IN THE SUPREME COURT OF FLORIDA

ANAMARIA SANTIAGO,

Petitioner,

v.

MAUNA LOA INVESTMENTS, LLC

Respondent.

Case No.: SC13-2194

L.T. Case Nos. 3D12-1825
10-07498-CA-04

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND THE FACTS

This appeal is from a decision by the Third District Court of Appeal that reversed a final judgment entered in favor of Petitioner, Anamaria Santiago ("Plaintiff"), and against Respondent, Mauna Loa Investments, LLC ("Defendant"), in a premises liability action. (A95;R3:395-400;**Appendix ("App.") A**)[1] This case arose when Plaintiff, a tenant of the Defendant, tripped and fell in a warehouse and suffered severe personal injuries. (A113:49-50;A138:3,5,18-19,26;A127;A130) Plaintiff's complaint asserted that: (1) Defendant owned, maintained, or controlled the property at the relevant time; (2) Defendant was responsible for the safety of the premises; (3) Defendant negligently maintained the premises and failed to warn Plaintiff about the unsafe condition of the premises; and (4) because a walkway was in disrepair and had developed holes and uneven areas, Plaintiff tripped on a poorly maintained walkway, fell, and suffered severe personal injuries and damages. (A3)

Defendant's liability was decided by default. (**App. A**) This appeal relates to Defendant's multiple requests that the default be vacated. Over a period of almost two years, Defendant filed five motions (as well as several other

[1] Record cites will be to "R," followed by the volume and page. R1:1 refers to volume 1, page 1. References to "A" are to the Appellant's appendices filed with the Third District and identified generally in the record index as located behind Tab A. A1:1 refers to tab 1, page 1. Additionally, references to the Third District's opinion, found at R3:395-400, will be to **App. A**.

documents), asking the trial court again and again to vacate the order. (**App. A** at 3;A1) Two different trial judges were assigned to this case over the life of this litigation, and they both rejected Defendant's arguments and denied the many requests to set aside the default. (**App. A** at 4,n.3;A10;A33;A34;A37;A43;A58)

Eventually, the case proceeded to trial on damages, and the trial court entered final judgment in favor of Plaintiff. (A97) Following the denial of Defendant's post-trial motion (A99), Defendant timely appealed to the Third District.[2] (R1:1-3) Because the Third District's decision expressly and directly conflicted with other decisions from this Court and from other District Courts of Appeal, Plaintiff filed a timely notice to invoke the discretionary jurisdiction of this Court.[3] After reviewing the parties' jurisdictional briefs, this Court exercised its discretion in favor of resolving this case on the merits.

Defendant Never Asserted That The Complaint Failed To State A Cause Of Action

The majority of the litigation in this case focused on whether the trial court, in its discretion, should vacate the default. (A8;A11;A18;A27;A108;A42) We summarize most of those arguments in the next section. Here, we address a unique argument that Defendant raised late. More than eleven months into this litigation

[2] The trial court rendered the judgment on June 14, 2012 (A1), and Defendant filed the Notice of Appeal on July 6, 2012, *i.e.* within 30 days. As a result, Defendant's appeal was timely. *See* Fla. R. App. P. 9.110.

[3] The Third District issued the revised opinion on October 16, 2013, and Plaintiff filed the Notice to Invoke within thirty (30) days, on November 12, 2013. As a result, this appeal is timely. *See* Fla. R. App. 9.120(b).

and after filing two motions to set aside the default (A8;A11), Defendant filed a motion asserting that the default should be vacated because Plaintiff had fraudulently filed suit against Defendant despite knowing all along that another party was the property owner at the relevant time. (A18;A27) In support, Defendant attached a recent complaint that Plaintiff had filed against another business, Iberia N.V., LLC. (A18;A27) Attached to this new complaint was a deed reflecting that Iberia owned the warehouse premises at the time Plaintiff fell. (A18;A27) So, according to Defendant, the default could not stand because Plaintiff knew all along that Defendant was not liable for Plaintiff's injuries and had even filed a suit against the proper party who had owned the premises at the relevant time. (A27)

Plaintiff's counsel responded to the allegations about ownership by explaining that he had filed the other action only to protect Plaintiff's interests in light of the impending statute of limitations and because Defendant had previously and repeatedly claimed that Defendant did not own the building. (A32:9-10; A108:5) Plaintiff's counsel added that he had subsequently dismissed that action because he later obtained concrete evidence establishing that Defendant did, in fact, own the property when Plaintiff fell. (A31;A32:9-10;A108:9-12) Once again, the trial court denied the request to vacate the default. (A33;A34;A37)

Never once, not in the trial court and not on appeal, did Defendant ever assert that the default was error as a matter of law (as opposed to an abuse of discretion) because the complaint wholly failed to state a cause of action for premises liability against Defendant. (A8;A9;A11;A18;A27;A42;A108;A109) Nonetheless, the Third District reversed on this basis. (R3:389-94) In doing so, the Third District expressly relied upon matters outside the four corners of Plaintiff's complaint. (*Id.*) Specifically, the Third District relied upon the complaint against Iberia and the attached deed to conclude that Plaintiff had "admitted" that Defendant did not own, control, or maintain the premises when Plaintiff was injured. (*Id.*)

Plaintiff filed a motion for rehearing and/or rehearing *en banc*, asserting, among other things, that the Third District had improperly ruled based on an argument that Defendant had never raised in the trial court or even on appeal, and had improperly relied upon matters outside the four corners of the complaint to conclude that it failed to state a cause of action. (R3:291-309) In support, Plaintiff pointed to decisions from other district courts of appeal as well as another Third District decision that had been issued the same day as the decision in this case, which properly limited the review to the allegations in the complaint. (*Id.*) Plaintiff further argued that, by considering matters outside the complaint, the Third District improperly converted its review of Plaintiff's action into a summary judgment, but

without any of the constitutional protections afforded by Florida Rule of Civil Procedure 1.510. (*Id.*)

The Third District granted rehearing, in part, and substituted a new, revised opinion in place of the original one. (**App. A**) The revised opinion persisted in granting relief to Defendant based upon an argument Defendant had not made in the trial court or on appeal. (*Id.*) It also continued to rely on matters outside the four corners of the complaint to conclude that the complaint failed to state a cause of action because Plaintiff "admitted" that Defendant did not own, control, or maintain the premises when Plaintiff fell. (*Id.*)

Defendant Focused Its Arguments On The Typical Discretionary Analysis Governing Whether A Default Should Be Vacated[4]

Instead of presenting the question of law relied upon by the Third District, Defendant filed four motions testing the discretionary standard that typically governs a request to vacate a default. (A8;A11;A18;A27) It was undisputed below that Defendant's burden was to establish three things: excusable neglect, a meritorious defense, and due diligence in seeking relief after learning of the default. (A8;A11;A18;A27) Defendant's numerous attempts to meet this burden were not consistent, and sometimes even contradictory. (*Id.*)

[4] Attached hereto as **Appendix C** is a detailed timeline showing the actual dates of the various motions, orders, and hearings.

