IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR MIAMI-DADE COUNTY
CIVIL DIVISION

ALEX BISTRICER, as limited partner of GULF ISLAND RESORT, L.P., et al.,

Plaintiffs/Counterclaim Defendants,

vs.

COASTAL REAL ESTATE ASSOCIATES, INC., etc., et al.,

Defendants/Counterclaim Plaintiffs.

CASE NO.: 08-79169 CA (09)

RECEIVER'S MOTION FOR SUMMARY JUDGMENT IN FAVOR OF OCEANSIDE AND DBKN WITH SUPPORTING MEMORANDUM OF LAW

MICHAEL GOLDBERG ("Receiver"), as State Court Appointed Receiver for OCEANSIDE ACQUISITIONS, LLC ("Oceanside") and DBKN GULF INCORPORATED ("DBKN") (collectively referred to as "Defendants"), pursuant to Fla. R. Civ. P. Rule 1.510, moves for summary judgment in favor of Defendants as to Counts III and IV of Plaintiffs' Third Revised Amended Complaint ("Complaint") as the undisputed facts do not support the claims asserted in either count as a matter of law. The grounds for this motion and the substantial matters of law to be argued are set forth in the following memorandum of law.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs claim that Defendants committed civil theft when Oceanside and DBKN purchased property at the Gulf Island Resort in Hudson, Florida from Gulf of Mexico Enterprises, Inc. ("GME") in February of 2003. Plaintiffs

additionally claim that Defendants conspired with GME's president and each other to commit civil theft. Under Florida law, Plaintiffs must prove every element of these claims by clear and convincing evidence. Based on the undisputed facts, including findings of fact already determined by the Court, Plaintiffs cannot present sufficient evidence to meet their burden as a matter of law.

Summary Judgment Standard

In Florida, "summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach*, 760 So.2d 126 (Fla. 2000), see also Fla. R. Civ. P. 1.510(c). A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. *See Johnson v. Gulf Life Ins. Co.*, 429 So. 2d 744 (Fla. 3d DCA 1983) Once the movant tenders competent evidence to support the motion for summary judgment, the opposing party must come forth with counter-evidence sufficient to reveal a genuine issue. *Id.* It is not enough for the opposing party merely to assert that a genuine issue of material fact does exist.

Plaintiffs may argue that there are facts in dispute, but that does not preclude summary judgment unless the disputed facts bear upon material issues. In the end, Plaintiffs cannot present counter-evidence sufficient to create a genuine issue of material fact as to their claims for conspiracy and civil theft. Through previous motions and hearings, the Court has made several factual determinations bearing on these issues. Plaintiffs cannot avoid

what has already been established and adjudicated. The undisputable facts in the record preclude Plaintiffs from meeting their burden of proof as a matter of law.

Background Facts

In February of 2003, DBKN purchased a vacant parcel of land located at the Gulf Island Resort in Hudson, Florida ("Vacant Land"). At the same time, Oceanside purchased several condominium units located at Gulf Island Resort ("Condominium Units"). Oceanside and DBKN purchased the Vacant Land and Condominium Units (collectively the "Subject Property") from the record title owner, GME.

According to the Official Records of Pasco County, Florida, GME was conveyed record title to the Vacant Land in December of 1999 via a quit claim deed ("1999 Deed") from Plaintiff, Gulf Island Resort L.P. ("GIRLP"). The 1999 Deed is recorded at Official Records Book 4279, Page 1103, in the public records of Pasco County, Florida.

In November of 2001, the Condominium Units were conveyed to GME via a warranty deed ("2001 Deed") from GIRLP. The 2001 Deed is recorded at Official Records Book 4774, Page 1842, in the public records of Pasco County, Florida. The 2001 Deed further supplemented and confirmed the 1999 Deed by conveying any remaining interest owned by GIRLP in the Vacant Land to GME.

Plaintiffs claim that the respective conveyances from GIRLP to GME were unauthorized. It has been established, however, that Plaintiffs were aware of

the 1999 conveyance nearly three years before any transaction involving Defendants occurred, and they have conceded that their own agent and officer, Candy Smith, was responsible for recording the 1999 Deed in the official records. They also had actual knowledge of the November 2001 conveyance as early as the next month. Yet, Plaintiffs failed to file claims against GME for "theft", nor did they file any legal action for the purpose of recovering title to the Subject Property.

Only after the Subject Property lay titled to GME for more than three years, and only after GME had sold the Subject Property to Oceanside and DBKN, did Plaintiffs file any legal claim relating to the Subject Property. Even then, their action was limited to challenging Defendants' title. Plaintiffs did not assert any claim of civil theft until April of 2005, more than two years after they first filed their action.

Plaintiffs' title challenge was unsuccessful. In prior proceedings in this action, the Court sanctioned Plaintiffs for gross misconduct, adjudicated the parties' ownership interests and determined as a matter of law that DBKN holds title to the Vacant Land and Oceanside holds title to the Condominium Units. (See Partial Final Judgment attached hereto as Exhibit A.)

Having failed in their effort to establish title, Plaintiffs elected to pursue their ill-defined claim of civil conspiracy. Based on that claim, they sought leave of court to add a demand for punitive damages. Plaintiffs proffered evidence pursuant to Section 768.72, Florida Statutes, and clarified that the tort underlying the conspiracy claim was civil theft. The Court heard Plaintiffs'

motion, reviewed the evidence, and concluded that there was insufficient evidence to satisfy the clear and convincing standard necessary to warrant punitive damages. Plaintiffs' motion to amend to add punitive damages was denied. (See Order Denying Motion to Amend Complaint to Add Punitive Damages ("Order Denying Punitive Damages") attached hereto as Exhibit B.)

Having failed to establish a basis for recovery of punitive damages, Plaintiffs amended their Complaint to add the new civil theft claim and to seek treble damages. Due to the undisputed and indisputable facts, and the Court's prior rulings, Defendants are entitled to summary judgment on the remaining claims as a matter of law.

