IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 07-43672 CA 09

STATE OF FLORIDA, OFFICE OF FINANCIAL REGULATION

Plaintiff,

v.

BERMAN MROTGAGE CORPORATION, a Florida corporation, M.A.M.C. INCORPORATED, a Florida corporation, DANA J. BERMAN, as Owner and Managing Member,

Defendants.

and,

DB ATLANTA, LLC, a Florida Limited Liability Company, et al.

Relief Defendants.

_______________________________________/

THE ORIGINAL FILED
ON APR 21 2011
IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

REQUEST FOR JUDICIAL NOTICE

In anticipation of the evidentiary hearing set before the Court on April 28, 2011 on the [I] *Receiver's Motion for an Order Approving the Receiver's Execution of Sales Contracts for the Sale of Additional Condominium Units Owned by Relief Defendant, Oceanside Acquisitions, LLC*; and [II] *Receiver's Second Amended Motion for an Order Approving the Receiver's Execution of All Future Sales Contracts for Condominium Units Owned by Relief Defendant, Oceanside Acquisitions, LLC*, Michael I. Goldberg, as Receiver over the Defendants and Relief Defendant, Oceanside Acquisitions, LLC by and through their undersigned

counsel, and pursuant to Florida Statutes §§ 90.202 and 90.203, hereby requests this Court take judicial notice of the *Third District Court of Appeal Opinion affirming Judge Cobb's Contempt Order and entry of partial judgment quieting title in favor of Defendant* attached as **Exhibit A.**

Section 90.202(6), Florida Statutes provides that a court may take judicial notice of the records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.

Judicial notice of a matter outlined in section 90.202 is compulsory upon a party's compliance with section 90.203 of the Florida Statutes. Section 90.203 provides that

> "[a] court shall take judicial notice of any matter in s. 90.202 when a party requests it and (1) [g]ives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request; (2) [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter."

WHEREFORE, the Receiver, Michael I. Goldberg, as Receiver over Oceanside Acquisitions, LLC, requests this Court to take judicial notice of the above referenced matter.

Respectfully submitted,

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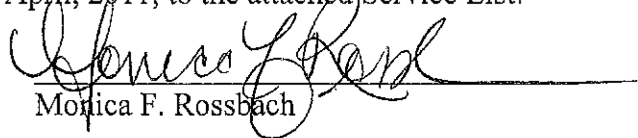
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 21st day of April, 2011, to the attached Service List.



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cc: The Honorable Jerald Bagley *(via U.S. Mail)*
Michael Goldberg, Esq., as Receiver *(via e-mail)*
The Investor(s)/Lender(s) Group *(via e-mail)*
Posted to the Berman Mortgage Website

3619296-1

Third District Court of Appeal

State of Florida, January Term, A.D. 2011

Opinion filed March 16, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-3002
Lower Tribunal No. 08-79169

Alex Bistricer, as limited partner of Gulf Island Resort, L.P., and Gulf Island Resort, L.P.,
Appellants,

vs.

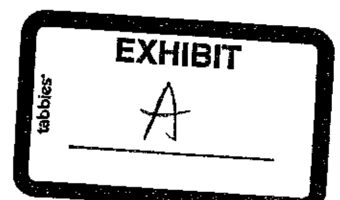
Oceanside Acquisitions, LLC, a Florida limited liability company; DBKN Gulf Incorporated, a Florida corporation; and Steven Carlyle Cronig,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Thomas S. Wilson, Jr., Judge.

Anania, Bandklayder, Baumgarten & Torricella and Maurice J. Baumgarten, for appellants.

Holland & Knight and Stacy D. Blank (Tampa), for appellees Oceanside Acquisitions, LLC and DBKN Gulf Incorporated.

Walton Lantaff Schroeder & Carson and Deborah P. Fitzgerald (Fort Lauderdale), for appellee Steven Carlyle Cronig.



Before SHEPHERD, SUAREZ, and ROTHENBERG, JJ.

ROTHENBERG, J.

This appeal filed by the plaintiffs, Alex Bistricer, as limited partner of Gulf Island Resort, L.P. ("Bistricer"), and Gulf Island Resort, L.P. ("GIRL") (collectively, "the Plaintiffs"), stems from an order granting a Motion for Contempt and Sanctions ("Contempt Order") filed by the defendants, Oceanside Acquisitions, LLC ("Oceanside") and DBKN Gulf Incorporated ("DBKN") (collectively, "the Defendants"). The Contempt Order strikes with prejudice the Plaintiffs' claims to quiet title to real property as a sanction for failing to comply with previously entered discovery orders and for presenting the false testimony of the Plaintiffs and their representatives. The Contempt Order was entered by Pasco Circuit Court Judge Wayne L. Cobb, Bistricer v. Coastal Real Estate Assocs., Inc., 2006 WL 3258226 (Fla. Cir. Ct. Aug. 30, 2006), and Judge Cobb then entered a partial judgment quieting title in favor of the Defendants. Thereafter, the Pasco Circuit Court action was transferred to Miami-Dade Circuit Court, and Judge Thomas S. Wilson, Jr. entered final summary judgment in favor of Oceanside, DBKN, and Steven Carlyle Cronig ("Cronig"), as to the remaining counts.

