IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2408

Lower Tribunal No(s).: 3D10-1331
10-16264

MIA CONSULTING GROUP, INC.

Petitioner,

vs.

HACIENDA VILLAS, INC.

Respondent.

ON REVIEW FROM AN OPINION OF THE
THIRD DISTRICT COURT OF APPEAL

PETITIONER'S AMENDED REPLY BRIEF

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Citations to Third District's Opinion and Appellate Briefs

Citations to the Third District's Opinion below shall be abbreviated "3d DCA Opinion."

Citations to Respondent Hacienda's Initial Brief filed in the Third District shall be abbreviated "3d DCA Initial Brief."

Citations to Petitioner MIA's Initial Brief in this appeal shall be abbreviated "SC Initial Brief."

Citations to Respondent Hacienda's Answer Brief in this appeal shall be abbreviated "SC Answer Brief."

II. ARGUMENT

A. Contract Claims for Unliquidated Damages Fall Within the Scope of the *Croker* Venue Rule

On five separate occasions, this Court has reiterated the long-standing venue rule that actions for breach of an express or implied contract to pay money may be brought in the county where the payments are agreed to be made or, if no place of payment is agreed upon, where the plaintiff resides. *Croker v. Powell*, 115 Fla. 733, 156 So. 146 (1934); *Baruch v. W. B. Haggerty, Inc.*, 137 Fla. 799, 188 So. 797 (1939); *Producers Supply, Inc. v. Harz*, 149 Fla. 594, 6 So. 2d 375 (1942); *Duggan v. E. D. Tomlinson*, 174 So. 2d 393 (Fla. 1965); *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So. 2d 8 (Fla. 1967). None of these cases contain any suggestion or hint that claims for "unliquidated" damages are excepted from the scope of their holdings.

Nevertheless, the Third District's Opinion below, without referencing *Croker* or any of the Court's other venue decisions, determined that "the present case does not involve an agreement to pay a liquidated sum in Miami-Dade County. This is a suit for damages which are unliquidated. Accordingly the debtor-creditor rule does not apply." 3d DCA Opinion, at 4. Hacienda likewise insists that "[a]n undisputed part of the debtor-creditor rule is that the debt must be

unliquidated [sic] and not subject to proof." SC Answer Brief, at 11.[1]

The question is thus squarely presented whether the Third District's Opinion below can be reconciled with the Court's decisions in *Croker*, *Baruch*, *Producers Supply*, *Duggan*, and *Saf-T-Clean*. More specifically, is the *Croker* venue rule inapplicable if the contract damages sought by a plaintiff are unliquidated or subject to proof? The answer is plainly no.

There is nothing in the Court's decisions that sanctions an "exception" based on the character of the damages suffered by a claimant. To the contrary, the Court has made clear in at least two of its venue decisions that claims for unliquidated damages fall squarely within the ambit of the *Croker* venue rule.

Croker itself involved a claim for unliquidated damages. In that case, the plaintiff, a Duval County attorney, sued his client in Duval County for the "reasonable value of the [legal] services rendered and performed by said plaintiff under, and in pursuance of, said contract and agreement." *Croker*, 156 So. at 149. Although the *Croker* opinion underscores the disputed nature of the plaintiff's damages, *see id.* at 150, 153, previous decisions of the Court make clear that *all* claims to recover unpaid attorneys' fees are, by their very nature, unliquidated and subject to proof. *E.g.*, *Parker v. Dekle*, 46 Fla. 452, 457, 35 So. 4, 5 (1903) ("[I]n order to ascertain what would be a reasonable attorney's fee in any case requires

[1] It appears that this sentence contains a typographical error. Hacienda's counsel plainly meant to use the word "liquidated," not "unliquidated."

the introduction of testimony.") (citations omitted); *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983) ("Since the 'reasonableness' of an attorney's fee or other charge for services cannot be ascertained without the presentation of facts relating to the factors that must be considered in determining reasonableness of a fee, *every claim of damages for the reasonable value of services is a claim for unliquidated damages*.") (emphasis added); *Watson v. Internet Billing Co., Ltd.*, 882 So. 2d 533, 534 (Fla. 4th DCA 2004) (same). Despite the unliquidated nature of his damages, the plaintiff in *Croker* was permitted to sue "in the county of his residence for the alleged anticipatory breach of the contract by the defendant." *Croker*, 156 So. at 151.