Civil Conspiracy

In Count III, Plaintiffs allege that Defendants are liable for civil conspiracy. Specifically, they state:

> 47. This is an action for civil conspiracy by the Defendants to wrongfully deprive GIRLP of *possession, ownership, and use* of the Subject Property as well as the proceeds from the unlawful disposition thereof.
>
> 48. Upon information and belief, *Defendants agreed with each other and Markovitz* to aid Markovitz in disposing of the Subject Property and depriving GIRLP of the proceeds from the unlawful disposition thereof.
>
> 49. Upon information and belief, in furtherance of the conspiracy, Defendants proceeded with the aforementioned transactions involving the Subject Property despite having *notice and knowledge that Markovitz was not authorized to convey the Subject Property* and despite having notice and knowledge that Markovitz intended to retain the proceeds of the aforementioned transaction for his own use.

> 50. Upon information and belief, in furtherance of the conspiracy, Defendants refused to cease their participation in transactions involving Markovitz' unlawful disposition of the Subject Property despite GIRLP demands that it do so.

Complaint (emphasis added).

Civil conspiracy is "an agreement, confederation, or combination of two or more persons to do an unlawful act or do or accomplish a lawful act or legal end by unlawful means, to do something wrongful either as a means or an end, or to effect an illegal purpose either by legal or illegal means or to effect a legal purpose by illegal means." *Kilgore Ace Hardware, Inc. v. Newsome*, 352 So.2d 918, (Fla. 2d DCA 1977).

Plaintiffs claim that Defendants conspired with GME's president, Eisi Markovitz ("Markovitz"), and with each other. The Court has previously considered evidence regarding this claim. As part of the May 2, 2007 Order Denying Motion to Amend Complaint to Add Punitive Damages, the Court determined that:

> The only relationship [Defendants] had with [GME] and Markovitz appears to have been arms-length in the negotiations for and the purchase of the property. There does not appear to be any evidence that they even discussed with Markovitz the claims of the Plaintiffs that [GME] could not provide clear title to the property.

Otherwise, the record remains devoid of evidence supporting a conspiracy with Markovitz. Summary judgment is appropriate to the extent Plaintiffs claim Defendants conspired with Markovitz.

Defendants are additionally entitled to summary judgment on the conspiracy claim insofar as Plaintiffs claim Defendants conspired with each

other. It is undisputed that Oceanside, a Florida limited liability company, paid valuable consideration to GME for the purchase of the Condominium Units. And it is undisputed that DBKN, a Florida corporation, paid valuable consideration to GME for the purchase of the Vacant Land. The Court has confirmed that the transactions were "arms-length" between buyers and sellers. "Since a corporation is a legal entity which can only act through its agents, officers and employees, a corporation cannot conspire with its own agents unless the agent had a personal stake in the activities that are separate and distinct from the corporation's interest." *Cedar Hills Properties Corp. v. Eastern Federal Corp.*, 575 So.2d 673 (Fla. 1st DCA 1999). With whom do Plaintiffs contend DBKN conspired? Or Oceanside? Besides GME, all other Defendants are either agents, officers or employees of these respective entities. There is no evidence to show that these agents had any interest in the purchase of the Subject Property separate or distinct from that of DBKN or Oceanside. As a matter of law, Defendants could not conspire with themselves.

"The gist of a civil action for conspiracy is not the conspiracy itself but the civil wrong which is alleged to have been done pursuant to the conspiracy." *Loeb v. Geronemus*, 66 So.2d 241, 243 (Fla. 1953). *See also Napper v. Krentzman*, 102 So.2d 633, 636 (Fla. 2d DCA 1958). During a hearing on May 30, 2007 upon Plaintiffs' Amended Motion for Leave to Amend, Plaintiffs confirmed that the alleged unlawful act Defendants conspired to commit was

civil theft.[1] As discussed below, indisputable facts preclude proof of the required elements of that tort.

Civil Theft

Claims of civil theft are governed by Sections 772.11 and 812.014, Florida Statutes. Section 772.11 defines what must be proven to establish civil theft, and it refers to Section 812.014 which defines the crime of theft. Remedies for civil theft are punitive in nature, allowing the assessment of treble damages. Based upon the severe consequences and harsh stigma of the charge of civil theft, it demands a heightened standard of proof. Civil theft is not merely an alternative claim to conversion. It requires evidence of felonious or criminal intent to steal. *See Daniels v. State,* 587 So.2d 460, (Fla. 1991). While the burden of proof does not rise to the criminal standard of "beyond a reasonable doubt," it requires a claimant to do far more than meet a mere "preponderance of the evidence." Plaintiffs must prove each element of civil theft by "clear and convincing evidence." *See* § 772.11, Fla. Stat. Plaintiffs must meet this heightened standard as to each element and must demonstrate Defendants' acts were tantamount to criminal conduct.

Section 812.014 defines the crime of theft as follows:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
>
> a) Deprive the other person of a right to the property or a benefit from the property.

[1] See Order on Plaintiffs' Amended Motion for Leave to Amend dated June 26, 2007.

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b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

First, Plaintiffs are unable to present evidence that GIRLP *owned* the Subject Property when Defendants purchased it; it has been indisputably established that GIRLP was not record title owner at that time. Second, Plaintiffs are unable to present evidence that Defendants *knew* that GIRLP had any valid claim of ownership; GIRLP had indisputably and repeatedly avoided legal process to resolve any title issues. And lastly, there is no evidence to support *criminal intent.* The Court has previously made determinations of these matters.

Sanctions Order

Prior to and during trial on title issues, Plaintiffs repeatedly tried to conceal evidence of their knowledge of, and involvement in, the conveyances of record title from GIRLP to GME. When their knowledge and involvement were discovered, the Court took strong action to sanction Plaintiffs. On August 30, 2006, the Court entered an Order Granting Defendants' Motion for Contempt and for Sanctions ("Sanctions Order"), a copy of which is attached hereto as Exhibit C. Plaintiffs are bound by the consequences of their egregious misconduct.

