Ku account to Dror and Suzan with which they purchased the Property seeking a judgment for the transferred funds; Count III for conversion against Dror and Suzan seeking a judgment for the value of the funds converted; and Count IV for imposition of an equitable lien on the Property. (R:29-32).

Dror and Suzan moved to dismiss the original complaint. (R:45-60). Among the arguments for dismissal was that Tabib had failed to join an indispensable party, Bha-Ku, and that Bha-Ku was the entity with standing and not Tabib. Tabib responded to same, with a supplement. (R:79-94, 95-100). Dror and Susan replied. (R:101-06). The trial court heard the motion to dismiss on September 1, 2022, but no order on the motion issued until

January 21, 2023. (R:711, 793). Nevertheless, and in the interim between the time of the hearing on the motion to dismiss and the order granting it, Tabib filed an amended complaint. (R:609-624).

III. THE FIRST AMENDED COMPLAINT.

This second iteration of the complaint (First Amended Complaint), filed on September 23, 2022, purported to add Dror's and Suzan's adult son, Liel Levy, as a party defendant because he occupied the Property with his parents. (R:609). It also alleged that Bha-Ku was the real party in interest and Bha-Ku—after its reinstatement as a Florida Corporation—ratified Tabib as its agent and endorsed Tabib's actions in filing and prosecuting the instant lawsuit but failed to add Bha-Ku as a party-plaintiff. (R:609-10). And Tabib asserted that Liel was an indispensable party to the lawsuit. (R:615). The First Amended Complaint included five counts: Count I for the imposition of an equitable lien and foreclosure on the Property in favor of Bha-Ku and against all defendants; Count II for breach of fiduciary duty of loyalty seemingly against only Dror but seeking judgment in Bha-Ku's favor and against all defendants for "restitutional remedies" such as the imposition of a constructive trust or equitable lien on the Property, the forced sale of the Property, or the transfer of legal title for the Property;

Count III for breach of fiduciary duty of care seemingly against only Dror but seeking judgment against all defendants for the award of “restitutional remedies” similar to those in Count II; and Count IV for unjust enrichment seeking a judgment against all defendants for the same or similar “restitutional remedies”; and Count V for conversion seeking money damages against Dror only. (R:609-24). The First Amended Complaint was not verified and did not include any attachment attesting to Bha-Ku’s authorization of Tabib as its agent.

Although an eSummons was issued on the Amended Complaint for Liel, and Tabib’s motions to extend time to effectuate service were granted (R: 729-31; 769) (“If Liel Levy is not served within 180 days from the date of this Order, this case will be dismissed as to Liel Levy, unless Plaintiff files a motion seeking an additional extension to effectuate service on Liel Levy.”), Liel was never served and no additional extension of time was sought for service of process on Liel. See generally, Docket.

Dror and Susan moved to dismiss the First Amended Complaint. (R:641-60). They argued, among other things that:

- Tabib still lacked standing to bring the action on behalf of Bha-Ku because he failed to comply with section § 607.0742, Florida Statute’s,

requirements for derivative actions by a shareholder to include a verified complaint that alleges a demand from the board for the action desired in the complaint and alleges either that the demand was refused, rejected or ignored for more than 90-days, irreparable, material injury to the corporation will result by waiting for the 90-day period to expire, or reasons why the shareholder did not make an effort for the board to take action;

- Bha-Ku is an indispensable party; and

- Susan and Liel should be dismissed as parties because there are no ultimate facts alleged against them connecting them to the dispute.

(R:641-61).

In opposition to the motion to dismiss the First Amended Complaint, Tabib argued that Dror and Suzan mischaracterized the effect of the order dismissing the original complaint; the legal standard for a motion to dismiss supports denial of the motion; he sufficiently pled his standing; he did not bring a derivative action; and Suzan and Liel Levy are indispensable parties to the action. (R:779-89).

The trial court denied the motion to dismiss the First Amended Complaint without explication and required Dror and Suzan to file an answer. (R:846). Dror and Suzan filed their answer and affirmative

defenses as required. (R:858-67).