Any doubt that the *Croker* venue rule applied to unliquidated damage claims was dispelled completely in *Duggan*. In that case, "the plaintiff's action was in general assumpsit on an implied contract *for the reasonable value of his services* rendered defendant at the latter's request -- and from which defendant benefited -- even though defendant resided in a different county than did plaintiff." *Duggan*, 174 So. 2d at 394-95 (emphasis added). Not only did the Court hold that the *Croker* rule applied in instances where there was an "implied" -- as opposed to an "express" promise to pay money -- but the venue rule was equally applicable when the damages are for the "reasonable value" of the plaintiff's services, a computation inherently unliquidated and subject to proof. *See Bowman*, 432 So.

2d at 663 ("every claim of damages for the reasonable value of services is a claim for unliquidated damages"). The Court held that "an action of this kind may be maintained in the county of plaintiff's residence." *Duggan*, 174 So. 2d at 395. Tellingly, Hacienda does not cite *Duggan* in its SC Answer Brief and does not acknowledge its holding, preferring to ignore it as if the case did not even exist.

In defense of the Third District's Opinion below, Hacienda not only insists that "[a]n undisputed part of the debtor-creditor rule is that the debt must be unliquidated [sic] and not subject to proof," but that "*every District Court of Appeal agrees*" with this proposition. SC Answer Brief, at 11 (emphasis in original). Hacienda further asserts -- without citation to any authority -- that the District Courts have applied the so-called exception "with this Court's acknowledgment and approval." *Id.* at 5. Neither contention is true. As *Sundor Brands, Inc. v. Groves Co., Inc.*, 604 So. 2d 901 (Fla. 5th DCA 1992) confirms, there is no unanimity among the District Courts. More importantly, this Court has *never* "acknowledge[d]" or "approve[ed]" an exception for unliquidated damages.

Hacienda does not even try to distinguish *Sundor Brands*, which expressly rejected the notion that *Croker* applies only to claims for a "sum certain" of damages. *Sundor Brands,* 604 So. 2d at 904 ("Although there is no specific sum of money identified in the Agreement that is payable to Sundor, we do not consider this fact dispositive. The key is that there is an express promise to pay the sums to

Sundor that would indemnify it for, *inter alia*, 'losses,' 'costs,' 'expenses', 'interest and penalties', resulting from any 'breach or inaccuracy' of any of the representations or warranties."). Relying in part on *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So. 2d 487 (Fla. 2d DCA 1970), the *Sundor Brands* court held that "[w]here, as here, a contractually incurred obligation to pay money is the performance called for in the contract, the residence of the payee is the place of performance, and default of payment is where the cause of action accrues." *Sundor Brands*, 604 So. 2d at 903. *James A. Knowles* correctly understood that under *Croker*, where "payment of the debt is the performance called for by the contract; and in such case, the residence of the payee (i.e., the place of payment) is the place of the required performance, in default of which the cause of action therein accrues." *James A. Knowles,* 238 So. 2d at 489.[2]

Contrary to Hacienda's implication, SC Answer Brief, at 16, MIA finds no fault with the holding in *James A. Knowles*. However, some District Court decisions, including some that Hacienda embraces in its SC Answer Brief, have mistakenly used *James A. Knowles* as a foundation upon which to construct the so-called "exception" for unliquidated damages. *See PDM Bridge Corp. v. JC Industrial Mfg.*, 851 So. 2d 289, 291 (Fla. 3d DCA 2003); *Morales Sand & Soil,*

[2] After properly construing *Croker*, the Second District held there was "no debtor-creditor relationship. The suit is not on a promise to pay monies owed, unpaid and payable; rather, it is for unliquidated damages allegedly resulting from a breach of a contract of assurance or security." *James A. Knowles,* 238 So. 2d at 489.