The Court determined the following facts:

Paragraph 26 : "Among the materials produced for the first time on June 29, 2006 were documents establishing ***facts directly inconsistent*** with those testified to at trial and in deposition by Plaintiff Bistricer, [Candy] Smith, and Plaintiff GIRL's corporate

representative, Robert Fireworker, ***concerning issues material to the case.***" (Emphasis added.)

Paragraph 31 : "[Candy] Smith, who according to Plaintiffs was an officer of GIRL and was GIRL's records custodian, testified at a deposition taken on November 17, 2003, that she 'didn't have anything to do with preparing it [the 1999 Deed], or recording it.' A copy of a check signed by Smith, made out to the Pasco County Clerk of Court, and used to record the 1999 Deed in the public records, was located in the newly produced documents. ***Counsel for the Plaintiffs and Smith even conceded that Smith wrote the check to record the 1999 Deed at the evidentiary hearing on August 8, 2006.***" (Emphasis added.)

Paragraph 32 : "Although Plaintiffs argue that GIRL representatives Bistricer, Smith and Fireworker were merely *'mistaken'* concerning their knowledge and involvement with the 1999 Deed, ***the Court finds that this is not a reasonable explanation for the false testimony given by all three representatives of Plaintiff GIRL on this important issue.***" (Emphasis added.)

The issue of ownership is critical to Plaintiffs' claim of civil theft. It is essential that the victim of a theft have a legally cognizable ownership interest in the property stolen. *Balcor Property Management, Inc. v. Ahronovitz*, 634 So. 2d 277, (Fla. 4th DCA 1994). And this element must be proven by clear and convincing evidence. *See Anthony Distributors, Inc. v. Miller Brewing Company*, 941 F. Supp. 1567 (M.D. Fla. 1996). Although Bistricer, Smith, and Fireworker have all given sworn testimony regarding preparation, recording, and knowledge of the 1999 Deed, this Court has determined that their sworn testimony was not credible. "Clear and convincing evidence requires that the evidence must be found to be credible." *Westinghouse Electric Corp., Inc. v. Bay County Energy Systems, Inc.*, 590 So. 2d 986, (Fla. 1st DCA 1991).

At the hearing in August of 2006, Plaintiffs tried to excuse the false testimony by claiming their witnesses were merely mistaken. Clear and convincing standards demand testimony to be "distinctly remembered." *See Westinghouse at 988.* Their testimony must be precise and explicit, and the witnesses must be lacking in confusion as to the facts at issue. *See Id.* Their "mistakes" on these critical issues is at least indisputable evidence sufficient to preclude Plaintiff from capably meeting its burden of proof.

However, the Court concluded that the false testimony was not a mistake and found that the excuses offered by Plaintiffs were not reasonable. The Court determined that Plaintiffs' witnesses intentionally gave false testimony. The law demands that Plaintiffs present "evidence of such a weight that it produces in the minds of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Id.* Intentionally false testimony cannot be relied upon to satisfy Plaintiffs' heightened burden.

Order Denying Punitive Damages

When Plaintiffs attempted to add a claim for punitive damages as part of their conspiracy claim, they were required to proffer clear and convincing evidence that Defendants were liable for intentional misconduct or gross negligence. As part of their motion to add punitive damages, Plaintiffs proffered evidence which they contended demonstrated such behavior by Defendants. On May 2, 2007, the Court entered the Order Denying Punitive Damages (Exhibit

B). After reviewing all of the evidence proffered by Plaintiffs, the Court found Plaintiffs' evidence insufficient. Specifically, the Court ruled:

> Pursuant to section 768.72, Florida Statutes, to be entitled to this amendment, the plaintiffs must establish by *"clear and convincing evidence"* that defendants were "personally guilty of intentional misconduct or gross negligence." ***The plaintiffs fail this test.*** (Emphasis added.)

Now, Plaintiffs have the burden of presenting evidence of a felonious intent to steal by the same clear and convincing standard. *See Westinghouse.* Plaintiffs cannot meet that burden. The Court has already determined as a matter of law that there is insufficient evidence to satisfy the heightened standard. The absence of the essential element of criminal intent is also fatal to Plaintiffs' claim of civil theft.

Conclusion

Based on the present record, it can be determined as a matter of law that Plaintiffs cannot meet the strict burden of proof required to impose liability on Defendants under theories of conspiracy or civil theft. The record shows that these claims are inventions of a creative pleader not founded on competent evidence. Because it is impossible for Plaintiffs to carry their burden, there is no basis to permit Plaintiffs to continue to pursue these flawed claims. Defendants are entitled to summary judgment as to Counts III and IV of the Complaint.

WHEREFORE the Receiver and Defendants respectfully request that the Court grant this motion and enter judgment in favor of Defendants as to

Counts III and IV of Plaintiffs' Complaint and grant any further relief the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by facsimile and U.S. mail to Maurice J. Baumgarten, Esq., Anania, Bandklayder, Blackwell, Baumgarten, Torricella & Stein, 100 Southeast Second Street, Bank of America Tower, Suite 4300, Miami, Florida 33131; and Deborah Poore FitzGerald, Esq., Walton, Lantaff, Schroeder & Carson, LLP, 110 East Broward Boulevard, Corporate Center, Suite 2000, Ft. Lauderdale, Florida 33301-3503 this 21st day of August, 2009.

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Attorney

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RECORDING; SEE BODY FOR SPECIFIC PARTIES

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION B

CASE NO: 51-2003-CA -942ES

JUDGE: WAYNE L. COBB

ALEX BISTRICER, as limited Partner of GULF ISLAND RESORT L.P., et al.,

Plaintiffs/Counterclaim Defendants,

vs.

COASTAL REAL ESTATE ASSOCIATES, INC., etc., et al.,

Defendants/Counterclaim Plaintiffs.

/

COASTAL REAL ESTATE ASSOCIATES, INC., etc., et al.,

Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs,

vs.

CANDY SMITH, etc., et al.,

Third-Party Defendants.