Importantly for the first prong – excusable neglect – Plaintiff served the complaint on Defendant in February 2010, and attorney Calejo appeared for Defendant nine days later. (A1:6;A4) Plaintiff waited until May 5, 2010, to move for a default. (A5:1) The trial court entered the default on May 13, and a copy was mailed to attorney Calejo that same day. (A6)

Defendant waited three-and-a-half months to file a motion to set aside the default. (A8;A1:6) As to excusable neglect, Defendant admitted to receiving the complaint on February 17, but asserted that: (1) she had hired attorney Calejo to handle it; (2) her later attempts to contact him had been unsuccessful; (3) attorney Calejo waited until August 30, 2010, to tell her that he would not handle the case; (4) she hired attorney Rudd on August 31, 2010; and (5) attorney Rudd discovered the default. (A8:1).

As to its due diligence in failing to seek relief sooner, Defendant, through its principal Mawanphy Gil, claimed in the motion that she did not know about the default before August. (A8:1-2). And, as to the third required prong, the motion summarily alleged that Defendant "has meritorious defenses and has basis [sic] for questioning [Plaintiff's] complaint." (A8:2) The motion did not attach the proposed affirmative defenses. (A8:2)

Nearly four months after its first motion – now almost one year from when its answer had been due – Defendant addressed the meritorious defense aspect of

its burden by filing an unverified answer and affirmative defenses. (A9). That document alleged only one defense – that Defendant owed no duty to Plaintiff because it did not own or control the premises at the relevant time. (A9) It did not challenge Plaintiff's allegation that Defendant was responsible for maintaining the premises. (A9)

A couple days later, the trial court held a hearing on the first motion and denied it. (A10) Defendant quickly filed a rehearing motion. (A11) This time Defendant's principal took a different approach on the due diligence prong. Contrary to her verified representation in the first motion, Ms. Gil admitted that she had, in fact, received the default in May. (A11:1) This motion did not acknowledge that she had previously filed a verified motion attesting the opposite – that she did not know of the default until after August, when her new attorney discovered it. (*See* A8:1-2) Another inconsistency in this motion was that she now alleged that she had in fact talked to attorney Calejo about the default, and that he had assured her that things were under control. (A11:1) In her first motion, Ms. Gil had alleged that the attorney never responded to her attempts to reach him until August 30 when he withdrew. (A8:1) With these new allegations, she asserted the four-month delay in filing the first motion was the fault of her attorney, and that her actions were reasonable. (A11:1)

Approximately eight months later (and without requesting a hearing or a ruling on the motion for rehearing), Defendant filed another motion, asserting a new argument altogether. More than fifteen months after the default was entered, Defendant now argued that the default should be set aside for "misrepresentation or mistake" because Plaintiff had sued the wrong entity as the owner. (A18) Defendant relied on only one argument in support – that Plaintiff had filed another action alleging that another party, Iberia N.V. (and others), owned the premises when Plaintiff fell and was, therefore, responsible. (A18) Defendant's motion was not verified, and she attached no supporting documents or affidavits. (A18) In addition, the motion did not address the other bases for premises liability – control or maintenance of the premises. (A18) And, as we explained in the first section, Defendant never asserted that Plaintiff's complaint failed to state a cause of action for premises liability. (A18)

After another three months passed, Defendant filed yet another motion, called: Amended Motion to Set Aside Default Based Upon Misrepresentation (or Mistake).[5] (A27) The Amended Motion took another run at the excusable neglect and due diligence prongs, based on yet another version of events relating to attorney Calejo. (A27) In an attached affidavit, attorney Calejo explained that he

[5] The Amended Motion to Vacate for Mistake was Defendant's fourth attempt to set aside the default. The Third District's reversal of the final judgment was premised upon this Amended Motion and the documents attached as exhibits. (*See* **App. A** at 3)

failed to respond to the complaint and to attend the hearing on the default motion because his secretary had not calendared the relevant dates after he and his secretary had a "falling out." (A28:1-2) However, attorney Calejo did not explain why he took no action to set aside the default between May and August 2010, and he did not clarify which of Ms. Gil's representations about their contact was actually the truth. (A28)

Otherwise, the Amended Motion made clear that Defendant's argument about ownership related to the third element for securing a default – the existence of a meritorious defense. (A27:3) An affidavit was attached to shore up this argument, too. The second attorney (attorney Rudd) represented that the very first motion had been denied only because he had failed to prove that he had filed an answer alleging a meritorious defense.[6] (A29:3-4) His affidavit went on to state that, by filing a separate action against another party, Plaintiff has now agreed that Defendant was not the property owner at the relevant time. (A29:3-4)

This Amended Motion attached the complaint the Plaintiff had filed against Iberia ("the Iberia complaint") in June 2011, which was almost a year-and-a-half after Plaintiff had filed suit against Defendant in this action. (A3;A29,Ex.H). The Iberia complaint alleged that these parties owned, controlled, or were responsible

[6] Because the January 13 hearing was not transcribed, the record is unclear as to why the trial court denied the first Motion to Vacate. (*See* A10) As argued below, it is likely the trial court denied the first motion because it failed to establish due diligence or a meritorious defense.

for the maintenance of the premises when Plaintiff fell, and that their negligence was the proximate cause of Plaintiff's injuries. (A29,Ex.H) The Iberia complaint attached a warranty deed showing that Iberia had transferred **ownership** of the premises to Defendant in October 2008, approximately three months after Plaintiff's accident. (A29,Ex.B to Ex. H;A18:1-2) This version of the motion also did not address the other bases for premises liability – control or maintenance of the premises. (A27)

As we explained above, Plaintiff's counsel responded to Defendant's ownership allegations and explained that he had filed the Iberia complaint only to protect Plaintiff's interests in light of the impending statute of limitations and because Defendant had previously claimed that it did not own the building. (A32:9-10;A108:5) Plaintiff's counsel added that he had subsequently dismissed the Iberia complaint because he later obtained concrete evidence establishing that Defendant did, in fact, own the property when Plaintiff fell. (A31;A32:9-10;A108:9-12).

The trial court denied Defendant's motions, and went on to prohibit Defendant from filing any additional motions related to the default. (A37)

In direct violation of that order, Defendant filed two other motions two weeks later, again asserting the existence of a meritorious defense because Defendant did not own the property when Plaintiff was injured. (A39;A42) This

time, in one of the motions and to support its claim, Defendant sought judicial notice of an affidavit Plaintiff had previously executed in an unrelated eviction action. (A39) Interestingly, unlike any of the prior motions, the second motion sought summary judgment and asserted an argument that Defendant had never made during the past fourteen months. (A6;A42) For the first time, Defendant claimed it was entitled to summary judgment because the complaint was not well pled because the causation allegations differed from the facts revealed in discovery. (A42;A110:12-13). These motions were denied as well. (A43;A58)

Shortly afterwards, the case was transferred to a new trial judge. (*Compare* A51 *with* A110) With the new judge came a new filing. This time, Defendant filed a sworn affidavit by Antonio Marmol, which was intended to establish that Iberia owned the premises on the day of Plaintiff's accident. (A53) However, that affidavit did not refute the other two bases for premises liability – control or maintenance. In fact, Antonio Marmol swore that, even though he owned Iberia's properties, he did not oversee them on a day-to-day basis. (A54:2) This fact was made clear at the trial on damages. The undisputed testimony established that Defendant oversaw operation of the premises through Defendant's principal, Ms. Gil, and her daughter, who was also an officer of Defendant. (A114:66,88-89,91,93,94-95;A115:102-03,105-07.) Indeed, Ms. Gil had so much control over

the premises that she instructed her daughter to forgive Plaintiff's rent from time to time. (A114:90-91;A115:102-03)