L.L.C. v. Kendall Properties & Investments, 923 So. 2d 1229, 1232 (Fla. 4th DCA 2006); *Koslow v. Sanders*, 4 So. 3d 37, 38 (Fla. 2d DCA 2009). Some of these cases go so far as to cite *James A. Knowles* for the proposition that the *Croker* venue rule only applies "for a specified sum of money." Of course, nothing in *James A. Knowles* speaks to any "exception" for a "specified sum of money."

In turn, the Third District's Opinion below relied on some of these same decisions as a basis to reverse the Circuit Court's venue order, and in so doing repeated the flawed conclusion that claims for unliquidated damages fall outside the *Croker* venue rule. The Third District offered no explanation why unliquidated damages should be treated differently from claims for a sum certain. Indeed, none of the District Court cases cited above provides any such rationale. Accordingly, the Court should reject the dubious rule recited in these cases. They are in irreconcilable conflict with the Court's well-reasoned decisions in *Croker*, *Baruch*, *Producers Supply*, *Duggan*, and *Saf-T-Clean*.

The Court's venue decisions have diligently upheld the long-held policy enshrined in Florida's venue statutes to facilitate an aggrieved creditor's ability to collect money owed from a defaulting debtor and to absolve the creditor of the burden to chase the debtor around the state. The statutes were created to aid the creditor in collection. *Bailey v. Crum*, 120 Fla. 36, 162 So. 356, 359 (Fla. 1935) (the venue statute "was designed to perfect the right, already possessed by the

creditor, of instituting his suit for the collection of his claim in the county where the *cause of action* accrued"). The cases relied on by the Third District and Hacienda completely undermine the venue statutes' intended purpose.

Moreover, for the reasons set forth in MIA's SC Initial Brief at page 17, allowing an exception to the *Croker* rule for liquidated damages will impose a pleading burden on plaintiffs not heretofore required by the Court. Under settled precedent, a plaintiff "need not plead or prove that his [venue] selection has been proper," *Inverness Coca-Cola Bottling Co. v. McDaniel*, 78 So. 2d 100, 102 (Fla. 1955), but endorsement of the exception that Hacienda is pushing will undermine that rule. Moreover, a claimant is not currently required to specify in its complaint the nature or quality of its damages in order to state a cause of action for breach of contract, *e.g.*, *Hutchinson v. Tompkins*, 259 So. 2d 129, 132-133 (Fla. 1972), but, if Hacienda's exception is adopted by the Court, a claimant will be required to allege whether its damages are wholly liquidated, wholly unliquidated, or liquidated in part.[3] Again, this runs contrary to the purpose of Florida's venue statute.

In the final analysis, MIA's Complaint alleges that as a result of its hard

[3] Hacienda assails MIA for not alleging in its Complaint "the specific amount of the 'consultant and management fees' that were supposedly due and owing under the contract," SC Answer Brief, at 4, but it was not MIA's burden to allege those details -- either to state a cause of action, *Hutchinson*, 259 So. 2d at 132-133 ("[g]eneral damages . . . need not be specifically pleaded") -- or to support venue in Miami-Dade County, *Inverness Coca-Cola Bottling*, 78 So. 2d at 102 (plaintiff "need not plead or prove that his [venue] selection has been proper").

work, a multi-million dollar grant was awarded to Hacienda triggering Hacienda's contractual duty to retain MIA as an implementation consultant and facility manager and pay MIA for those services in Miami-Dade County. Hacienda's breach excused MIA from providing those services, but it does not deprive MIA of its entitlement to be paid the fees due under the repudiated contract. *E.g.*, *Hospital Mortgage Group v. First Prudential Dev. Corp.*, 411 So. 2d 181, 182 (Fla. 1982) ("nonbreaching party is relieved of its duty to tender performance, and has an immediate cause of action against the breaching party"). Irrespective of whether the damages are liquidated, MIA's suit is properly venued in Miami-Dade County.