/

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CLERK OF CIRCUIT AND COUNTY COURTS

PARTIAL FINAL JUDGEMENT ON ACTION TO QUIET TITLE

This action was tried before the Court. Matters arose during trial, which resulted in an Evidentiary Hearing on August 8, 2006, upon a Motion for Contempt and Sanctions. This Court granted Defendants' Motion for Contempt and Sanctions in an Order dated August 30, 2006. Therefore, pursuant to Defendants, (Oceanside

EXHIBIT
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Acquisitions, LLC) and (DBKN Gulf Incorporated's,) Motion for Entry of Final Judgment as to Quiet Title and Slander of Title Actions, it is

ADJUDGED that:

1. Good and marketable title to Units 104-A, 105-A, 111-A, 202-A, 210-A, 301-A, 302-A, 308-A, 311-A, 401-A, 406-A, 408-A, 510-A, 601-A, 704-A, 706-A, 803-A, and 804-A, of GULD ISLAND BEACH AND TENNIS CLUB I, A CONDOMINIUM, according to the Declaration of Condominium thereof filed for record in Official Records Book 1381, at Page 992, of the Public Records of Pasco County, Florida, together with all dock spaces, parking spaces and other limited common elements appurtenant thereto, and Condominium Unit 201-W of GULD ISLAND BEACH AND TENNIS CLUB II, A CONDOMINIUM, according to the Declaration of Condominium thereof filed for record in Official Records Book 3300, at Page 208, of the Public Records of Pasco County, Florida, is quieted in favor of Oceanside Acquisitions, LLC, which shall be entitled to immediate possession thereon.

2. Good and marketable title to the property known as, SECTION 32, TOWNSHIP 24 SOUTH, RANGE 16 EAST, Pasco County, Florida, being more particularly described as follows:

> Commence at the Northeast corner of the Northeast one-quarter (1/4) of Section 33, Township 24 South, Range 16 East; thence 89° 36' 30" West a distance of 3170.03 feet to the POINT OF BEGINNING; thence run due South a distance of 883.80 feet; thence run South 83° 03' 23" West a distance of 33.41 feet; thence run South 08° 30' 58" East a distance of 319.09 feet; thence run South 03° 00' 00" West a distance of 5.63 feet; thence run North 87° 00' 00" West a distance of 91.87 feet; thence run South 03° 00' 00" a distance of 134.74 feet; thence run South 89° 29' 25" West a distance of 175.92 feet; thence run due North a distance of 1341.45 feet; and thence run North 89° 36' 30" East a distance of 287.99 feet to the POINT OF BEGINNING.

Is quieted in favor of DBKN Gulf Incorporated and said Defendant shall be entitled to immediate possession of the subject property and entry thereon.

3. This Court retains jurisdiction over this action to award attorney's fees and costs pursuant to Defendant's pending Motion for Attorney's Fees and Costs.

DONE AND ORDERED in Chambers, at Pasco County, Florida, this 9 day of May, 2007.

CIRCUIT JUDGE

Copies furnished to:

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D ALEX BISTRICER, derivatively as limited partner of GULF ISLAND RESORT, L.P.; and derivatively as shareholder of GULF ISLAND RESORT, INC.

PARTIES TO FJ PER ATTY. JAMES GASSENHEIMER. 6-27-07 KRA

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

Case No. 51-2003-CA-942-ES
Division B

ALEX BISTRICER, as limited partner of GULF ISLAND RESORT, L.P., and GULF ISLAND RESORT, L.P.,

Plaintiffs,

vs.

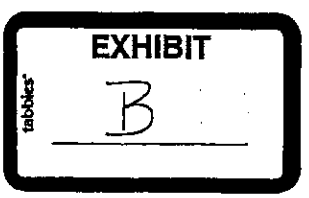
COASTAL REAL ESTATE ASSOCIATES, INC., a Florida corporation; BERMAN MORTGAGE CORPORATION; DANA BERMAN; OCEANSIDE ACQUISITIONS, LLC, a Florida limited liability company; DBKN GULF INCORPORATED, a Florida corporation; and STEVEN CARLYLE CRONIG,

Defendants.

ORDER DENYING MOTION TO AMEND COMPLAINT TO ADD PUNITIVE DAMAGES

In count III of the Second Amended Complaint, plaintiffs charge defendants with civil conspiracy to wrongfully deprive plaintiff GIR-LP of the subject property. Plaintiffs now plead to amend their complaint to demand punitive damages for that civil conspiracy. Pursuant to section 768.72, Florida Statutes, to be entitled to this amendment, the plaintiffs must establish by "clear and convincing evidence" that defendants were "personally guilty of intentional misconduct or gross negligence." The plaintiffs fail this test.

The evidence does not indicate that the defendants had any relationship with plaintiffs when they purchased this property from Mexico. The only relationship they had with Mexico and Markovitz appears to have been arms-length in the negotiations for and the purchase of the



property. There does not appear to be any evidence that they even discussed with Markovitz the claims of the plaintiffs that Mexico could not provide clear title to the property. There is evidence that defendants were aware of possible impediments to title but buyers of real estate can accept title encumbered or deficient if they wish. They can take a chance and they are free to discuss the impediments and their negative value among themselves. They can buy a lame horse if they want to with the hope of the horse recovering from the lameness or in the hope that the market for lame horses may rise.

The plaintiffs argue that even if the defendants conspired only among themselves to buy this property under the prevailing circumstances from Mexico that they are subject to punitive damages. But the plaintiffs point to no special duty or obligation of care owed by defendants to the plaintiffs. The fact that the plaintiff Bistricer informed in some way the plaintiffs that he believed there was some encumbrance in the title of GME does not create some duty running from the defendants to the plaintiffs. It is true that a prudent buyer would have further investigated Mexico's title but that prudence springs from protecting themselves, not from any duty to plaintiffs.

The plaintiffs argue, but have not pled, that the conspiracy they will prove is theft. And it appears that conspiracy to commit theft "in the acquisition of any title to, or any right, interest, or equity in, real property . . ." (section 772.103(1), Fla. Stat.) may constitute a statutory cause of action pursuant to Chapter 772, Florida Statutes. However, sections 772.104 and 772.11 make it clear that punitive damages are not recoverable in any event.