IV. AFFIRMATIVE DEFENSES AND MOTION FOR JUDGMENT ON THE PLEADINGS.

The affirmative defenses included lack of standing to sue, expiration of the statute of limitations, failure to comply with section 607.0742, and failure to include indispensable parties. Dror and Suzan also filed a crossclaim against Tabib and a third-party complaint against Bha-Ku and others. (R:1028-46). Although Tabib and Bha-Ku moved to dismiss the counterclaims and crossclaims, Tabib did not reply to Dror's and Suzan's affirmative defenses.

Dror and Suzan ultimately moved for judgment on the pleadings on February 13, 2024, as amended on March 18, 2024. (R:1147-53, 1195-203). The motion was not a last-minute filing before trial, as the trial period was set by court order on February 14, 2024 for the docket commencing October 7, 2024 with calendar call set for September 4, 2024. (R:1154). Dror and Suzan reasserted their argument under section 607.0742 for Tabib's failure to comply with the requirements for a derivative action, continued to argue that Bha-Ku was an indispensable party, and argued that Liel—who had yet to be served with the complaint at the time of the amended motion (almost 18 months after the First Amended Complaint

was filed) with no renewed request for an extension of time to do so—was an indispensable party. (R:1195-203). Tabib did not file a response to the motion for judgment on the pleadings.

After a zoom hearing at which Tabib’s counsel did not appear (R:1221, 1227), the trial court entered an order granting in part and denying in part Dror’s and Suzan’s motion for judgment on the pleadings. (R:1210-11). The order found Bha-Ku to be an indispensable party where “a corporation is an essential, indispensable party in a derivative action, and the failure to make the corporation a party is not a mere defect of parties but leaves the stockholders without a cause of action and the court without jurisdiction” (R:1210). It also found Liel to be an indispensable party. (R:1210). The trial court noted its February 28, 2023 order providing that if “Liel Levy [w]as not served within 180 days] from February 28, 2023, the “case will be dismissed as to Liel Levy”, unless a “motion seeking an additional extension to effectuate service on Liel” was filed. (R:1210-11). It also noted that Liel was not served. (R:1211). But even after the February 28, 2023 order was entered, Tabib “successfully argued in Plaintiff’s memorandum of law in opposition to Defendants’ Motion to Dismiss Amended Complaint filed on September 3, 2023, to Defendant’s Motion to

Dismiss, that Liel Levy was an indispensable party.” (R:1211); see also (R:787-88) (providing argument as to why “Suzan Levy and Liel Levy are Indispensable Parties”) and (R:846) (denying motion to dismiss the First Amended Complaint). The trial court then dismissed Tabib’s lawsuit on behalf of Bha-Ku without prejudice. (R:1211).

V. RECONSIDERATION.

Tabib moved for reconsideration of the order on the motion for judgment on the pleadings. (R:1216-19). He failed to state the rule under which the motion was brought. The reconsideration motion argued that counsel for plaintiff had “technical issues logging into the zoom hearing” but was “signed in in to the Court's Zoom Meeting Link ... and waited to be admitted for the majority of the hearing, but was never admitted.” (R:1216). This portion of the motion was supported by an affidavit by Tabib’s counsel acknowledging that the hearing was scheduled for 10:30 a.m. on March 25, 2024. Counsel attested to the fact that she was logged into the hearing by 10:38, acknowledged the fact that the hearing started at 10:35 a.m. and ended at 10:50 a.m., and appears to rely on the fact that from 10:38 to 10:54 a.m., her office sent three separate emails to counsel for Dror and Suzan (but not to the trial court’s judicial assistant) while the hearing was in

progress to request that Tabib's counsel be admitted. (R:1221-22). The emails on which Tabib's counsel relies for the affidavit show that Dror's and Suzan's counsel advised Tabib's counsel at 10:33 a.m. that "[w]e are in the hearing with [the judge]. Are you able to attend?" (R:1223-24). The hearing transcript attached to the motion indicates that the trial court waited for Tabib's counsel to appear until 10:35 and then proceeded with the hearing. (R:1228).