The new trial judge denied Defendant's latest round of arguments to vacate the default and issued another order prohibiting additional motions. (A58) Defendant ignored this prohibition order as well, this time filing: (1) a copy of the lease between Plaintiff's business and Iberia (A66); (2) a motion for protective order (A68); and (3) a new, but invalid, affidavit of Antonio Marmol. (A69)[7] At this late date, Defendant finally asserted that it did not own, maintain, or control the premises when Plaintiff fell. (A68:1-2;A69)

SUMMARY OF ARGUMENT

The Third District's decision in this case should be reversed. The court's opinion is fraught with legal errors and should not be permitted to remain in Florida's body of law. Indeed, in reversing the final judgment and in direct violation of long-standing, well-established Florida law, the Third District expressly relied upon matters outside the four corners of Plaintiff's complaint to conclude that Plaintiff's complaint wholly failed to state a cause of action against Defendant for premises liability. The court provided absolutely no explanation for

[7] The affidavit was not sworn, notarized, or accompanied by a proper *jurat.* As a result, the affidavit creates no evidentiary conflict with the default. *See Lackow v. Walter E. Heller & Co. S.E., Inc.*, 466 So. 2d 1120, 1125 (Fla. 3d DCA 1985).

its blatant violation of that law. Because no legal justification exists for the law's violation, the Third District's decision should be reversed.

The Third District's decision to set aside the default should also be reversed because the Third District usurped the trial court's broad discretionary authority as to default matters. In doing so, the Third District tried to convert a matter that is subject to an abuse of discretion standard into a question of law and then failed to follow the very rules that are applicable to that type of legal analysis. Thus, the Third District's decision should be reversed.

The Third District's decision should also be reversed because when the court determined that Plaintiff's complaint failed to state a cause of action, it erroneously concluded that the final judgment was void rather than merely voidable. *See Condo. Ass'n of La Mer Estates, Inc. v. Bank of New York Mellon*, 137 So. 3d 396, 400 (Fla. 4th DCA 2014) (holding that under Florida Supreme Court precedent, a default judgment is voidable, not void, where the defaulted complaint fails to state a cause of action). Then, the Third District compounded its error by granting Defendant relief from a voidable judgment more than one year after the entry of that judgment. Because relief was granted more than one year later, the Third District violated Rule 1.540 of the Florida Rules of Civil Procedure. *See Le Mer Estates*, 137 So. 3d at 400-02. As a result, the Third District's decision should be reversed for this reason as well.

The Third District's decision should also be reversed because by looking beyond the four corners of the complaint, the Third District improperly granted Defendant a summary judgment without providing Plaintiff any opportunity to be heard or to present conflicting evidence as to Defendant's ownership of the property at the relevant time. Thus, the Third District deprived Plaintiff of both the protections of Rule 1.510 of the Florida Rules of Civil Procedure and the due process clauses of the Florida and United States Constitutions. Therefore, the Third District's decision should not be allowed to stand.

Moreover, the Third District's decision must not be permitted to remain in the body of Florida law because in resolving the case in this manner, the Third District improperly treated the two complaints – the Iberia complaint and Plaintiff's complaint – as if they had been merged into one, unitary case or cause of action. Such a treatment of the two complaints violated the long-standing rule that consolidation does not a merger make. To make matters worse, the Third District's opinion also deprived Plaintiff of her right to plead inconsistent, even mutually exclusive, causes of action in the alternative under Rule 1.110 of the Florida Rules of Civil Procedure. Furthermore, by granting Defendant relief it never even requested and without providing Plaintiff any opportunity to be heard on the issue, the Third District violated Plaintiff's right to due process under the

Florida and United States Constitutions. Therefore, the Third District's decision should be reversed.

The decision should also be reversed because, ultimately, the Third District overlooked the fact that property ownership is only one foundation upon which premises liability can lie. Plaintiff had also alleged that Defendant controlled or maintained the property at the relevant time. Because the deed pertained only to ownership and not to control or maintenance, the deed did not undermine Plaintiff's complaint in so far as it alleged that Defendant controlled or maintained the premises when Plaintiff tripped and fell. Consequently, Plaintiff's complaint still stated a cause of action for premises liability against Defendant, even if Defendant had proved as a matter of undisputed fact that it did not own the property at the relevant time – which Defendant clearly did not do. Therefore, the Third District's conclusion that Plaintiff's complaint wholly failed to state a cause of action against Defendant for premises liability was patently incorrect. As a result, this Court should reverse the Third District and affirm the final judgment.

Finally, the final judgment should also be affirmed because the trial court did not abuse its discretion by refusing to set aside the default in this case. None of Defendant's motions established the necessary bases for setting aside a default – excusable neglect, due diligence, and a meritorious defense. Therefore, given the broad discretion afforded to trial courts in default matters and the fact that the

Third District did not find an abuse of discretion in this case, nor was there any, the final judgment should be affirmed.

ARGUMENT

I. The Third District's Decision Is Fraught With Legal Errors And Should Therefore Be Reversed And The Final Judgment Affirmed

Standard of Review: Whether a complaint states a cause of action is an issue of law that is subject to the *de novo* standard of review. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009) (citations omitted); *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citation omitted).

We begin by acknowledging that Florida appellate decisions reflect a policy generally favoring the liberal exercise of discretion by trial courts in vacating defaults so that cases may be decided on their merits. *See, e.g., Reicheinbach v. Southeast Bank, N.A.*, 462 So. 2d 611, 612 (Fla. 3d DCA 1985). In its discretion, a trial court may set aside a default judgment only upon a showing of excusable neglect, the existence of a meritorious defense, and due diligence in seeking relief after learning of the default. *See Wolff v. Piwko*, 104 So. 3d 372, 375-76 (Fla. 3d DCA 2012); *Wells Fargo Bank, N.A. v. Jidy*, 44 So. 3d 162, 164 (Fla. 3d DCA 2010). These arguments were well vetted in the trial court by two different trial judges reviewing multiple motions to vacate the default. At every turn over the course of more than two years of litigation, both trial judges reached the same

conclusion – Defendant did not establish a right to relief from the default. The Third District's opinion did not question or invalidate the trial judges' conclusions in this regard. (**App. A**)

Rather, the Third District premised its reversal of the final judgment on a new argument – one not raised in the trial court or even on appeal – that is a question of law, not of discretion. (*Id.*) The Third District determined that the final judgment must be reversed because Plaintiff's complaint wholly failed to state a cause of action against Defendant for premises liability as a matter of law. This Court should reverse the Third District's decision because in reversing the final judgment, the Third District improperly: 1) looked beyond the four corners of Plaintiff's complaint to determine that it did not state a cause of action; 2) usurped the trial court's broad discretionary authority in default matters; 3) granted Defendant relief on a voidable judgment more than one year after its entry; 4) granted Defendant a summary judgment in violation of rule 1.510 and Plaintiff's due process rights; 5) treated Plaintiff's complaint as if it were merged with the Iberia complaint; 6) denied Plaintiff her right to plead claims in the alternative; 7) relied upon an argument Defendant never raised below or on appeal without providing Plaintiff the right to brief the issue; and 8) overlooked the remaining, unquestioned allegations in Plaintiff's complaint which were sufficient by themselves to state a cause of action. Then, upon reversal, this Court should also

affirm the final judgment because the Third District did not find an abuse of discretion nor did one occur in this case.