Therefore, the court finds that plaintiffs have demonstrated no common law duty owned by defendants to plaintiffs and that punitive damages are prohibited by the Civil Remedies for Criminal Practices Act. (Chap. 732, Fla. Stat.). It is, hereby,

ORDERED that plaintiffs' motion to amend the pleadings to demand punitive damages is denied.

DONE and ORDERED in Chambers, Dade City, Pasco County, Florida, this _____ day of May, 2007.

Wayne L. Cobb, Circuit Judge

Copies to:

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Scott A. McLaren, Esquire
P. Hutchison Brock, II, Esquire
Robert W. Lang, Esquire
Deborah Poore Fitzgerald, Esquire
Peter F. Valori, Esquire

SIGNED AND DATED
MAY - 2 2007
WAYNE L. COBB
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
CIVIL DIVISION

ALEX BISTRICER, as limited partner of GULF ISLAND RESORT, L.P., et al.,

Plaintiffs/Counterclaim Defendants,

vs.

CASE NO 51-2003-CA-942ES

COASTAL REAL ESTATE ASSOCIATES, INC., etc., et al.,

Defendants/Counterclaim Plaintiffs.

COASTAL REAL ESTATE ASSOCIATES, INC., etc., et al.,

Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs,

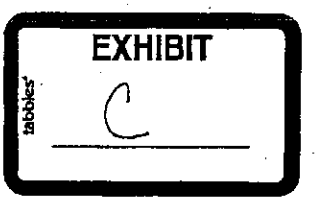
vs.

CANDY SMITH, etc., et al.,

Third-Party Defendants.

ORDER GRANTING
DEFENDANTS' MOTION FOR CONTEMPT AND SANCTIONS

This matter came before the Court for evidentiary hearing on August 8, 2006, upon Defendants' Motion for Contempt and Sanctions dated July 14, 2006. The Court has considered the motion, the record in this case, the evidence presented at the hearing, the arguments of counsel, and has been otherwise fully advised. The Court makes the following findings of fact and conclusions of law:



I. FINDINGS OF FACT

A. This is a case involving a protracted history of discovery abuses by Plaintiffs. Defendants have been required to obtain numerous rulings requiring Plaintiffs and their representatives to produce documents and appear at properly noticed depositions.

B. Twice this Court has withheld ruling on a motion by Defendants seeking sanctions for refusal of Plaintiffs and their representatives to comply with discovery orders of this Court. On January 9, 2006, this Court held Plaintiff, Alex Bistricer ("Bistricer"), in contempt of two (2) prior discovery orders dated May 28, 2004 and September 1, 2005. At that time, the Court withheld ruling as to any sanctions that were appropriate for Plaintiff's contempt of the prior Court orders. On May 28, 2004, this Court ordered Plaintiff Bistricer to produce documents in order to comply with this Court's October 8, 2003 discovery order with which Plaintiff had failed to comply previously. On May 28, 2004, the Court withheld ruling on Defendants Motion for Contempt and Sanctions as a result of Plaintiff's refusal to comply with the Court's October 8, 2003 Discovery Order.

C. The most recent violation of this Court's discovery rulings and the Rules of Civil Procedure relating to discovery, and the gravamen of Defendants' Motion for Contempt and Sanctions, involves Plaintiffs' production of 68,111 documents to Defendants after discovery had been completed and after five days of a bench trial had already transpired. Defendants contend that the failure of Plaintiffs and their records custodian to produce these documents timely during discovery constitutes a willful violation of prior discovery orders of this Court and demonstrates a callous disregard for the authority of the Court and the discovery process.

Defendants also argue that the 68,111 newly produced documents establish that Plaintiffs and their representatives have repeatedly and consistently testified falsely to this Court on material issues in the case, thereby perpetrating a fraud upon the Court.

D. The evidence at the hearing established the following facts:

1.. During discovery in the instant case, Plaintiffs and their representatives identified Third Party Defendant Candy Smith ("Smith") as the records custodian for Plaintiff Gulf Island Resort, L.P. ("GIRL") and GIRL's corporate general partner, Gulf Island Resort, Inc. ("GIRI"). Smith was also identified by Plaintiffs at trial as an officer of Plaintiff GIRL.

2. On September 18, 2003 – at the outset of discovery – Defendants served an Amended Notice of Deposition ("Amended Notice") Duces Tecum upon Smith. As part of this notice duces tecum, Defendants included an instruction to Smith such that all "documents requested herein are those maintained or controlled by you, individually, as well as those maintained or controlled by you for GIRL (or any of its general or limited partners), or GIRI (or any of its shareholders)."

3. The document request Defendants directed to Smith in the Amended Notice was very broad, and included virtually every non-privileged document relating to GIRL (and any of its general or limited partners). For example, the request sought all communications between GIRL representatives, as well as "all documents evidencing, referring, or relating to any action(s) taken by or on behalf of GIRL (or any of its general or limited partners), or GIRI, (or any of its shareholders)."

4. Smith, the records custodian for Plaintiff GIRL and GIRI, and - - according to Plaintiffs - - an officer of Plaintiff GIRL, was and is represented in the instant case by R. Nathan

Hightower, Esq. ("Hightower"). Hightower was identified by Plaintiffs as the partnership attorney for Plaintiff GIRL, and is currently counsel of record for Plaintiffs GIRL and Bistricer in the instant case. Smith, by and through her counsel, Hightower, sought a protective order regarding the documents requested by Defendants in the Amended Notice. At a hearing on September 29, 2003, before the Honorable Lynn Tepper, the Court ordered that Smith must produce at the deposition scheduled for September 30, 2003, "all documents created on or after February 10, 1993, that are responsive to the September 18, 2003 Amended Notice," except for a few documents not relevant to the requests referenced above.

5. Smith appeared for deposition on September 30, 2003, represented by Hightower. Plaintiff Bistricer was also present at this deposition. At that deposition, Scott McLaren ("McLaren"), counsel for Defendants, asked Smith if she was producing documents on that date that were responsive to the requests in the Amended Notice and the Court's discovery order. Smith answered that question in the affirmative, and indicated that the documents being produced were voluminous.