B. The Complaint States a Cause of Action and Alleges a Debtor-Creditor Relationship

Recognizing the weakness of its venue position, and rather than address *Croker*, *Duggan* and the Court's other venue decisions, Hacienda instead resorts to scattershot attacks on the *merits* of MIA's claim -- i.e., that MIA's Complaint does not state a cause of action, SC Answer Brief, at 10, n.5, that the "scope of the duties MIA would later perform was left to conjecture as was the amount of the payment," *id.* at 3, that the grant application was not attached to the Complaint, *id.* at 10 n. 5, that "no contract for the performance of services at [Hacienda's] place of business was ever entered into by the parties," *id.* at 5, that MIA "was never hired to perform any services on Hacienda's behalf in Hillsborough County," *id.* at 12 -- all a thinly veiled invitation for the Court to dismiss the entire proceeding in

lieu of rendering an opinion on venue. Of course, none of these arguments was made below in the Circuit Court. Hacienda's Rule 1.140 motion challenged only venue. App. Ex. 2. The motion did not seek to dismiss the Complaint as legally insufficient. The arguments cannot be raised before this Court when they were not raised below. *E.g.*, *Mims v. State*, 994 So. 2d 1233, 1235 (Fla. 3d DCA 2008) ("[T]he argument advanced by the State was not made or considered by the trial court. We cannot consider this argument for the first time on appeal.").

Even if it were appropriate at this stage of the appeal to consider these arguments, it is clear that MIA's Complaint not only alleges a legally sufficient claim for breach of contract, but also demonstrates the existence of a debtor-creditor relationship that supports venue in Miami-Dade County. The Complaint alleges that the parties agreed that MIA would prepare and submit an application to HUD for a grant to convert the Hacienda Villas housing project into an assisted living facility. Complaint, ¶ 8. Hacienda agreed that if the grant were awarded to Hacienda, it would retain MIA as an "implementation consultant" and as "managing agent" of the Hacienda Villas facility. *Id.* In accordance with their agreement, MIA prepared the grant application on Hacienda's behalf, Hacienda signed the application, and the application was submitted to HUD by MIA. *Id.* at ¶ 9. Hacienda acknowledged in Exhibit IX to the grant application that it had retained MIA, and relevant portions of Exhibit IX were quoted in the Complaint:

"Hacienda Villas has contracted with MIA Consulting Group, Inc. to implement the assisted living program and provide/manage the supportive services for the assisted living facility residents" and "MIA Consulting Group, Inc. has been contracted to manage the ALF portion of the Hacienda facility." *Id.* at ¶ 10.

HUD awarded Hacienda a multi-million dollar grant in March 2009, and later that year Hacienda began the conversion of its existing facility to an assisted living facility. *Id.* at ¶ 11-12. [4] All conditions precedent to Hacienda's performance under the contract -- including the duty to pay MIA at MIA's principal office in Miami-Dade County, Florida -- occurred or were satisfied. However, in breach of its agreement with MIA, and in contravention of its representations in the grant application, Hacienda refused to retain MIA as its "implementation consultant" and as "managing agent" for the facility and to pay MIA the agreed-upon amounts set forth in the grant application. *Id.* at ¶ 13.

