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

CASE NO: 4D2023-3031
L.T. CASE NO.: 502020CA000251

Boca View Condominium Association, Inc.

Petitioner

v.

Eleanor and Edward Lepselter

Respondents

An Original Action Arising From Circuit Court, 15th Judicial Circuit, Palm Beach County, Florida

REPLY ON PETITION FOR CERTIORARI

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ARGUMENT

I. THE TRIAL COURT LACKS JURISDICTION TO AUTHORIZE POST-JUDGMENT DISCOVERY THAT IS IRRELEVANT TO ENFORCING THE JUDGMENT

A. Certiorari Standard

The Association seeks a ruling on certiorari that the trial court lacks jurisdiction to allow the Lepselters to pursue post-judgment discovery. The Association is not simply arguing that the Lepselters' discovery requests are overbroad. As a result, the traditional certiorari discovery analysis does not apply here. *Cf. Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. 4th DCA 2015); *Int'l Bank of Miami v. Shinitzky*, 849 So. 2d 1199, 1190 (Fla. 4th DCA 2003). Rather, certiorari is the appropriate remedy to quash a trial court order issued in excess of its jurisdiction. *Geico Gen. Ins. Co. v. Rodriguez*, 151 So. 3d 554, 554 (Fla. 5th DCA 2014).

B. A Trial Court Has No Jurisdiction to Allow Post-Judgment Discovery on the Merits of a Claim or for Potential Future Claims

The discovery requests served by the Lepselters seek information relevant only to the enforcement of a money judgment. Such information may have been relevant when the discovery was originally served in March 2023: there was a money judgment pending for statutory damages, and the Lepselters expected that they would obtain a money judgment for their attorney's fees.

The Lepselters concede in their response that there is no longer a money judgment subject to execution. (Response 22). As a result, the Lepselters' arguments based on *Regions Bank v. MDG Frank Helmerich, LLC*, 118 So. 3d 968, 969 (Fla. 2d DCA 2013); *Albert v. Hartford Nat'l Bank & Trust*, 423 So. 2d 1027 (Fla. 4th DCA 1982) and *Wilde v. Wilde*, 237 So. 2d 203 (Fla. 4th DCA 1970) are irrelevant here because those cases all discuss the justifications for broad discovery in aid of execution on a money judgment.

So now the Lepselters have come up with a new argument that the discovery is relevant to enforcing the nonmonetary portion of the judgment. Again, the records inspection had not begun when these discovery requests were served in March 2023, so the discovery cannot have been served for this purpose. Even so, the discovery requests are irrelevant to whether the Association has provided the Lepselters with access to inspect the records as required by the judgment.

The Lepselters claim that *JPMorgan Chase Bank, N.A. v. Llovet*, 330 So. 3d 1006 (Fla. 3d DCA 2021) is irrelevant to the issues on this petition. (Response 20). However, *JPMorgan* is on point here because it discusses the caution that trial courts must exercise in allowing post-judgment discovery. The *JPMorgan* decision likewise recognizes that litigation must, at some point, come to an end. *Id.* at 1010. Thus, post-judgment discovery cannot be used to rehash the issues of the case or to seek information a party had hoped to obtain before trial.

The Lepselters do not respond to the Association's argument that the Lepselters are pursuing these discovery requests to seek information relevant to the merits of the underlying action or future potential actions, rather than enforcement of the judgment. The Lepselters do not attempt to distinguish *Omes v. Ultra Enterprises*, 116 So. 3d 633, 636 (Fla. 3d DCA 2013), *Rappaport v. Mercantile Bank*, 17 So. 3d 902, 907 (Fla. 2d DCA 2009), or *Berger v. Riverwind Parking*, 836 So. 2d 1073, 1075 (Fla. 5th DCA 2003). These cases all hold that discovery cannot be used to seek information in support of a potential future claim.

The Lepselters have repeatedly admitted that they are seeking to continue discovery in pursuit of future claims against the Association. Jonathan Yellin, the Lepselters' representative conducting the inspection, testified that the Lepselters seek to "expose what my clients believe is a criminal syndicate in fraud perpetrated by your clients for the sole purpose of enriching themselves and defrauding the owners." (Appendix 648–49). Mr. Yellin testified at length on the Lepselters allegations that the Association has not properly kept its records and has not properly managed its money. (Appendix 565–66). Mr. Yellin admitted that

the Lepselters are planning to bring a future claim based on their allegation that records are missing. (Appendix 581).