6. On October 1, 2003, and again on October 10, 2003, McLaren sent letters to Hightower, by facsimile and by mail, communicating that the Defendants demanded from Plaintiffs that all documents produced at Ms. Smith's deposition in accordance with the Court's September 29, 2003 ruling be copied, with the copies being delivered to McLaren's office. Hightower responded by letter to McLaren on October 15, 2003, stating that the documents requested were to be picked up by a copy service on October 15, 2003, for copying and delivery in accordance with McLaren's requests.

7. Plaintiffs also requested documents from all other GIRL representatives who might have any discoverable documents. Multiple sets of document requests and/or subpoenas

were served on Smith, Bistricer, Robert Fireworker (identified as GIRL's corporate representative at trial) and GIRL employee and Third Party Defendant Barry Pedersen.

8. On October 29, 2003, Plaintiff Bistricer, through his counsel Hightower, filed a response to Defendants' first request for production to Plaintiffs. In responding to Defendants' request for "any document or files evidencing, referring or relating to any action taken by or on behalf of GIRL or GIRI," Plaintiff Bistricer represented that notwithstanding certain objections, material responsive to the request had been produced, with the exception of telephone bills and materials relating to litigation of other matters. The same response was repeated in responding to Defendants' requests for any documents relating to the subject property, and "any aspect of or issue affecting GIRL (its general and/or limited partners, employees, agents, or representatives); any aspect of or issue affecting GIRI (its shareholders, employees, agents, or representatives.)"

9. Plaintiff Bistricer appeared at a deposition on October 29, 2003, represented by counsel Hightower. When asked by counsel for Defendants about requested documents, Bistricer responded, "Candy Smith being the custodian of records, we told her to give you all of these things."

10. On November 17, 2003, Smith appeared for the continuation of her deposition. During this deposition, Smith confirmed that she kept the books and records of the business, GIRL. She further indicated that she had located and produced to Defendants all GIRL documents in her possession.

11. On December 15, 2003, McLaren sent a letter by facsimile and by mail to Hightower. In this letter, McLaren indicated that after his review of the documents produced by counsel for Plaintiffs and Smith, it had become apparent at the November 17, 2003 deposition of Smith that she and Plaintiff Bistricer had not produced all of the documents and information

required by prior discovery orders of the Court. McLaren advised that he would seek judicial intervention if all documents were not produced by December 22, 2003.

12. Hightower responded to McLaren by letter on December 18, 2003, indicating that he was unaware of any documents, other than emails, that had not been produced. Hightower requested that McLaren specify documents that he felt had not been produced. The next day, McLaren responded by letter to Hightower and specified several categories of documents he believed Bistricer and Smith had failed to produce.

13. After additional letters from McLaren to Hightower requesting that Plaintiff and Smith produce the documents they had been ordered to produce proved futile, Defendants filed a Motion for Contempt, for Sanctions, and to Compel Discovery as against Smith and Plaintiff Bistricer seeking compliance with the Court's prior discovery orders.

14. A hearing was held on May 20, 2004, on Defendants Motion for Contempt, for Sanctions, and to Compel Discovery. At that hearing, Hightower represented to the Court on the record that, "when Ms. Smith appeared at her deposition day two [September 30, 2003], went through the documents that the subpoena had addressed, all the documents had been produced with the exception of one account." Later in the May 20, 2004 hearing, Hightower agreed to produce the documents relating to the aforementioned "one account." The Court entered an Order dated May 28, 2004 granting Defendants' Motion to Compel and requiring compliance with the Court's prior discovery orders – and setting a specific deadline for compliance. Further, the May 28, 2004 Order specifically withheld any ruling on Defendants' Motion for Contempt and Sanctions for Plaintiff's violation of the prior discovery Orders.

15. Plaintiff Bistricer appeared at a continuation of his deposition on June 9, 2004. During this deposition Bistricer again confirmed that "Ms. Smith, she keeps the books and records. She's the custodian."

16. On June 16, 2004, McLaren sent another letter to Hightower by facsimile and by mail explaining that Plaintiffs still had not produced all of the documents which the Court had ordered produced in the prior discovery Orders, including the May 28, 2004 Order. McLaren described particular documents remaining to be produced. Hightower responded to McLaren by letter on June 18, 2004, informing him that all requested documents had been produced.

17. Plaintiff Bistricer appeared at a continuation of his deposition on December 13, 2005. McLaren asked Bistricer whether he had spoken to Smith regarding the production of documents. Bistricer responded affirmatively, and further testified that "My understanding the last time we visited this issue is that you requested and received 17 boxes, effectively every piece of paper that the partnership [GIRL] had in its possession and Candy Smith was the custodian of all the records and I think – I recall she told me and I can testify that she gave you every document that she had."

18. After discovery had expired and exhibit lists had been exchanged, a nonjury trial on the merits of this matter commenced on May 30, 2006.

19. Plaintiff Bistricer was called as the first witness in Plaintiffs' case. Bistricer testified that certain documents were executed for each of eight (8) transactions that Plaintiffs were involved in that were important to the merits of the case. During cross-examination of Plaintiff Bistricer on June 6, 2006, Defendants pointed out that despite Bistricer's testimony and Defendants' discovery requests, Plaintiffs had failed to produce the referenced documents for three (3) of the eight (8) transactions in question.

20. Within a few days after the June 6 trial day, Plaintiffs' counsel produced to Defendants, for the first time, alleged copies of the previously missing documents for the three (3) transactions. On June 15, 2006, the next scheduled day of trial, Plaintiffs attempted to introduce these three documents into evidence. Counsel for Defendants objected to their introduction based upon the failure to produce them in response to discovery requests and discovery Orders of the Court, or otherwise disclose them prior to trial.