A. The Third District Improperly Looked Outside the Four Corners Of Plaintiff's Complaint

Plaintiff acknowledges that a default may be challenged if the complaint fails to state a cause of action because the effect of the default is to admit only the well pleaded allegations of the complaint. After all, if the complaint fails to state a cause of action, then arguably nothing is admitted by default. It is the scope of this inquiry that forms the basis of Plaintiff's argument here. The undisputed law of this Court and of all the district courts of appeal in Florida is that a court must confine its review to the four corners of the complaint when determining whether that complaint states a cause of action upon which relief can be granted. Because the Third District relied upon matters outside the four corners of Plaintiff's complaint, however, the Third District's decision should be reversed.

In determining whether a complaint states a cause of action, it is axiomatic that the defect alleged to defeat the cause of action must appear on the face of the challenged complaint. *E.g., Neuteleers v. Patio Homeowners Ass'n, Inc.*, 114 So. 3d 299, 301 (Fla. 4th DCA 2013). As this Court has repeatedly held, a court "must confine itself strictly to the allegations within the four corners of the complaint," when reviewing the sufficiency of that complaint. *E.g., Pizzi v. Central Bank & Trust*, 250 So. 2d 895, 986 (Fla. 1971) (citation omitted). The purpose of this

review is not to determine issues of ultimate fact. *Berdick v. Costilla*, 97 So. 3d 316, 318 (Fla. 2012) (citation omitted); *see also McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So. 2d 214, 215 (Fla. 2d DCA 1998). The question is merely whether the complaint adequately states a cause of action and apprises the opposing party of the charges against it. *See Hammonds v. Buckeye Cellulose Corp.*, 285 So. 2d 7, 11 (Fla. 1973).

Every district court in Florida, including the Third District itself, has articulated and adhered to this well-established rule that requires a court to confine itself to the four corners of the complaint when determining whether that complaint states a cause of action. *See, e.g., Adams v. Lieberman*, 507 So. 2d 716, 717 (Fla. 1st DCA 1987); *Baycon Industr., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998); *Minor v. Brunetti*, 43 So. 3d 178, 179 (Fla. 3d DCA 2010); *Posner & Sons, Inc. v. Transcapital Bank*, 65 So. 3d 1193, 1199 (Fla. 4th DCA 2011); *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1206-07 (Fla. 5th DCA 2003). Whether a complaint states a cause of action is a question of law and nothing outside the complaint and its attachments may be considered. *Berdick*, 97 So. 3d at 318; *see also Lonestar Alternative Solution, Inc. v. Leview-Boymelgree Soleil Developers, LLC*, 10 So. 3d 1169, 1171-72 (Fla. 3d DCA 2009); *Thompson v. Martin*, 530 So. 2d 495, 496 (Fla. 2d 1988).

Prior to the Third District's decision in this case, this same limitation applied to the review of defaulted complaints. *E.g., Rhodes v. O. Turner & Co., LLC*, 117 So. 3d 872, 875-77 (Fla. 4th DCA 2013) (confining review to four corners of complaint to determine whether defaulted complaint stated a cause of action), *receded from on other grounds, La Mer Estates*, 137 So. 3d at 396-401. To do otherwise would be to improperly treat a motion to dismiss as a motion for summary judgment. *E.g., Hill v. Murphy*, 872 So. 2d 919, 921 (Fla. 2d DCA 2003) (citation omitted). If a trial court cannot look to matters outside the four corners of a complaint, then a district court may not either. *See Rivera v. Torfino Enters., Inc.*, 914 So. 2d 1087, 1090 (Fla. 4th DCA 2005) (concluding that district court on appeal may not look outside four corners to determine whether complaint states a cause of action).

The cases cited by the Third District to support its reversal do not contradict this well-established law. Rather, the Third District cited to five decisions which actually followed the long-standing rule that the sufficiency of the complaint must be determined from the allegations on its face: *Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla. 3d DCA 2009); *Morales v. All Right Miami, Inc.*, 755 So. 2d 198, 198 (Fla. 3d DCA 2000); *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 Sol. 2d 490, 493-94 (Fla. 3d DCA 1994); *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989); and *Sunshine Sec. & Detective Agency v. Wells Fargo Armored*

Servs. Corp., 496 So. 2d 246, 246 (Fla. 3d DCA 1986). (**App. A** at 5) In every single one of those decisions, the Third District confined its review to the four corners of the complaints and any attached exhibits. Indeed, in *Becerra*, the Third District expressly stated that the determination as to the sufficiency of a complaint is limited to whether "the defect is apparent from the face of the complaint." 551 So. 2d at 488; *see also Bank of New York Mellon v. Reyes*, 126 So. 3d 304, 304-09 (Fla. 3d DCA 2013) (where the court looked only to the allegations of the defaulted counterclaim to determine the validity of the cause of action for purposes of reviewing the denial of a motion to vacate a default judgment).[8]

Contrary to all of this well-established law, however, the alleged defect the Third District relied upon to reverse the final judgment did not appear on the face of Plaintiff's complaint. Rather, it was found in the Iberia complaint and the deed attached to it. (**App. A** at 5-6) The Third District did not provide any explanation for its decision to review matters outside the four corners of Plaintiff's complaint in violation of the well-established law prohibiting such a procedure. (**App. A**)

The Third District's decision to violate this long-standing law was all the more troubling because Plaintiff had properly dismissed the Iberia complaint the Third District relied upon before the hearing on the Amended Motion to Vacate for Mistake. Obviously, a complaint filed in a separate action or attached to a

[8] Ironically, the Third District issued the *Reyes* opinion the same day it issued the original, subsequently withdrawn opinion in this case.

document filed by Defendant (not Plaintiff) is outside the four corners of Plaintiff's complaint. For that reason, the Third District should not have considered the deed or the Iberia complaint in the first instance. *Cf. Hill*, 872 So. 2d at 921 (concluding that the trial court did not abuse its discretion by refusing to vacate a default where the movant relied on matters outside the four corners of the complaint to argue that the complaint wholly failed to state a cause of action). Therefore, the Third District's decision should be reversed.

B. The Third District Improperly Usurped The Trial Court's Broad Discretionary Authority In Default Matters

The Third District's decision should also be reversed because the Third District invaded the trial court's broad discretionary authority in default matters. As the Third District noted, Defendant filed no fewer than five motions to set aside the default, all of which were denied by two separate trial judges over the course of more than two years of litigation. By attempting to convert the trial courts' discretionary decisions into an issue of law – yet violating the very rules it sought to apply – the Third District improperly usurped the trial court's discretion in default matters. *See, e.g., Farish v. Lum's, Inc.*, 267 So. 2d 325, 327-28 (Fla. 1972) ("The exercise of discretion by a trial judge who sees the parties first-hand and is more fully informed of the situation is essential to the just and proper application of the procedural rules. In the absence of facts showing an abuse of that discretion, the trial court's decision excusing or refusing to excuse noncompliance with rules

... must be affirmed."). This is particularly true in this case because, as argued below, the Third District granted Defendant relief it never even requested in the trial court or on appeal. *See id.* at 327-328 ("In considering the exercise of discretion courts must recognize that litigants may not properly be allowed with impunity to disregard the process of the court, and, indeed, it would be an abuse of discretion to vacate a judgment when the moving party shows no legal ground therefor and offers no excuse for his or her own negligence or default." (citation omitted)). Such a practice should not be condoned by this Court, nor should such a decision be permitted to remain in the body of Florida law. Therefore, the Third District's decision should be reversed and the final judgment affirmed.