In further support of reconsideration, Tabib argued that rule 1.210(a) did not require Tabib to join Bha-Ku to the suit. (R:1217). Even if Bha-Ku must be added, Dror added Bha-Ku as a third-party defendant in their crossclaim. (R:1217). He also asserted that even though multiple attempts to serve Liel were made, he would have served Liel through the Hague Convention but was unable to locate an address for Liel, and Dror and Suzan responded to the First Amended Complaint that they were "without knowledge" and therefore denied whether Liel was living with them at the Property. No argument was made as to these facts. Nor did Tabib address the fact that he failed to seek an additional extension of time to serve Liel with the First Amended Complaint, such that by operation of the trial court's February 28, 2023 order, Liel was automatically dismissed from the case.

(R:1216-19).

Instead, Tabib sought leave to file a second amended complaint to incorporate all of the parties the trial court ruled were indispensable. (R:1218-19). That proposed amended complaint sought to add Bha-Ku as a party-plaintiff and continued to include Liel as a defendant despite the fact that he had been dismissed for Tabib's failure to timely serve Liel with the First Amended Complaint. (R:1237-52). It included an allegation (not in the statement of facts) that Liel (or an unknown tenant) was "deliberately evading service" and Tabib would "serve the Florida Secretary of State through an Alias Summons pursuant to F.S. § 48.181" to gain jurisdiction over Liel. (R:1239).

Dror and Suzan responded to the motion for reconsideration. (R:1260-67). They argued that Dror's third-party complaint did not make Bha-Ku a first-party plaintiff. (R:1262). They also argued that the court should decline to permit Tabib to re-add Liel where Tabib had over a year to serve Liel with the potential to extend that generous deadline for service but failed to do so. (R:1263). Finally, they argued that Tabib failed to show that amendment would not be futile, that the privilege to amend had not been abused, and that Dror and Suzan would not be prejudiced by the

amendment. (R:1262).

Dror and Susan then showed that amendment would be futile because service of Liel was improper under section 48.181, Florida Statutes, as such service only applies in instances where individuals or foreign business are sued in connection to business carried out by them in the state, and they have been deemed to conceal their location. (R:1264). There were no allegations of Liel being sued in connection with business carried out by him in the state of Florida. (R:1264). They also showed that Tabib abused the privilege to amend where he was only seeking to amend after a judgment on the pleadings was entered against him: a party should not be permitted to amend pleadings in reaction to a ruling on a motion versus prior to a hearing on that motion. (R:1264-65). Dror and Suzan also showed prejudice in the form of being able to prepare their case for the pending trial where an indispensable party is missing. (R:1265-66).

As an additional rationale for denying reconsideration, Dror and Suzan relied on the fact that Tabib had filed counterclaims to Dror's counterclaim/third-party complaint in this action. (R:1275). Those counterclaims asserted by Tabib and Bha-Ku were virtual carbon copies of the proposed amended complaint Tabib asked for the trial court to permit.

(R:1275; 1290-305). Because Tabib should not be permitted to maintain two identical actions, and because he chose his remedy through the filed counterclaims, the reconsideration motion should be denied. (R:1275-76).

The trial court denied the motion for reconsideration (R:1364), and this appeal followed. (R:1366-69).

SUMMARY OF THE ARGUMENT

Tabib's initial brief provides no basis for this Court to reverse the trial court's entry of judgment on the pleadings or the order denying the motion for rehearing below. Bha-Ku was an indispensable party in what can only be categorized as Tabib's shareholder derivative action and Dror's counterclaims against Bha-Ku did not provide Bha-Ku status as a party-plaintiff to the original action.

Tabib's arguments for reversal of entry of judgment finding Liel to be an indispensable party fare no better. Tabib's complaint against Liel was dismissed months before based on a failure to serve the First Amended Complaint on Liel or request an extension of time to do so. And Tabib repeatedly advocated for Liel's status as an indispensable party through the pleadings and motions. Tabib should not be able to argue to the contrary now. Moreover, Tabib's arguments for reversal of the judgment as

to Liel make no sense. Tabib has asserted that the judgment on the pleadings as to Liel must fail where the material allegations in the pleading of the moving party which have been denied are taken as false. But Tabib did not file a reply to deny any of Dror's and Suzan's affirmative defenses. Instead, Tabib misconstrues the case law and attempts to rely on the denial to Tabib's assertions that Liel is an indispensable party. That's just not how it works.