21. Plaintiffs' counsel argued that these three (3) documents had been located by Plaintiffs after the June 6 trial day. Hightower gave testimony confirming that during discovery, the "10 to 20 bankers boxes" of documents produced at Smith's September, 2003 deposition were copied, reproduced, and delivered to counsel for Defendants. Hightower further testified that the three (3) new documents were not produced during discovery. Hightower testified that after the June 6 trial date, he obtained the keys to the GIRL office maintained by Smith from co-counsel for Plaintiffs, Maurice Baumgarten ("Baumgarten"), went to that office, and found two of the three missing documents.[1]

22. Although Plaintiff moved for these three (3) previously "missing" documents to be introduced into evidence at trial on June 15, 2006, neither Plaintiffs nor their counsel made mention of any additional documents that: (a) were responsive to prior discovery requests and orders; (b) were located in GIRL's offices; and (c) had not been produced previously.

23. Subsequently, counsel for Defendants requested from the Court an opportunity to review any additional documents that: (a) were located in GIRL's offices; (b) were responsive to prior discovery requests and orders of the Court; and (c) had not been previously produced in discovery. In response, on June 29, 2006, Plaintiffs produced to Defendants 46 bankers boxes of

[1] Counsel for Plaintiffs testified that the third missing document was obtained from a Miami attorney, Louis Zaretsky, Esquire. Mr. Zaretsky was identified by Plaintiffs and their representatives as another attorney for Plaintiff GIRL.

documents, containing 68,111 pages of materials. The Court finds, based on the evidence presented, that a small percentage of these documents were produced previously in discovery, and that some of these documents were not responsive to prior discovery requests and orders of the Court. However, the Court also finds that a substantial amount of the 68,111 documents produced during the trial were: (a) required to be produced by prior discovery Orders of this Court; and (b) were not produced during discovery in violation of these discovery Orders.

24. The Court finds that a number of the 68,111 documents are quite relevant to the cross examination of key witnesses in the case, and to rulings that the Court is required to make on the issue of title to the disputed properties. Three (3) years of discovery and dozens of depositions have been taken subsequent to the time that the documents should have been produced. Therefore, Defendants have been prejudiced greatly by Plaintiffs' failure to timely produce these documents.

25. Also contained within the 46 boxes/68,111 documents produced during trial are certain letters and other documents relating to the instant case dated after the September 30, 2003 document production and after Plaintiffs' representations that all documents had been produced. The existence of these documents within the 46 newly produced boxes establishes that Plaintiffs and their representatives were aware of the existence of these boxes during discovery and before trial, yet failed to produce these documents as required.

26. Among the materials produced for the first time on June 29, 2006 were documents establishing facts directly inconsistent with those testified to at trial and in deposition by Plaintiff Bistricer, Smith and Plaintiff GIRL's corporate representative, Robert Fireworker, concerning issues material to the case. One such issue involved their knowledge and involvement relating to a 1999 quit claim deed ("1999 Deed") from GIRL to Gulf of Mexico

Enterprises, Inc. ("GME")[2] which is critical in determining the validity of Defendants' Defenses of estoppel, laches and waiver.

27. In March of 2006, Plaintiff Bistricer filed an affidavit in this action asserting under oath that he "did not even become aware that Markovitz had executed the 1999 Deed until sometime in 2002, when GIRL's attorney, Nathan Hightower received documents from Old Republic Title Insurance Company."

28. During trial Plaintiff Bistricer was shown a copy of the 1999 Deed and was asked whether he had ever seen the document before 2002. Bistricer testified unequivocally that he had never seen it, nor was he aware of its existence, prior to 2002. He further testified that he was not aware that Markovitz had purported to quit claim the vacant land prior to 2002.

29. In the course of reviewing the 68,111 newly produced documents, counsel for Defendants located an Affidavit which had a facsimile date/time stamp of August 4, 2000, and had the signature of Plaintiff Bistricer dated the same day. In this Affidavit, Plaintiff Bistricer testified that he was aware of the 1999 Deed in August, 2000 – a fact very important to Defendants defenses of laches, estoppel, and waiver.

30. GIRL's corporate representative, Fireworker, testified repeatedly in a deposition taken February 25, 2004 that he had never seen the 1999 Deed. Counsel for Defendants located in the newly produced documents an Affidavit signed by Fireworker, dated August 4, 2000, with a facsimile time/date stamp of the same date, which established Fireworker's knowledge of the 1999 Deed directly contrary to his sworn testimony.

31. Smith, who according to Plaintiffs was an officer of GIRL and was GIRL's records custodian, testified at a deposition taken November 17, 2003, that she "didn't have

[2] Defendant DBKN Gulf, Incorporated acquired a portion of the disputed property directly from GME in 2003. Plaintiffs dispute the validity of the GIRL to GME transaction. Therefore, Plaintiffs' knowledge and involvement concerning GME's acquisition of the property goes to the heart of the title claims in this case.

anything to do with preparing it [the 1999 Deed], or recording it." A copy of a check signed by Smith, made out to the Pasco County Clerk of Court, and used to record the 1999 Deed in the public records, was located in the newly produced documents. Counsel for Plaintiffs and Smith even conceded that Smith wrote the check to record the 1999 Deed at the evidentiary hearing on August 8, 2006.

32. Although Plaintiffs argue that GIRL representatives Bistricer, Smith and Fireworker were merely "mistaken" concerning their knowledge of and involvement with the 1999 Deed, the Court finds that this is not a reasonable explanation for the false testimony given by all three representatives of Plaintiff GIRL on this important issue.

33. In addition to the testimony concerning the 1999 Deed, Plaintiffs and their representatives repeatedly (and falsely) assured Defendants and the Court that all requested documents had been produced to Defendants.

34. The Court finds that the collective effect of the false testimony provided by Plaintiffs and their representatives constitutes a fraud upon the Court resulting in the loss of evidence to the Defense.

35. The Court finds that there were voluminous records in the possession, custody, and control of Plaintiffs that had been requested by Defendants during discovery which Plaintiffs' records custodian had been ordered to produce, but that were not produced prior to trial. Plaintiffs and their officers/representatives misled Defendants and the Court with repeated assurances that all requested documents had been produced. The existence of the 68,111 documents was not disclosed by Plaintiffs until several days into the trial when Plaintiffs found it to their advantage to offer into evidence some of the previously undisclosed documents in

support of their claims. Only after another request was made by Defendants at trial was this large volume of previously undisclosed documents made known and available to Defendants.