C. The Third District Improperly Treated The Judgment As Void Rather Than Voidable And Then Granted Relief From The Judgment More Than One Year After Its Entry In Violation Of Rule 1.540

The Third District's decision should also be reversed because it concluded that the failure of Plaintiff's complaint to state a cause of action rendered the final judgment void rather than merely voidable. *See La Mer Estates, Inc.*, 137 So. 3d at 400. In *La Mer Estates*, the Fourth District recently[9] sat *en banc* and concluded that

[9] This *en banc* decision was issued well after Plaintiff's motion for rehearing and/or for rehearing *en banc* in the Third District (R3:291-309) and, therefore, Plaintiff did not have an opportunity to present this argument to the Third District during the appeal below. At that time, Third District precedent reached the contrary conclusion. *See Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla. 3d DCA 2009). The Fourth District certified conflict with *Moynet* in *Le Mer Estates*. *See La Mer Estates*, 137 So. 3d at 401.

a default final judgment based upon a complaint that fails to state a cause of action is merely voidable, not void. *Id.* at 397-401. In doing so, the Fourth District reversed its pre-existing law on this issue. The *en banc* court also concluded that because the defendant had failed to move for relief from the voidable default final judgment within one year as required by rule 1.540(b) of the Florida Rules of Civil Procedure, the defendant was not entitled to relief from the default judgment on the ground that the complaint did not state a cause of action. *Id.* at 397. That is the same conclusion this Court should reach here.

At no time in the trial court or on appeal, did Defendant argue that the final judgment was void or even voidable because Plaintiff's complaint wholly failed to state a cause of action against it. Rather, nearly three years after the entry of the default and more than one year after the entry of the final judgment, the Third District, on its own initiative, concluded that Plaintiff's complaint wholly failed to state a cause of action against Defendant for premises liability. (**App. A** at 6) As the Fourth District recently ruled, however, such a conclusion would render the final judgment voidable, not void. *See La Mer Estates*, 137 So. 3d at 397-401; Fla. R. Civ. P. 1.540(b). As a result, Rule 1.540 of the Florida Rules of Civil Procedure required Defendant to seek relief from the allegedly voidable final judgment within one year. *Id.*; Fla. R. Civ. P. 1.540. Here, the Third District vacated the final judgment approximately sixteen months after its rendition and without Defendant

ever actually requesting relief on that ground.[10] Therefore, the Third District granted Defendant relief from a voidable final judgment – relief Defendant never even requested – well beyond the one-year period provided by rule 1.540. *See La Mer Estates*, 137 So. 3d at 398-99. As a result, Defendant was not entitled to have the final judgment vacated or reversed regardless of whether Plaintiff's complaint actually stated a cause of action. *Id.* at 397-401. Therefore, the Third District's decision should be reversed.

D. The Third District Improperly Granted Summary Judgment To Defendant In Violation Of Rule 1.510 Of The Florida Rules Of Civil Procedure And The Due Process Clauses Of The Florida And United States Constitutions

The Third District should also be reversed because its decision to set aside the default in this case granted Defendant a summary judgment against Plaintiff without affording her any of the protections required by Rule 1.510 of the Florida Rules of Civil Procedure or the due process clauses of the Florida and United States Constitutions. As explained above, the analysis here is the same as that used to consider a motion to dismiss for failure to state a cause of action. The corollary to the well-established law that prevents a court from looking beyond the four corners of the complaint is the equally well-known principle that relying on evidence outside the complaint improperly converts a motion to dismiss into a motion for summary judgment. *See, e.g., Baycon Industries, Inc.*, 714 So. 2d at

[10] The trial court entered the final judgment on June 14, 2012 (A97), and the Third District issued its revised opinion on October 16, 2013. (**App. A** at 1)

1095 (concluding that trial court improperly treated a motion to dismiss as a motion for summary judgment and stating: "A motion to dismiss is not a substitute for a motion for summary judgment, and in ruling on a motion to dismiss the trial court is confined to consideration of the allegations found within the four corners of the complaint."); *see also Hill*, 872 So. 2d at 921; *Stone v. Stone*, 97 So. 2d 352, 354 (Fla. 3d DCA 1957). The result of such an improper conversion is a violation of the non-movant's constitutional right to due process because the judgment is entered in favor of the movant on a judicial determination about the sufficiency of the evidence without ever affording the non-movant the opportunity to present the other side of the story. *See Stone*, 97 So. 2d at 354.

In fact, here, Plaintiff represented to the trial court that she had evidence that Defendant did, in fact, own the premises before the deed was executed and recorded. (A32:9-10;A108:9-12) Instead of challenging the sufficiency of Plaintiff's complaint and arguing that it failed to state a cause of action, however, Defendant filed the Amended Motion to Vacate for Mistake and accused Plaintiff of fraudulently alleging that Defendant owned the property when Plaintiff knew all along (by virtue of the Iberia complaint and deed) that Iberia actually owned the property at that time. Defendant essentially argued that Plaintiff sued the wrong corporation. Defendant supported that argument by filing a copy of the Iberia complaint, which attached the deed, which had been executed after the injury.

Then, Defendant relied upon those extraneous documents to argue – as undisputed fact – that it did not actually own the premises at the relevant time.

In the trial court, Plaintiff responded that, if afforded the opportunity, she could present evidence to refute Defendant's claim of lack of ownership. (A32:8-10;A108:9-12) Indeed, Plaintiff's counsel represented that he had concrete evidence that Defendant owned the premises at the relevant time regardless of the state of the record title. (*Id.*) Thus, this is not a case where an injustice occurred because a judgment was entered against the wrong party. Rather, Plaintiff assured the trial court that, if required to do so, she could prove that Defendant legally owned the premises before the title transferred of record. (*Id.*) Because the trial court denied the Amended Motion to Vacate, however, Plaintiff never had to produce her evidence of ownership to the trial court. Thus, by converting a motion-to-dismiss analysis into a summary judgment, the Third District deprived Plaintiff of her right to present evidence on this issue as provided by Rule 1.510 of the Florida Rules of Civil Procedure and the due process clauses of the Florida and United States Constitutions. *See generally Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard." (citation omitted)). As a result, the Third District's decision was clear legal error and it should not be permitted to stand.

Moreover, the Third District's erroneous conclusion should not be sustained because Plaintiff also argued, quite correctly, that ownership of the property is not the only basis for a premises liability action. Plaintiff also alleged that Defendant controlled or maintained the property when Plaintiff fell. Indeed, there was evidence in the appellate record before the Third District that Defendant controlled or maintained the premises at the time of Plaintiff's injury. (A108:4-6,9-12) Each of these – ownership, control, maintenance – is an independent basis for a premises liability action. *See, e.g., Worth v. Eugene Gentile Builders*, 697 So. 2d 945, 947 (Fla. 4th DCA 1997) (stating that it is not ownership of the property that determines the duty of care but actual possession and control); *Cooke v. Ins. Co. of N. America*, 652 So. 2d 1154, 1156 (Fla. 2d DCA 1995) (stating that ownership or control must be proved in a premises liability case).