The case cannot continue without Liel as a party plaintiff. Tabib's argument that he could and should be able to serve Liel through substitute service of process through the Secretary of State fail based on the allegations in the proposed second amended complaint. The request for leave to amend was properly denied.

Tabib's request for rehearing was also properly denied. Tabib showed no abuse of the trial court's discretion in denying rehearing. While there was potentially a colorable entitlement on excusable neglect, the record facts did not bear out that entitlement. Tabib's counsel failed to respond to the motion and failed to timely attend the hearing on same. The record refutes that Tabib's counsel's attendance at the hearing was solely based on the excusable neglect of "technological problems" where the

record facts show she only attempted to log on once prompted by Dror's and Suzan's counsel via message at the hearing.

Finally, Tabib's and Bha-Ku's own pleadings below have mooted this appeal. Before Tabib filed his notice of appeal, both he and Bha-Ku filed response pleadings asserting crossclaims and third-party claims against Dror that are indistinguishable from their proposed second amended complaint.

For all these reasons, the judgment on the pleadings should be affirmed or the appeal should be dismissed as moot.

STANDARD OF REVIEW

"The standard of review applicable to a judgment on the pleadings is de novo." *Miller v. Finizio & Finizio, P.A.*, 226 So. 3d 979, 982 (Fla. 4th DCA 2017). "A denial of a motion for rehearing is reviewed under the abuse of discretion standard." *J.J.K. Int'l, Inc. v. Shivbaran*, 985 So. 2d 66, 68 (Fla. 4th DCA 2008). "The standard of review for an order denying leave to amend a complaint is abuse of discretion." *JBK Inv. of South Fla., Inc. v. Southern Title Grp., Inc.*, 251 So. 3d 173, 180 (Fla. 4th DCA 2018).

ARGUMENT

I. THE JUDGMENT ON THE PLEADINGS WAS PROPERLY GRANTED AND TABIB FAILED TO SHOW ANY LEGAL

ERROR ON THE PART OF THE TRIAL COURT.

The parties agree on the standard by which the trial court was under an obligation to rule on the motion for judgment on the pleadings. In *Urribari v. 52 SW 5th CT WHSE, LLC*, 266 So. 3d 1257 (Fla. 4th DCA 2019) this Court set out that standard: “A motion for judgment on the pleadings is governed by the same legal test as a motion to dismiss for failure to state a cause of action.” *Id.* at 1262. In order to grant the motions for judgment on the pleadings, the trial court was required to find that based exclusively on the pleadings, Dror and Suzan were entitled to judgment as a matter of law. *Urribari*, 266 So. 3d at 1262. Here, the trial court, on pleadings with no factual issues to be resolved, entered a judgment on the pleadings. It did so with no reliance on matters outside the pleadings, as it was required to do. *Id.* at 1262. It also “treat[ed] as true all of the ... complaint’s well-pleaded allegations, including those that incorporate attachments.” *Id.* at 1261.

“Florida Rule of Civil Procedure 1.140(h)(2) provides that the failure to join an indispensable party may be raised by motion for judgment on the pleadings or at trial on the merits.” *Moore v. Leisure Pool Serv.*, 412 So. 2d 392, 393 (Fla. 5th DCA 1982). Through this lens, Dror and Suzan will show

that the trial court properly entered judgment on the pleadings, as well as show that the judgment should be affirmed in all respects.

A. Bha-Ku was Never Made a Party-Plaintiff to the First Amended Complaint and its Participation was Required as an Indispensable Party; Therefore, the Trial Court's Judgment on the Pleadings Related to Bha-Ku Should be Affirmed.

Tabib argues that judgment on the pleadings should have been denied as to Bha-Ku, because Bha-Ku was not an indispensable party as this was not a derivative proceeding under chapter 607, Florida Statutes, and because Bha-Ku was already a party to the litigation through Dror's and Suzan's third-party claims against it as a third-party defendant. (IB:13, 15). Rather, Tabib argues, he was authorized by Bha-Ku to bring the litigation in his name. These arguments fail on the merits.