The primary issue before this Court is whether Judge Cobb abused his discretion by entering the Contempt Order, and thereafter, entering a partial

judgment quieting title in favor of the Defendants. As Judge Cobb's Contempt Order documents the ongoing and egregious discovery violations and the false testimony presented by the Plaintiffs and their representatives, and because, under the circumstances, the imposition of the most severe sanction—striking pleadings—was a proper sanction, we conclude that he did not abuse his discretion.

Judge Cobb's Contempt Order contains the following findings of fact, which accurately reflect the record before this Court. In March 2003, the Plaintiffs filed an action against the Defendants, seeking, in part, to quiet title to condominium units and undeveloped land. On September 18, 2003, the Defendants served an amended notice of subpoena duces tecum ("Amended Notice") on Candy Smith ("Smith"), a third-party defendant and the records custodian for GIRL and its general partner, Gulf Island Resort, Inc. ("GIRI"). The Amended Notice requested, in part, that Smith appear at a deposition scheduled for September 30, 2003, and produce all documents relating to work performed on behalf of or at direction of GIRL, GIRI, or GIRI's shareholders—Bistricer, Eisi Markovitz, and Robert Fireworker. In response, Smith, who was represented by R. Nathan Hightower ("Hightower"), the same counsel representing Bistricer and GIRL, filed a protective order. At a hearing held on September 29, 2003, Pasco Circuit Court Judge Lynn Tepper overruled Smith's objections to the Amended Notice, and

ordered Smith to appear at the scheduled deposition and to produce all documents created after February 10, 1993, that are responsive to the Amended Notice. Thereafter, on February 5, 2004, Judge Tepper entered a written order memorializing her oral ruling ("Judge Tepper's Order"). As ordered, Smith appeared at the deposition, and thereafter, Smith's counsel, Hightower, and the Defendants' counsel, Scott McLaren ("McLaren"), arranged to have the documents copied and delivered to McLaren.

Bistricer was then served with a request for production, seeking any documents relating to action he took on behalf of GIRI or GIRL. At a deposition, Bistricer represented that he instructed GIRL's records custodian, Smith, to provide all the requested documents. Thereafter, McLaren and Hightower exchanged letters in which McLaren claimed that Smith and Bistricer had not produced all documents required by Judge Tepper's Order, and Hightower asserted that he believed that the documents had been produced. Believing that Smith and Bistricer had not fully complied with the prior discovery order, the Defendants filed a Motion for Contempt, for Sanctions, and to Compel Discovery. At a hearing held on May 20, 2004, Hightower acknowledged that documents pertaining to "one account" had not been produced, and thereafter, on May 28, 2004, the trial court entered an order compelling the Plaintiffs to produce those documents, but withholding ruling on the Defendants' motions for sanctions and

contempt. Once again, in June 2004, McLaren and Hightower exchanged correspondence, with McLaren accusing the Plaintiffs of not fully complying with previous discovery orders, and the Plaintiffs assuring the Defendants that all documents had been produced.

At a deposition held on December 13, 2005, Bistricer represented to Defendants' counsel, McLaren, that, except for telephone bills, all documents responsive to the request for production had been produced by Smith:

> My understanding the last time we visited this issue is that you requested and received 17 boxes, effectively every piece of paper that [GIRL] had in its possession and Candy Smith was the custodian of all the records that I think-I recall she told me and I can testify that she gave you every document that she had.

(Emphasis added).

On May 30, 2006, a non-jury trial, which was scheduled for several days over a period of months, commenced before Judge Cobb. Bistricer testified as to eight relevant real estate transactions, explaining that certain documents were executed that support his position. During cross-examination conducted on June 6, 2006, Bistricer acknowledged that documents for three of the eight transactions were never located during discovery. Several days later, the Plaintiffs' counsel informed the Defendants' counsel that the missing documents from the three real estate transactions had been located.

When trial commenced in mid-June, the Plaintiffs' counsel attempted to

introduce the documents into evidence. Following the Defendants' objection, Hightower testified as to the circumstances surrounding the discovery of these documents. Hightower explained that the documents relating to one transaction were obtained from an attorney involved in that transaction, and the documents from the other two transactions were located in a filing cabinet and a briefcase located at GIRL's office. Thereafter, Judge Cobb ordered the Plaintiffs to allow the Defendants to review any documents at GIRL's office that had not been previously produced and were responsive to prior discovery requests and orders. Although Bistricer had previously testified that Smith had given the Defendants "every document that she had," the Plaintiffs produced an additional forty-six boxes, containing over 68,000 documents.