Furthermore, even if ownership were determinative (which it is not), a deed, by itself, is not sufficient to establish ownership. Instead, the law is well settled that legal title to property creates only a rebuttable presumption of ownership. *See, e.g., Miller v. Berry*, 78 Fla. 98, 99-100, 82 So. 764 (Fla. 1919) (determining ownership not from the record title, but from independent evidence of ownership); *Hagopian v. Zimmer*, 653 So. 2d 474, 475-57 (Fla. 3d DCA 1995) (stating that the person whose name appears on legal title is "presumed" to be the owner); *see also In re Lezdey*, 373 B.R. 164, 170 (Bankr. M.D. Fla. 2007) ("In sum, Florida law

recognizes circumstances, like a gift or resulting trust, where an owner of record may be shown *not* to have any beneficial interest in the property.") (citing *Miller*, 78 Fla. at 99-100). This makes sense because the concept of ownership applies in multiple contexts which do not involve a legal deed – circumstances like gifts, resulting trusts, and adverse possession. *See Lezdey*, 373 B.R. at 170. Legal title is just one factor for determining ownership and sometimes is not a factor at all. Again, Plaintiff represented to the trial court that she could make such a showing here and establish that Defendant did own the premises before the legal title, *i.e.*, the deed relied upon by the Third District, was executed and recorded. (A32:9-10;A108:4-6,9-12)

These evidentiary issues were never reached in the trial court, however, in part because Defendant's allegations of fraud did not address Plaintiff's other, separate claims of control or maintenance. Having limited its fraud allegation only to the issue of ownership, Plaintiff's complaint (and, therefore, the resulting final judgment) stood unchallenged as to the elements of control or maintenance. For purposes of the Third District's decision, however, the result was that Plaintiff was never afforded the opportunity to present her opposing evidence.

Thus, the Third District's decision granted summary judgment to Defendant without considering the fact that Plaintiff was never given the opportunity to submit evidence to refute Defendant's claim that it did not "own" the property at

the relevant time. In doing so, the Third District violated long-standing Florida law which strictly narrows the occasions when a judicially-determined summary judgment is appropriate. Under established Florida law, summary judgment is simply not permitted where, as here, Plaintiff was denied notice and an opportunity to present conflicting evidence as to ownership, maintenance, or control of the premises, and in the face of apparent genuine issues of material fact. One of many descriptions of this restrictive summary-judgment standard is this Court's statement that "[t]he law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). The Third District did not meet that standard in this case.

Indeed, the Third District's violation of the summary-judgment standard was even more glaring here because the "evidence" the Third District considered was the Iberia complaint and the deed, which do not even qualify as summary judgment evidence under rule 1.510 of the Florida Rules of Civil Procedure or the applicable rules of evidence. Because those documents were neither certified nor authenticated, they were not admissible under the applicable rules. *See* Fla. R. Civ. P. 1.510(c); §§ 90.901, 90.902, Fla. Stat.; *cf. McWhirter, Reeves*, 704 So. 2d at 215-216 (stating that where pleadings from another matter were not before court

on proper grounds, the court had no basis to rely upon them to resolve the judicial estoppel issue on a motion to dismiss which was focused only on the four corners of the complaint at issue). Therefore, the Third District's decision should be reversed.

E. The Third District Improperly Merged The Two Complaints

The Third District's decision should also be reversed because the Third District treated Plaintiff's complaint and the Iberia complaint as if they had been merged into one, unitary case or cause of action. The fact that the two complaints had been consolidated into the same action for a brief period of time does not change the Court's analysis.[11] The consolidation of various actions does nothing to affect the pleading of the individual causes of action. As the Third District succinctly explained in *Shores Supply Company v. Aetna Casualty & Surety Company, Inc.*, 524 So. 2d 722, 725 (Fla. 3d DCA 1988) (citation omitted): "Consolidation does not merge suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another. Rather each suit maintains its independent status with respect to the rights of the parties involved." *See also Wagner v. Nova Univ., Inc.*, 397 So. 2d 375, 377 (Fla. 4th DCA 1981) (stating that consolidation "does not merge the suits into a single

[11] Strangely, the Third District stated that the fact that the Iberia complaint had been properly dismissed before the hearing on the Amended Motion to Vacate for Mistake did not affect its analysis in any way. (**App. A** at 6, n.4)

cause, or change the rights of the parties, or make those who are parties in one suit parties in another" (citation and footnote omitted)). Consolidated cases simply do not lose their individual identities as distinct, separately filed causes of action. *E.g., OneBeacon Ins. Co. v. Delta Fire Sprinklers, Inc.*, 898 So. 2d 113, 116 (Fla. 5th DCA 2005) (granting certiorari where trial court improperly treated consolidated cases as merged) (citing *CDI Contractors, LLC v. Allbrite Elec. Contractors, Inc.*, 836 So. 2d 1031, 1033 (Fla. 5th DCA 2002) ("Consolidation affects only the procedure of cases, but has no effect on the substantive rights of the parties in an individual case, and does not destroy their separate identities." (other citation omitted))). Thus, by looking to the Iberia complaint, which had been filed in a separate action and had been properly dismissed before the hearing on the Amended Motion, the Third District violated the fundamental, long-standing principle of Florida law that a consolidation does not a merger make. Indeed, by looking to the Iberia complaint to conclude that Plaintiff "admitted" that Iberia, and not Defendant owned, controlled, or maintained the Property at the relevant time, the Third District improperly treated the two, separate cases as if they had been merged into one. Since Plaintiff's complaint – the complaint the Third District challenged on its face – did not attach or even reference the Iberia complaint or the deed, however, the Third District's reliance upon those documents to determine that Plaintiff did not properly plead a cause of action was improper as

a matter of law. *See McWhirter, Reeves*, 704 So. 2d at 215-16. Therefore, the Third District's decision should be reversed.

F. The Third District Improperly Violated Plaintiff's Right To Plead Even Mutually Exclusive Claims In The Alternative

This Court should also reverse because the Third District's decision flies in the face of established Florida law which authorizes parties to plead even mutually exclusive claims in the alternative. *See, e.g., Holliman v. Green*, 439 So. 2d 955, 956-57 (Fla. 1st DCA 1983) (holding that HRS could join both the woman's husband and another possible biological father in the same paternity action thereby alleging, quite impossibly, that both men were the biological father of the child); *see also* Fla. R. Civ. P. 1.110(b) & 1.110(g); *Palafrugell Holdings, Inc. v. Cassel*, 825 So. 2d 937, 939 n.2 (Fla. 3d DCA 2001) (noting that pleading in the alternative is a "perfectly acceptable practice under Florida law" (citing Fla. R. Civ. P. 1.110(g)), *opinion corrected on other grounds*, 854 So. 2d 225 (Fla. 3d DCA 2003); *Bryant v. Stevens*, 313 So. 2d 124, 125 (Fla. 2d DCA 1975) ("A party is not estopped to maintain an inconsistent position in his pleadings unless the previous position has been successfully maintained." (citing *Olin's Inc. v. Avis Rental Car System of Fla.*, 104 So. 2d 509 (Fla. 1958))). Numerous decisions recognize that alternative pleading is essential where a plaintiff cannot ascertain which person or entity is liable without conducting the discovery permitted during litigation. *See* 29 Am.Jur.2d Evidence, § 791. Plaintiff simply was not required to know for certain

whether Defendant or someone else owned, controlled, or maintained the property prior to filing suit so long as she made her allegations in good faith. *Id.* Indeed, Florida law even allows Plaintiffs to file multiple counts in one complaint that contain inconsistent or even mutually exclusive allegations which, if not incorporated into other counts, may not be used by the opposing party as proof of an issue. *E.g. Vann v. Hobbs*, 197 So. 2d 43, 45 (Fla. 2d DCA 1967) ("[I]nconsistent positions taken by a party through the pleadings [in different counts] he files in an action may not be used by an opposing party as proof of an issue."); *Hines v. Trager Constr. Co.*, 188 So. 2d 826, 830 (Fla. 1st DCA 1966) ("Under the form of pleading permitted by the rule, the pleader may seek relief on causes of action asserted under any one or more different theories of law, each of which depend upon the establishment of facts which may be materially different from or inconsistent with those supporting the alternative claims based upon other theories of law ... the salutary purpose of the rule would be emasculated if not completely destroyed if the allegations of fact contained in an alternative and inconsistent statement of a cause of action or defense could be used in evidence against the pleader as proof of the facts alleged in such pleading."). On its face, the Third District's decision violated this well-established and long-standing procedural rule.