As Tabib alleged in the First Amended Complaint, Tabib brought the action "[a]s authorized by Fla. R. Civ. P. 1.210 and *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178 (Fla.3d DCA 1985) (holding that a nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest), while acknowledging that Bha-Ku was the real party in interest. (R:610). Rule 1.210, however, does not authorize an "agent" to prosecute an action in his own name without joining the party for whose benefit the action is brought. That 1.210 authorization is exclusively

limited to “a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute.” Fla. R. Civ. P. 1.210(a).

Although *Kumar*, discusses an “agent”, the facts of that case are wildly distinguishable. First, the appellate court found Kumar had standing to sue by virtue of an agreement with Nava as Nava’s agent. There was no agreement alleged in the First Amended Complaint that was in place at the time the original complaint was filed as there was in *Kumar*. Although Tabib alleges that Bha-Ku ratified and endorsed Tabib’s actions in prosecuting the claims on Bha-Ku’s behalf, there was no affidavit like the one in *Kumar* attesting to Tabib’s status as an agent.

The case at hand is clearly a derivative action. *Kaplus v. First Cont’l Corp.*, 711 So. 2d 108, 110 (Fla. 3d DCA 1998) (“In a derivative action, a stockholder seeks to sustain in his or her name, a right of action belonging to the corporation. Accordingly, the corporation is the real party in interest with the stockholder being only a nominal plaintiff.”). “[A] stockholder has no right to sue for damages to the corporation, unless the suit is a derivative action.” *Grandin Indus., Inc. v. Fla. Nat’l Bank*, 267 So. 2d 26, 31

(Fla. 4th DCA 1972). What Tabib should have done as the shareholder of Bha-Ku, as acknowledged by the trial court and as required by statute, was file a shareholder derivative action.

While Tabib alleged his shareholder status, he failed to comply with section 607.0742, Florida Statutes, which is the statute under rule 1.210 that gave him the right to pursue the action on behalf of Bha-Ku. That statute includes that a demand be made to obtain the action desired by the shareholder from the board of directors and, in this instance, “the reason or reasons the shareholder did not make the effort to obtain the desired action from the board of directors or comparable authority.” § 607.0742(1)(c), Fla. Stat. Here, the lawsuit was brought by Bha-Ku’s alleged shareholder—Tabib—for the benefit of and damages to the corporation. Tabib was therefore required to comply with the statute. He did not.

As the trial court noted, “a corporation is an essential, indispensable party in a derivative action, and the failure to make the corporation a party is not a mere defect of parties but leaves the stockholders without a cause of action and the court without jurisdiction.” *Francini v. Int’l Marble Trades*, 546 So. 2d 777, 779 (Fla. 3d DCA 1989). The absence of the corporate defendant as at least a nominal party serves to divest the court of

jurisdiction. *Daniels v. Vann*, 396 So. 2d 723, 723 (Fla. 4th DCA 1981) (reversing final judgment for stockholder plaintiff because the court was divested of jurisdiction due to the stockholder plaintiff's failure to include the corporation since was an indispensable party).

Tabib's reliance on Dror's third-party claim against Bha-Ku to argue that Bha-Ku was already a party to the case must fail. Florida law makes it "quite clear a third-party claim is a separate and distinct action from the claims brought in the main action." *Brady v. P3 Grp. (LLC)*, 98 So. 3d 1206, 1209 (Fla. 3d DCA 2012). Bha-Ku was therefore not a party to Tabib's First Amended Complaint.

The trial court's judgment should be affirmed on these bases.

B. Liel was also an Indispensable Party, Tabib's Arguments on Appeal are Either Unpersuasive or Unpreserved, and the Trial Court's Judgment on the Pleadings Related to Liel is Fully Supported Based on Tabib's Failure to Serve Liel with the First Amended Complaint and to Procure any Additional Extension when Permitted by the Court to do so.