Thus, Hacienda's argument that the allegations of the Complaint fail to state a cause of action for breach of contract lacks any merit whatsoever. The same allegations also demonstrate the existence of a debtor-creditor relationship. "Money due under a contract creates a debtor-creditor relationship between the

[4] To suggest, as Hacienda now does, that MIA provided no "services of any kind" to Hacienda is tantamount to reading only the even numbered paragraphs of the Complaint. SC Answer Brief, at 5. Furthermore, Hacienda's refusal after the grant was awarded to execute the consulting agreement appended to the grant application, and previously agreed to by the parties, does not mean that "no contract was ever entered into by the parties." SC Answer Brief, at 5.

parties." *Carter Realty Co. v. Roper Bros. Land Co., Inc.*, 461 So. 2d 1029, 1030 (Fla. 5th DCA 1985) (the Fifth District further noting that "[w]here the alleged breach is a failure of a defendant to pay money due under the contract the breach occurs where the defendant was obligated to pay and deliver the money.").

Hacienda chides MIA for not attaching the entire grant application to its Complaint. SC Answer Brief, at 10 n.5. This argument was not raised in Hacienda's venue motion, App. Ex. 2, and is waived, *e.g.*, *Mims*, 994 So. 2d at 1235, but in any event, attaching the entire application was unnecessary to state a cause of action. The salient provisions of the grant application reciting Hacienda's acknowledgment that MIA was to be retained were quoted verbatim in the Complaint. *See* Complaint, ¶ 10 ("Hacienda Villas has contracted with MIA Consulting Group, Inc. to implement the assisted living program and provide/manage the supportive services for the assisted living facility residents" and to "manage the ALF portion of the Hacienda facility.")

On the other hand, Hacienda's failure to file the grant application (or, at a minimum, the salient compensation provisions incorporated in the grant application) in support of its venue motion has significant negative repercussions to Hacienda's effort to change venue. Hacienda concedes, as it must, that it had the burden of proof to demonstrate improper venue, 3d DCA Initial Brief, at 9, and that the "the trial court must resolve any relevant factual disputes and then make a

legal determination as to proper venue." SC Answer Brief, at 9; *see also Inverness Coca-Cola Bottling*, 78 So. 2d at 102 ("[T]he burden of pleading and proving that the venue is improper, if such is the fact, is upon the defendant."). Although Hacienda insists that it raised the issue of unliquidated damages before the Circuit Court, the record does not support that assertion.[5] Hacienda's sole, unverified argument in the Circuit Court in support of a change of venue was that "[t]he services alleged to be provided by [MIA] were to be provided at the Hacienda Villas [facility] in Tampa, Hillsborough County, Florida." *See* Hacienda Motion to Dismiss for Improper Venue, at ¶ 7, App. Ex. 2. Hacienda failed to proffer any evidence in the Circuit Court, including the grant application, to prove that MIA's damages were, in fact, unliquidated. The first time that Hacienda made any written assertion concerning the alleged unliquidated nature of MIA's damages was before the Third District in its Initial Brief. Hacienda's 3d DCA Initial Brief, at 13 (arguing that the *Croker* rule is inapplicable because "there is no certain sum

[5] Hacienda says that it raised the issue of MIA's "unliquidated" damages before the Circuit Court at the May 6, 2010 hearing on its venue motion by citing to *Morales Sand & Soil, L.L.C. v. Kendall Properties & Investments*, 923 So. 2d 1229 (Fla. 4th DCA 2006), but there is no hearing transcript or other evidence to support that contention. The Stipulated Statement of Facts does not reflect that Hacienda made *any* argument on this specific point, but merely relied on the *Morales Sand* case. Stipulated Statement of Proceedings, ¶ 3, Hacienda's App. Ex. 6. Even if the issue had been raised by Hacienda before the Circuit Court, unsworn arguments of counsel in support of a motion to change venue are insufficient as a matter of law. *Singer v. Krevoy*, 457 So. 2d 590, 591 (Fla. 3d DCA 1984); *Davis v. Dempsey*, 343 So. 2d 950, 952 (Fla. 3d DCA 1977).

alleged to be due and owing," i.e., MIA's damages were "unliquidated.").