Moreover, the Third District's decision is erroneous because it is also conceivable that Iberia owned the property while Defendant controlled or maintained it, thereby potentially subjecting Iberia and Defendant to joint liability.[12] *See Improved Benev. & Protected Order of Elks of World, Inc. v. Delano*, 308 So. 2d 615, 618 (Fla. 3d DCA 1975) (holding landowner and contractor jointly liable for condition of premises). To allow the Third District's erroneous legal conclusions to stand would be to deprive litigants of the established right to plead even inconsistent claims in the alternative when necessary. It would also require trial courts to dismiss complaints that allege alternative claims against more than one defendant on the ground that neither claim stated a cause of action. That is not, and should not be, Florida law.

Another point should not be missed here. Even if the unauthenticated, uncertified deed proved Iberia owned the property, which Plaintiff flatly denies, it did not disprove the other allegations Defendant admitted by default, *i.e.*, that Defendant controlled or maintained the property at the relevant time. *E.g.*, *Regency Lake Apts. Assoc. Ltd. v. French*, 590 So. 2d 970, 974 (Fla. 1st DCA 1991) ("In general, a cause of action for premises liability does not hinge on legal title or ownership, but rather on the failure of the party who is in *actual possession or*

[12] Indeed, one view of the facts in this case tends to support the conclusion that Iberia may have owned the property, but in accordance with Marmol's sworn affidavit and the trial evidence, Ms. Gil and her daughter, as agents of Defendant, controlled and managed the property on a day-to-day basis.

control to perform its legal duty." (citation omitted)); *see also Link v. Gonzalez*, 699 So. 2d 266, 267 (Fla. 3d DCA 1997); *Solomon v. New ERA Meat No. 2*, 961 So. 2d 989, 989 (Fla. 3d DCA 2007). Even though Iberia may have owned the property, Defendant could still have been responsible for maintaining and controlling the property as Defendant admitted by default. *See Delano*, 308 So. 2d at 618. Because the Third District's opinion never even considered the sufficiency of the allegations that Defendant maintained or had control of the premises at the relevant time, however, both allegations remained as valid, undisputed, and defaulted bases for Defendant's duty to Plaintiff. That Plaintiff also alleged, in the separate, unincorporated, and subsequently dismissed Iberia complaint, that Iberia controlled or maintained the property does not establish that Plaintiff's complaint – the defaulted complaint – wholly failed to state a cause of action against Defendant or even that Iberia actually controlled or maintained the premises at the time of Plaintiff's injury. This is particularly true where Iberia's principal, Antonio Marmol, conceded he was not in day-to-day control of Iberia's properties (A54:2) and Defendant's principal and officer, Ms. Gil and her daughter, both testified at trial that they were, in fact, in control of the property long before legal title to the property transferred to their company, the Defendant. (*See* A54:2;A108:9-12;A114:66,88-89,91,93-95;A115:102-03,105-07) Therefore, because the Third District's decision deprived Plaintiff of her right to plead in the alternative, the

opinion should be reversed and the case remanded with instructions to affirm the final judgment

G. The Third District Improperly Granted Defendant Relief Based On An Argument Defendant Never Raised In The Trial Court Or Even On Appeal

The Third District's decision should also be reversed because the Third District also improperly granted Defendant relief even the Third District seems to have acknowledged that Defendant never sought in the trial court or on appeal and, therefore, failed to preserve. In its decision, the Third District made it clear that its reversal was premised on arguments presented in Defendant's Amended Motion to Vacate For Mistake. (**App. A** at 3) However, the Amended Motion did not present the legal theory that the Third District relied upon to reverse the final judgment, *i.e.*, that Plaintiff's complaint wholly failed to state a cause of action against Defendant for premises liability. (A27) Indeed, nowhere in the Amended Motion did Defendant assert that Plaintiff's complaint wholly failed to state a cause or action on its own or that the Iberia complaint caused Plaintiff's complaint to fail to state a cause of action against it. (A27) Rather, Defendant argued only that it was entitled to summary judgment because Plaintiff sued the wrong entity and fraudulently alleged in her complaint that Defendant owned the property when the documents attached to the Amended Motion showed that Plaintiff had "admitted" that Iberia actually owned the premises at the relevant time. (A27) The trial court considered Defendant's argument and rejected it. (A37) In its opinion, however,

the Third District discarded Defendant's argument on appeal that the trial court's ruling on the Amended Motion was an abuse of discretion. (**App. A**) Rather, even though Defendant had never made the argument, the Third District ruled, as a matter of law, that Plaintiff's complaint wholly failed to state a cause of action against Defendant as a direct result of the allegations contained in the Iberia complaint. Thus, the Third District reversed the final judgment based upon an argument Defendant had never made to the trial court in violation of Florida law.

Florida law is well settled that an appellate court is not permitted to reverse a trial court's ruling for a reason the appellant never presented to the trial court. *See Rachid v. Perez*, 26 So. 3d 70, 72 (Fla. 3d DCA 2010); *Roth v. Cohen*, 941 So. 2d 496, 500 (Fla. 3d DCA 2006) (quoting *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993)). Ironically, this established law has even been applied in the Third District on review of a default judgment. *See Wells Fargo Bank, N.A. v. Jidy*, 44 So. 3d 162, 163-64 (Fla. 3d DCA 2010) (refusing to reverse denial of a motion to vacate a default judgment where defendant failed to present the proper argument for relief in the trial court). That same rule applies where the challenge is a failure to state a cause of action. *See M&M Aircraft Servs., Inc. v. EC Technologies, Inc.*, 911 So. 2d 161, 162 (Fla. 3d DCA 2005) (concluding that issue of whether a defaulted complaint stated a cause of action was waived where it was not presented to the trial court (citation omitted)). No matter what, the argument must first be made to

the trial court in order to be considered by an appellate court. *See E.g., Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (citation omitted)); *see also Hammond v. State*, 12 So. 3d 252, 253 (Fla. 2d DCA 2009) (stating that because appellant did not make a specific argument to the trial court, it was not preserved for review on appeal (citation omitted)); *Bamberg v. State*, 953 So. 2d 649, 654 (Fla. 2d DCA 2007) (same).