For Tabib's argument that judgment on the pleadings should not have been granted in favor of Dror and Suzan because Liel was an indispensable party, Tabib relies on this Court's precedent in *Windle v. W.W. Windle Co., Inc.*, 731 So. 2d 36, 37 (Fla. 4th DCA 1999), *Urribari*, 266 So. 3d 1257, and other collected cases for the proposition that "the

material allegations of the moving party which have been denied are taken as false” and the trial court “must accept as true all well-pleaded allegations.” (IB:19-20). Dror and Suzan agree with that basic premise. But the trial court committed no error.

As a threshold matter, Tabib did not make this specific argument in the trial court below. (IB:1216-19). Issues are waived unless they are first presented to the trial court. *Fleischer v. Fleischer*, 586 So. 2d 1253, 1254 (Fla. 4th DCA 1991). Stated differently, “[t]o be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” *Mansueto v. State*, 148 So. 3d 813, 815 (Fla. 4th DCA 2014) (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

Even if the argument was preserved, it has no merit. Appellant attempts to use *Urribari* arguing that the court there “reversed a judgment on the pleadings where the moving party effectively denied an allegation by claiming to be ‘without knowledge’ in its answer, and holding ‘for purposes of the motion for judgment on the pleadings, the allegations should have been taken as false.’ ” (IB:20). That’s not what happened. In *Urribari*, there

were two lawsuits. In the second lawsuit, 52 SW was a commercial landlord that filed a complaint to evict its tenant, La Placita Grocery. *Urribari*, 266 So. 3d at 1260. La Placita answered the eviction complaint, responding to the allegation on 52 SW's ownership of property leased by La Placita by stating it was "without knowledge and [could] neither deny nor admit" this ownership allegation. *Id.* at 1263.

The court noted that Florida Rule of Civil Procedure 1.110(c) requires these allegations to "operate as a denial." *Id.* Therefore, because the non-moving party to the motion for judgment on the pleadings (La Placita, the defendant) denied the moving party's (52 SW, the plaintiff) allegation, this Court found that "for purposes of the motion for judgment on the pleadings, the complaint's allegations should have been taken as false." *Urribari*, 266 So. 3d at 1263. In other words, if a party brings a motion for judgment on the pleadings, any of the moving party's allegations denied by the non-moving party must be taken as false for purposes of ruling on the motion. *See id.*

Here, Tabib seems to be mixed up as to the impact of a moving party's denial to an allegation in a complaint. *Urribari* does not speak to that issue. The rule does not require or even suggest that the court "take as

false” the moving party’s denial of the non-moving party’s allegation. The rule requires the opposite: “In ruling on a motion for judgment on the pleadings material allegations of the moving party which have been denied are taken as false.” *Windle*, 731 So. 2d at 37. The line of cases on which Tabib relies therefore provides no support for his position where Dror and Suzan were the moving party and they denied one of Tabib’s allegations. What the trial court actually did is accept Tabib’s “well-pleaded allegation” on Liel as true and found that he was an indispensable party that Tabib had failed to serve/join.

Given Tabib's allegations in the First Amended Complaint that Liel was an indispensable party and Tabib’s repeated representations below that Liel was an indispensable party—even after he was dismissed from suit—Tabib should be judicially estopped from asserting a contradictory position. “One who assumes a particular position or theory in a case is judicially estopped in a later phase of that same case, or in another case, from asserting any other or inconsistent position toward the same parties and subject matter.” *In re Adoption of D.P.P.*, 158 So. 3d 633, 638-39 (Fla. 5th DCA 2014).

Taking Tabib’s allegations in the First Amended Complaint as true,

this case cannot continue without Liel, as a failure to include an indispensable party amounts to a failure to state a cause of action. *Cty. Of Miami v. Vill. Of Key Biscayne*, 199 So. 3d 300, 302 n.3 (Fla. 3d DCA 2016) (stating that a failure to join an indispensable party is akin to failing to state a cause of action). Tabib's contention that Liel is indispensable is an admission that no final decision can be rendered without Liel as party-defendant. *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 (Fla. 1984) ("Indispensable parties are necessary parties so essential to a suit that no final decision can be rendered without their joinder.").