36. Defendants were effectively denied the opportunity to examine the documents and determine their relevance at a time when they could incorporate them into their discovery planning, case preparation, trial strategy, and use at trial for cross-examination and other purposes. The documents produced for the first time during the trial included relevant and important documents bearing on central issues in the case.

II. CONCLUSIONS OF LAW

A. On July 14, 2006, Defendants filed their Motion for Sanctions and Contempt. Defendants' motion sought relief based upon Plaintiffs' abuses and violations of the discovery process and false testimony constituting a fraud upon the Court. The evidence presented at the August 8 hearing and in the record support Defendants' request for the imposition of the most severe sanctions on these grounds.

B. Plaintiffs' actions constitute a violation of prior discovery Orders of this Court, and demonstrate deliberate and contumacious disregard of this court's authority, as well as behavior evincing deliberate callousness to the discovery process. *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983); *Marr v. State of Florida*, 614 So.2d 619 (Fla. 2d DCA 1993).

C. Defendants have presented clear and convincing evidence of actions on the part of Plaintiffs and their representatives intended to interfere with the judicial system's ability to impartially adjudicate this matter by improperly influencing the trier of fact and by unfairly

hampering the presentation of the Defendants' claims and defenses. *Hutchinson v. Plantation Bay Apartments*, 931 So.2d 957 (Fla. 1st DCA 2006); *Cox v. Burke*, 706 So.2d 43 (Fla. 5th DCA 1998).

D. Plaintiffs' discovery abuses and violations of the Court's orders were egregious. Plaintiffs are responsible for creating a situation during the trial, which has made striking their pleadings and entering judgment in favor of the Defendants, the only practical alternative available to resolve this matter. *Montage Group Ltd. v. Athle-tech Computer Systems, Inc.*, 889 So.2d 180 (Fla. 2d DCA 2004).

E. Additionally, the false testimony provided to this Court by Plaintiffs and their representatives, constituting a fraud on the Court, warrants the severe sanction of striking the pleadings in this case. *Morgan v. Campbell*, 816 So.2d 251 (Fla. 2d DCA 2002); *Austin v. Liquid Distributors*, 928 So.2d 521 (Fla. 3d DCA 2006); *Hutchinson v. Plantation Bay Apartments*, 931 So.2d 957 (Fla. 1st DCA 2006).

Based on the foregoing findings and conclusions, it is

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Contempt and Sanctions is hereby GRANTED on the grounds set forth therein as more specifically stated below.

2. The Pleadings filed on behalf of Plaintiffs Bistricer and GIRL as to the Quiet Title in Count I of Plaintiff's Second Amended Complaint and Count I of Defendants Counterclaim are hereby stricken with prejudice.

3. Good and marketable title to the properties that are the subject of the instant case (the "Subject Property") is hereby quieted in Defendants. Defendants shall be entitled to immediate possession of the Subject Property and entry of judgment in their favor as to the issues of quiet title to the Subject Property, specifically:

A. Oceanside Acquisitions LLC shall be entitled to immediate possession and the entry of a judgment quieting title in its favor as to Condominium Units 104-A, 105-A, 111-A, 202-A, 210-A, 301-A, 302-A, 308-A, 311-A, 401-A, 406-A, 408-A, 510-A, 601-A, 704-A, 706-A, 803-A, and 804-A, of GULF ISLAND BEACH AND TENNIS CLUB I, A CONDOMINIUM, according to the Declaration of Condominium thereof filed for record in Official Records Book 1381 at Page 932 of the Public Records of Pasco County, Florida, together with all dock spaces, parking spaces and other limited common elements appurtenant thereto, and Condominium Unit 201-W of GULF ISLAND BEACH AND TENNIS CLUB II, A CONDOMINIUM according to the Declaration of Condominium thereof filed for record in Official Records Book 3300 at Page 208 of the Public Records of Pasco County, Florida,; and

B. DBKN Gulf Incorporated shall be entitled to immediate possession and the entry of judgment quieting title in its favor as to a parcel of land lying in SECTION 32, TOWNSHIP

24 SOUTH, RANGE 16 EAST, Pasco County, Florida, being more particularly described as follows:

> Commence at the Northwest corner of the Northeast one-quarter (1/4) of Section 33, Township 24 South, Range 16 East; thence run South 89° 36' 30" West a distance of 3170.03 feet to the POINT OF BEGINNING; thence run due South a distance of 883.80 feet; thence run South 83° 03' 23" West a distance of 33.41 feet; thence run South 08° 30' 58" East a distance of 319.09 feet; thence run South 03° 00' 00" West a distance of 5.63 feet; thence run North 87° 00' 00" West a distance of 91.87 feet; thence run South 03° 00' 00" a distance of 134.74 feet; thence run South 89° 29' 25" West a distance of 175.92 feet; thence run due North a distance of 1341.45 feet; and thence run North 89° 36' 30" East a distance of 287.99 feet to the POINT OF BEGINNING.

4. This Court retains jurisdiction and reserves ruling as to the entitlement to, and the amount of, any damages, costs, attorneys' fees, and any other relief sought by Defendants' Motion for Contempt and Sanctions.

DONE AND ORDERED in Chambers at Dade City, Pasco County, Florida, on this ____ day of _____, 2006.

SIGNED AND DATED
AUG 8 0 2006
WAYNE L. COBB
CIRCUIT JUDGE

Wayne L. Cobb
Circuit Court Judge

Copies furnished to:

Scott A. McLaren, Esquire
Eric E. Page, Esquire
P. Hutchison Brock, II, Esquire
William S. Dufoe, Esquire
Robert W. Lang, Esquire
Maurice Baumgarten, Esquire
R. Nathan Hightower, Esquire
Deborah P. Fitzgerald, Esquire
Peter Valori, Esquire