Several of these documents were generated prior to Smith's September 30, 2003, deposition; had not been previously produced by either Smith or Bistricer; and were responsive to the prior discovery requests and orders of the trial court. More importantly, the boxes contained documents relevant to the issues and/or affirmative defenses raised in the parties' pleadings, and therefore would have been addressed during the pre-trial depositions and the cross-examination of the Plaintiffs' key witness, Bistricer, during trial. Further, these documents were inconsistent with (1) Bistricer's affidavit denying knowledge of a relevant transaction/document; (2) Bistricer's deposition testimony; (3) Bistricer's trial

testimony; (4) Fireworker's deposition testimony; and (5) Smith's deposition testimony.

In the Contempt Order, Judge Cobb rejected the Plaintiffs' argument that Bistricer, Smith, and Fireworker were "merely mistaken" when they testified that all documents had been produced, and instead, found that "this is not a reasonable explanation for the false testimony given by all three representatives of Plaintiff GIRL on this important issue." Judge Cobb also found 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," and that the "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."

Judge Cobb concluded that the Plaintiffs' discovery violations "demonstrate deliberate and contumacious disregard of this court's authority, as well as behavior evincing deliberate callousness to the discovery process." Judge Cobb also concluded that the Defendants presented clear and convincing evidence that the 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

decisions." Further, although Judge Cobb acknowledged that striking a party's pleadings is a "severe sanction," based on the "egregious" violations of discovery orders and the false testimony by the Plaintiffs and their representative, striking the pleadings is "the only practical alternative to resolve this matter."

Based on these findings and conclusions, Judge Cobb granted the Defendants' Motion for Contempt and Sanctions, striking the claims to quiet title and granting good and marketable title to the subject properties in favor of the Defendants. Thereafter, Judge Cobb entered a partial judgment quieting title in favor of Oceanside and DBKN.

The primary issue before this Court is whether Judge Cobb abused his discretion by striking a portion of the Plaintiffs' pleadings as a sanction for violating discovery orders and presenting false testimony. See Morgan v. Campbell, 816 So. 2d 251, 253 (Fla. 2d DCA 2002) (noting that an appellate court reviews an order imposing sanctions under an abuse of discretion standard). As we conclude that Judge Cobb did not abuse his discretion, we affirm.

In Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983), the Florida Supreme Court succinctly explained:

> [T]he striking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances. A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or

conduct which evinces deliberate callousness.

(Citations omitted); see also Metro. Dade Cnty. v. Martinsen, 736 So. 2d 794, 795 (Fla. 3d DCA 1999) ("It is well-settled 'that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve her ends.'") (quoting Hanono v. Murphy, 723 So. 2d 892, 895 (Fla. 3d DCA 1998)).

In the instant case, the record demonstrates that the Plaintiffs' discovery abuses were protracted. Basically, between September 30, 2003, and the start of trial on May 30, 2006, the Plaintiffs assured the Defendants that, except for certain telephone bills, all documents responsive to discovery requests and orders had been produced. During this nearly three-year period, even after the trial court withheld its ruling on motions for contempt and sanctions, the Plaintiffs continued to violate discovery orders. It was not until after the trial court had completed five days of trial that the Plaintiffs announced that they had located certain documents, which allegedly favored their position. When trial continued, the Plaintiffs attempted to introduce these documents without immediately disclosing that they had also discovered over 68,000 other documents. After the trial court inquired as to where these documents were located, it learned that many other documents were sitting in a filing cabinet at GIRL's office. Pursuant to the trial court's order, the Plaintiffs produced these documents, and it was then that the Defendants learned

that several documents were "quite relevant" as they supported their affirmative defenses and impeached Bistricer's, Smith's, and Fireworker's testimony on a key issue. As these documents were "quite relevant," they would have been addressed during the various pre-trial depositions and during Bistricer's trial testimony. Finally, as these documents were located in active files at GIRL's office, Judge Cobb was within his discretion to reject the Plaintiffs' explanation for not producing these documents prior to trial. Under these circumstances, we conclude that Judge Cobb did not abuse his discretion by imposing the severest sanction—striking pleadings. Accordingly, as the remaining arguments pertaining to the entry of the Contempt Order or partial judgment quieting title in favor of the Defendants lack merit, we affirm these orders.

The remaining issues raised by the Plaintiffs as to the entry of final summary judgment in favor of Oceanside, DBKN, and Cronig, lack merit. Accordingly, we also affirm that order.

Affirmed.

A True Copy
ATTEST:
MARY CAY BLANKS
Clerk, District Court of
Appeal, Third District
By: ________ Deputy Clerk