That the relevant portions of the grant application were not proffered to the Circuit Court is a fatal error that rests at the feet of Hacienda, *not* MIA. If the instant venue determination actually hinges on whether MIA's damages are liquidated or unliquidated (a proposition that MIA disputes, *see supra* at pp. 1-8), then it was Hacienda's burden in the Circuit Court to "plead and prove" such facts in order to obtain a change of venue. *Inverness Coca-Cola Bottling Co.*, 78 So. 2d at 102. A defendant cannot satisfy its burden to show that venue is improper by relying on an unsworn motion or argument of counsel, as Hacienda did below. Hacienda was required to proffer affidavits, testimony, or other evidence showing that venue is improper. *Singer v. Krevoy*, 457 So. 2d 590, 591 (Fla. 3d DCA 1984) (unsworn motion to change venue without testimony, affidavits or other evidence is insufficient as matter of law); *Davis v. Dempsey*, 343 So. 2d 950, 952 (Fla. 3d DCA 1977) (absence of sworn proof is fatal to motion to change venue). If Hacienda had timely raised the contention that MIA's damages were unliquidated *and* properly supported the contention with evidence, then either party could have filed the salient portions of the grant application or proffered other evidence to permit the Circuit Court to make a factual finding.

Having failed to raise the issue properly in the Circuit Court, Hacienda then compounded its error by making the same unsworn argument on appeal. Just as

there was no evidence to support the naked argument of Hacienda's counsel before the Circuit Court, there was likewise no evidence before the Third District. Yet, surprisingly, and in the teeth of its own decisions which reject unsworn or unverified venue challenges, *see Singer*, 457 So. 2d at 591; *Davis*, 343 So. 2d at 952, the Third District accepted as true Hacienda's argument on appeal that MIA's damages were "unliquidated." There was absolutely no evidence on this point. The Third District should not, consistent with *Singer* and *Davis*, have considered the argument. To do so was prejudicial to MIA. At most, the Third District should have remanded to the Circuit Court for a determination on this factual issue.

Hacienda now argues that "[e]ven accepting the notion that there was some type of agreement for Hacienda to later employ MIA to perform services at its facility in Hillsborough County, *there clearly is no set amount of money due and owing to MIA*." SC Answer Brief, at 11 (emphasis added). That unsworn argument, at best, flies in the face of a contrary set of facts known to Hacienda. Hacienda is aware that its own signed grant application incorporated the agreed-upon terms under which Hacienda would pay MIA, including the specific compensation to be paid to MIA. Hacienda stipulated in the application that, if the HUD grant were to be awarded, it would pay MIA a fixed fee of $120,000 for "project implementation" and an 8% management fee for management of the assisted living facility.

Hacienda contends that the Court cannot consider the provisions of the grant application that recite the fees to be paid to MIA since the entire grant application was not attached to the Complaint or filed in the Circuit Court. SC Answer Brief, at 20. The argument misses the point entirely. It was Hacienda's burden -- not MIA's -- to file the grant application with the Circuit Court if it wanted to assert that MIA's damages were unliquidated. It failed to do so, no doubt because it was keenly aware that the grant application did not support its argument. In any event, the grant application was expressly referenced in the Complaint, and the portions relevant to Hacienda's acknowledgement of its retention of MIA were quoted in the Complaint. *See* Complaint, ¶ 10. Because MIA's claim is expressly predicated on the grant application, a court is entitled to consider those portions of the grant application not quoted in the Complaint. *Veal v. Voyager Property and Cas. Ins. Co.*, 51 So. 3d 1246, 1249-1250 (Fla. 2d DCA 2011) ("[T]he complaint refers to the settlement agreement. . . . [S]ince the complaint impliedly incorporates the terms of the agreement by reference, the trial court was entitled to review the terms of that agreement to determine the nature of the claim being alleged.").

III. CONCLUSION

For the reasons stated above, MIA respectfully requests the Court to reverse the Third District's Opinion and affirm the Circuit Court's order denying Hacienda's Motion to Dismiss for Improper Venue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Petitioner hereby certifies that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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