The Lepselters similarly make allegations unsupported by evidence that the Association "selectively removed records from the materials it produced." (Response 26). The Lepselters' attorney also admits that these discovery requests are intended as a vehicle to drag the individual board members into the proceeding, and "bring everybody in front of the Court for a contempt hearing . . . ." (Appendix 537).

The Lepselters seek this discovery not to enforce the trial court judgment, but to pursue future claims against the Association. As in *Omes v. Ultra Enterprises*, 116 So. 3d 633 (Fla. 3d DCA 2013), the Lepselters here seek far more than a simple inspection of the Association's records. However, the trial court lacks jurisdiction to allow them to "piggyback" irrelevant discovery under the guise of enforcing the judgment to seek information for a potential future claim. *See Rappaport v. Mercantile Bank*, 17 So. 3d 902, 907 (Fla. 2d DCA 2009). Therefore, the trial court lacks jurisdiction to allow the Lepselters to seek discovery intended to support future claims.

C. The Discovery is Beyond the Scope of a Statutory Records Request Action

The Lepselters claim in their response that the discovery is relevant because the records inspected so far do not contain copies of cancelled checks. The Lepselters claim that cancelled checks should be included in the Association's statutory official records under the category of "Accurate, itemized, and detailed records of all receipts and expenditures." Section 718.111(12)(a)(11)(a), *Florida Statutes*. The Lepselters cite no legal authority for their argument that a Florida condominium association is required to include cancelled checks as part of its official records. Because cancelled checks are not a part of the Association's official records, the Lepselters have no right to seek production of them. *See Shands Jacksonville Med Ctr. v. State Farm Mut. Auto. Ins.*, 213 So. 3d 372 (Fla. 1st DCA 2015). The Association has complied with the statute and the judgment by providing for inspection the Association's financial ledgers, balance sheets, monthly financial statements, bank statements, and year-end C.P.A. financial audits.

The Lepselters are also seeking production of the signature cards for the Association's bank accounts. (Appendix 120–29, Response 41). However, the statute does not include bank signature cards as documents required to be kept as official records. *See* Section 718.111(12)(a), *Florida Statutes*. The Lepselters have not attempted to argue in their response that bank signature cards are part of the Association's official records. Thus, there is no legal basis for allowing production of bank signature cards under the statute.

The Lepselters' response does not address *Omes v. Ultra Enterprises*, 116 So. 3d 633 (Fla. 3d DCA 2013). The Third District Court of Appeal in *Omes* held that even where a party has a right to inspect an organization's records, it cannot be compelled to disclose the "underlying raw financial data" used to create the records. *Id.* at 634, 634 n.4. An organization cannot be required to produce documents that it does not have at the time a records inspection request is made, nor can it be compelled to prepare the requested record from documents that it might obtain from others. *Id.* at 635. Therefore, the discovery requests cannot be justified as an attempt to reconstruct purportedly missing records.

II. THE TRIAL COURT'S ORDERS COMPELLING DISCLOSURE OF BANK RECORDS VIOLATE THIRD-PARTY PRIVACY RIGHTS

Even if the trial court had jurisdiction to compel the discovery sought by the Lepselters, the discovery orders would also constitute a departure from the essential requirements of the law, violating privacy rights that could not be remedied on a later appeal.

The Lepselters misinterpret *Winfield v. Division of Pari-Mutual Wagering*, 477 So. 2d 544 (Fla. 1985). The *Winfield* opinion recognized that Florida's constitutional right of privacy is a fundamental right. *Id.* at 548. Thus, any law intruding on this right is presumptively unconstitutional. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017). An individual has a legitimate expectation of privacy in financial institution records. *Winfield*, 477 So. 2d at 548. The party seeking to infringe on Florida's constitutional right of privacy has the burden to prove that the intrusion is justified by a compelling state interest carried out through the least intrusive means. *Gainesville Woman Care*, 210 So. 3d at 1245–46.