Tabib was given ample opportunity to serve Liel through an extension, even more opportunity to extend that extension, and failed to make that service. The trial court properly granted judgment on the pleadings for Tabib's failure to join or serve Liel as an indispensable party.

II. TABIB FAILED TO SHOW AN ABUSE OF DISCRETION IN THE TRIAL COURT'S DETERMINATION TO DISPENSE WITH REHEARING OR TO REJECT THE PROPOSED SECOND AMENDED COMPLAINT.

While it is true that both Florida Rule of Civil Procedure 1.530 and 1.540 authorize a trial court to grant a party relief for excusable neglect via an evidentiary hearing, the request for relief must set forth a "colorable entitlement on excusable neglect" and not be refuted by the record. *Burke*

v. Soles, 326 So. 3d 83, 84 (Fla. 4th DCA 2021). In this case, Tabib failed to respond in opposition to the motion for judgment on the pleadings and his counsel failed to timely attend the hearing. This type of conduct should not be condoned or rewarded by the Court.

While there might be colorable entitlement here, the record refutes that Tabib's counsel's failure to attend the hearing was based solely on "technological problems" or that counsel's emails to the Dror's and Suzan's counsel was sufficient evidence of excusable neglect. Counsel provided no evidence of when she started her attempt to log into the hearing. (R:1221-22). Nor did she proactively reach out to the trial court or Dror's and Suzan's counsel to inform anyone of any technical difficulty. (R:1270). And the evidence shows that Dror's and Suzan's counsel emailed and had his assistant call to see if Tabib's counsel was attending the hearing with no response until 8 minutes into the hearing time allotted for 15 minutes, and that response stated that Tabib's counsel was "logging in right now" at 10:38 a.m. (R:1223-24, 1269). By that time, the trial court proceeded with the 10:30 a.m. hearing at 10:35 a.m. and the court and counsel were engaged in the hearing. (R:1228).

Additionally, Tabib never asked the trial court to hold an evidentiary

hearing on the motion for rehearing based on excusable neglect. Again, “[t]o be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” *Mansueto*, 148 So. 3d at 815 (quoting *Tillman*, 471 So. 2d at 35).

There is also an additional basis for why the denial of rehearing was proper. Tabib has conceded—more than once—that Liel is an indispensable party. Tabib’s proposed second amended complaint includes Liel and Bha-Ku as party-plaintiffs. Yet, despite over a year in which to serve Liel with further leave to ask for an extension to do so, Tabib failed to effect service and failed to seek an additional extension that he was guaranteed by order to be supplied. As the Appellees argued below, Liel’s absence was not a pleading deficiency but a conscious failure to serve him or a to seek that extension. (R:1261-62).

Moreover, in order for the trial court to have abused its discretion by not granting rehearing and permitting Tabib to amend his complaint, Tabib was required to show that the privilege to amend had not been abused, there was no prejudice to Dror and Suzan, and any amendment would not

be futile. *Fed. Home Loan Mortg. Corp. v. Beekman*, 174 So. 3d 472, 474 n.1 (Fla. 4th DCA 2015). That is because the “rule of liberality ‘gradually diminishes as the case progresses to trial’ and ‘[t]here comes a point in litigation where each party is entitled to some finality.’ ” *Id.*

Here, Tabib’s proposed second amended complaint is futile where it purports to serve Liel via the substituted service provision of section 48.181, Florida Statutes, on nonresidents and foreign business entities. “[I]n order to support substituted service of process on a defendant [through the Secretary of State], the complaint must allege the jurisdictional requirements prescribed by statute.” *Alhussain v. Sylvia*, 712 So. 2d 806, 806 (Fla. 4th DCA 1998); *see also Jupiter House, LLC v. Deutsche Bank Nat’l Tr. Co.*, 198 So. 3d 1122, 1123 (Fla. 4th DCA 2016) (“[T]he plaintiff failed to amend its complaint to allege the necessary allegations to support substitute service.” (citing *Alhussain*, 712 So. 2d 806)). “The burden of pleading facts that support, as a matter of law, the applicability of substituted service falls on the party seeking to invoke the provisions” of section 48.181.” *Mecca Multimedia, Inc. v. Kurzbard*, 954 So. 2d 1179, 1182 (Fla. 3d DCA 2007). And in order for a Florida resident defendant to qualify for substitute service of process under 48.181, Florida Statutes, a

plaintiff must allege that the defendant was concealing their whereabouts and that the cause of action arose from the defendant conducting business in Florida. See § 48.181(4), Fla. Stat.

Here, Tabib's proposed second amended complaint alleged that Liel was a resident of Florida. (R:1239-44). However, the factual allegations in that complaint contained no factual allegations regarding Liel concealing his whereabouts. (R:1239-44). The factual allegations also failed to show that Liel was doing business in Florida as required for a defendant to qualify for substitute service of process, especially considering Liel was only included as a party for allegedly being a tenant of the property at issue. (R:1239-44); see also *Dinsmore v. Martin Blumenthal Assocs., Inc.*, 314 So. 2d 561, 564 (Fla. 1975) ("The activities of the person sought to be served pursuant to Fla. Stat. 48.181(1) must be considered collectively and show a general course of business activity in the State for pecuniary benefit."); see also *Herff v. Weston Props., Ltd. Liab. Co.*, 335 So. 3d 133, 134 (Fla. 4th DCA 2022) (quashing substitute service of process because a defendant executing a lease agreement in Florida for a private residence did not constitute engaging in business activity in Florida as required by section 48.181).

Tabib's proposed second amended complaint failed to make the required allegations to show that Liel qualified for substitute service of process via section 48.181, Florida Statutes, and the proposed amendment would have been futile. The trial court did not abuse its discretion by not granting rehearing and permitting Tabib to amend his complaint.

III. TABIB AND BHA-KU MOOTED ANY NEED TO AMEND TABIB'S PLEADINGS BY FILING CLAIMS ADDITIONAL CLAIMS IN RESPONSE TO DROR'S COUNTERCLAIMS AND THIRD-PARTY COMPLAINT BELOW BEFORE TABIB FILED HIS NOTICE OF APPEAL.

On April 5, 2024, Tabib and Bha-Ku filed third-party counterclaims against Dror, Suzan, and Liel in the instant action. (R:1338-54). These pleadings were filed before Tabib filed his notice of appeal for the order granting judgment on the pleadings. (R:1366). Additionally, these pleadings mirror Tabib's and Bha-Ku's proposed second amended complaint. (R:1237-52).

Vanderberg v. Rios, 798 So. 2d 806 (Fla. 4th DCA 2001), is instructive in this case. While procedurally different, the results should be the same. In *Vanderberg*, this Court found that where a party could file a pleading as a matter of right—albeit there an amended complaint—the original complaint was rendered moot by filing the amended complaint. *Id.*

at 806-07. The Court should find the same result here. Here, Tabib filed a post judgment motion for leave to file a second amended complaint then also filed a third-party counterclaims against Dror, Suzan, and Liel, along with Bha-Ku, arguing that Dror's counterclaim was now the operative complaint.

The court has two options as cogently stated by the concurring opinion in *J.R.P.W v. State*, 332 So. 3d 574, 577 (Fla. 1st DCA 2022), Makar, J., concurring: "One is to the dismiss this appeal as premature" because of the pending Counter-claim by Tabib against Dror, Susan, and Liel, and the second is to dismiss the appeal as moot "where the underlying basis for the initial appeal has been mooted [and] it is not apparent that a subsequent appeal will materialize." *Id.*

Therefore, alternatively, this appeal should be dismissed.

CONCLUSION

The trial court's order granting judgment on the pleadings is fully supported and should be affirmed in total. To the extent that the Court finds that Tabib's and Bha-Ku's third-party counterclaims moot this appeal, the Court should dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 6, 2025, I electronically filed the foregoing document with the Clerk of the Court and served same on the service list below by using ePortal filing system:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirement of rule 9.045 and 9.210 in that it was prepared utilizing Arial 14-point font and contains under 13,000 words.

By: /s/ Elaine D. Walter