Applying these principles, the Florida Supreme Court in *Winfield* held that the State had a compelling interest in investigating the pari-mutuel industry, and that the state exercised the least intrusive means to achieve that interest. *Winfield*, 477 So. 2d at 548. No such showing has been made here that there is a compelling state interest that can justify allowing members of a condominium association to obtain the private financial records of every other member of the association by simply submitting a records inspection request.

Contrary to the Lepselters' argument in the response, nothing in the text of the *Winfield* opinion suggests that Florida's constitutional right to privacy extends only to one's own bank records. Rather, Florida's constitutional privacy protection is broadly intended to protect against collection, retention, and use of private data by the government and by businesses. *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 536 (Fla. 1987). As a result, the constitutional privacy right in financial information is not limited to only one's own bank records.

Here, the production of the unredacted bank records would reveal unredacted social security numbers and bank account numbers to the Lepselters' attorney. Such discovery was held to be a departure from the essential requirements of the law in *Wyndham Vacation Resorts, Inc. v. Ocean Walk Resort Condo. Ass'n*, 86 So. 3d 592, 593 (Fla. 5th DCA 2012). The Lepselters make no attempt to distinguish *Wyndham* in their response. Nor do the Lepselters discuss *Rousso v. Hannon*, 146 So. 3d 66, 71–72 (Fla. 3d DCA 2014), which held that inadequate measures to protect privacy rights in discovery materials should be quashed. Thus, contrary to the Lepselters' arguments, the trial court's order allowing the Lepselters' counsel to redact the bank records does not adequately balance the privacy rights of the non-parties. (*See* Response 40–43).

The Lepselters cite *Rosen v. McCobb*, 192 So. 3d 576 (Fla. 4th DCA 2016) for the proposition that trial courts have broad discretion in balancing the right to privacy with the right to discovery. However, *Rosen* involved a claim for punitive damages, which Florida law has long recognized as opening the door to financial worth discovery. *See id.* at 577; *see also Globe Newspaper Co. v. King*, 658 So. 2d 518, 519–20 (Fla. 1995). This Court in *Rosen* also granted certiorari to quash the parts of the discovery order that allowed financial discovery from the defendant's non-party husband. *Rosen*, 192 So. 3d at 578–79. As a result, *Rosen* does not apply to the questions at issue in this petition.

The Lepselters cite to *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015), for the proposition that a legitimate expectation of privacy must exist before the right to privacy attaches. Thus, this Court ruled in *Nucci* that there was no reasonable expectation of privacy for posts to Facebook, regardless of any privacy settings the user applies to the post. *Id.* at 153. However, such logic does not apply to financial records. As discussed above, Florida's appellate courts have repeatedly

recognized that financial records are protected by Florida's constitutional right to privacy.

The Lepselters also cite *Woodside Village Condo. Ass'n v. Jahren*, 806 So. 2d 452 (Fla. 2002), for the proposition that the nature of condominium living requires unit owners to "give up a certain degree of freedom." (Response 38–40). However, such restrictions on unit owner freedoms must be described in the Association's governing documents. Nothing in this Association's governing documents or Florida law suggests that a member's private financial information is subject to disclosure to other members in a records request.

The Lepselters cite *Network Communications v. Dep't of Revenue*, 334 So. 3d 707 (Fla. 1st DCA 2022) for the proposition that Florida's constitutional privacy protections do not extend to corporations. Even so, the Association is seeking to protect the privacy rights of the individuals who serve on its board, as well as the individuals who own units in the condominium. These rights are protected under Florida's constitution.

CONCLUSION

Petitioner, Boca View Condominium Association, Inc., seeks a writ of certiorari quashing the trial court's November 20, 2023, and December 7, 2023, discovery orders. These discovery orders exceed the trial court's jurisdiction by allowing post-judgment discovery, during the pendency of an appeal, of matters beyond the scope of enforcing the judgment. These discovery orders should also be quashed because they require the disclosure of private non-party social security numbers, driver's license information, signatures, and bank account numbers.

Respectfully submitted,

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I certify that a copy of this document has been served via the Florida E-Filing portal on January 2, 2024, to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font and word count requirements set forth in Florida Rules of Appellate Procedure 9.045 and 9.210. The brief is presented in Bookman Old Style, 14-point font.

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