Even if the Third District had looked at Defendant's numerous other motions challenging the default, none of those other motions asserted the argument relied upon by the Third District in its opinion either. (*See* A8;A11;A12;A18;A42) Indeed, Defendant did not even plead a failure to state a cause of action as an affirmative defense or allege it as a meritorious defense when seeking to set the default aside. (*Id.*;A9) Rather, Defendant lodged only one argument challenging the sufficiency of Plaintiff's complaint, but that argument was contained in a summary judgment motion which asserted that the evidence disclosed in discovery contradicted the allegations in Plaintiff's complaint regarding the cause of the injury. (A.39;A110) Importantly, at the hearing on that motion for summary judgment (Defendant's fifth motion to vacate the default), Defendant expressly

admitted that it had never previously challenged the sufficiency of the complaint or argued that it failed to state a cause of action. (A110:12-13,28-32) Therefore, the Third District should not have reversed the final judgment based on an argument Defendant never made to the trial court. *See Tillman*, 471 So. 2d at 35; *Hammond*, 12 So. 3d at 253; *Bamberg*, 953 So. 2d at 654.

The same is true about arguments not raised on appeal. Florida law, including the law in the Third District, prevents an appellate court from considering arguments not raised by an appellant in briefing. *See, e.g., Martinez v. Rodriguez*, 927 So. 2d 93, 96 (Fla. 3d DCA 2006); *Harbor Bay Condo., Inc. v. Basabe*, 856 So. 2d 1067, 1069 n.4 (Fla. 3d DCA 2003); *Ramos v. Philip Morris Companies, Inc.*, 743 So. 2d 24, 28-29 (Fla. 3d DCA 1999) (citing *Chaachou v. Chaachou*, 135 So. 2d 206, 221 (Fla. 1961) (other citation omitted)). On appeal to the Third District, as to the trial court below, Defendant argued only that the final judgment should be reversed because it was entered against the wrong party and because the other party, Iberia, was an indispensable party that was never joined in the suit. (*See* R4, tab A, pp. 18-25) The only time in the appeal that Defendant argued that it was entitled to relief on Plaintiff's complaint was when Defendant argued, as it did below, that it was entitled to summary judgment because the evidence discovered regarding how Plaintiff's injury occurred differed from the allegations in her complaint. (*See* R4, tab A, pp. 25-29) By raising the issue

regarding the sufficiency of Plaintiff's complaint as a whole so as to defeat the final judgment for the first time in its decision, the Third District deprived Plaintiff of any right to respond to that argument during briefing. In addition, the Third District further deprived Plaintiff of her fundamental right to due process of law, which is guaranteed by the Florida and United States Constitutions. *See generally Keys Citizens*, 795 So. 2d at 948 (cited *supra*). For these reasons as well, the Third District's decision should be reversed and the case remanded with instructions to affirm the final judgment on appeal.

H. The Judgment Should Be Affirmed Because Plaintiff's Complaint Stated A Cause Of Action Against Defendant For Premises Liability

The default as to liability should also be affirmed because Plaintiff's complaint properly stated a cause of action for premises liability against Defendant. To state a cause of action for premises liability, a Plaintiff must allege the standard elements of negligence – duty, breach, causation, and damage – as well as the additional elements that the defendant owned, controlled, or maintained the premises and knew or should have known of the allegedly dangerous condition. *Lisanti v. City of Port Richey*, 787 So. 2d 36, 37 (Fla. 2d DCA 2001) (citations omitted); *see also Solomon*, 961 So. 2d at 989 (citing *Lisanti*). Plaintiff properly pled all of these required elements in her complaint against Defendant. (A3:2) Thus, Plaintiff pled all the essential elements of her premises liability claim. *See Lisanti*, 787 So. 2d at 37. As a result, Plaintiff's complaint stated a cause of action

against Defendant for premises liability. Therefore, the Third District's decision, which reached a contrary conclusion, should be reversed.

II. The Final Judgment Should Be Affirmed Because The Trial Court Did Not Abuse Its Discretion By Denying Any Or All Of Defendant's Motions To Set Aside The Default

Standard of Review: Orders denying motions to set aside a default are reviewed for an abuse of discretion. *See N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 852 (Fla. 1962); *see also Anish v. Topiwala*, 430 So. 2d 990, 991 (Fla. 3d DCA 1983) (citation omitted). Trial courts are vested with broad discretion to determine whether the facts justify setting a default aside. *Anish*, 430 So. 2d at 991 (citation omitted). "It is the duty of the trial court, and not the appellate courts, to make that determination." *Acme Fast Freight, Inc. v. Bell*, 318 So. 2d 212, 213-14 (Fla. 3d DCA 1975). A court should not find that a trial court's discretion has been abused unless it could conclude that no reasonable man would adopt the view taken by the trial court. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted).

In this case, the Third District did not conclude that no reasonable man would have adopted the view taken by the trial court on the default motions, and as a result, the final judgment should be affirmed. Here, Defendant never established by affidavit or sworn testimony the existence of the necessary requirements to set the default aside. As a result, the final judgment should be affirmed.

For a court to set aside a default, the moving party must show that the failure to file a responsive pleading resulted from excusable neglect, that it has a meritorious defense, and that it acted with due diligence in seeking relief from the default. *Airport Centre, Inc. v. Ugarte*, 91 So. 3d 936, 936 (Fla. 3d DCA 2012) (citation omitted). The failure to establish any one of these elements is fatal to the moving party's request for relief from the default. *Id.*; *see also Church of Christ Written in Heaven of Georgia, Inc. v. Church of Christ Written in Heaven of Miami, Inc.*, 947 So. 2d 557, 559 (Fla. 3d DCA 2006) ("A party's failure to satisfy these requirements is fatal to the success of a motion to vacate."). The necessary requirements must be established by affidavit or other sworn statement. *B.C. Builders Supply Co., Inc. v. Maldonado*, 405 So. 2d 1345, 1348 (Fla. 3d DCA 1981) (citations omitted). Conclusory claims of excusable neglect, meritorious defenses, or due diligence are not sufficient. *See, e.g., Church of Christ Written in Heaven*, 947 So. 2d at 559 (reversing order setting aside default where unverified motion contained only bare allegations of excusable neglect and a meritorious defense).

Defendant's motions to vacate the default were not legally sufficient because they did not establish either Ms. Gil's or attorney Calejo's excusable neglect. *See Scherer v. Club, Inc.*, 328 So. 2d 532, 533 (Fla. 3d DCA 1976) (stating that to set aside a default for a corporate defendant, the corporate defendant must prove

excusable neglect by an officer or agent). Indeed, the motions contained conflicting statements about Ms. Gil's and attorney Calejo's alleged excusable neglect. The motions should fail on that basis alone. In addition, however, not one of the many motions provided any sworn explanation for why attorney Calejo took no action to set the default aside between May, when he and Ms. Gil first received it, and August 2010, when he dropped Defendant as a client. Consequently, because Defendant did not establish that one requirement for setting aside the default, the trial court did not abuse its discretion by denying those motions. *See Ugarte*, 91 So. 3d at 936; *Church of Christ Written in Heaven*, 947 So. 2d at 559. Thus, the final judgment should be affirmed.

The fact that Ms. Gil swore in the first motion that attorney Calejo's secretary assured her attorney Calejo would handle the matter does not establish excusable neglect. Indeed, the Third District rejected this very type of argument in *Abel, Tony & Aldo Creative Group, Inc. v. Friday Night Investors, Inc.*, 419 So. 2d 1135 (Fla. 3d DCA 1982). There, the corporate defendant filed a motion to vacate a default judgment. In an affidavit, the defendant's president stated that he had referred the complaint to an attorney and "thought" the attorney had responded. *Id.* at 1135. The Third District held that the affidavit was insufficient to establish excusable neglect. *Id.*

That is the same result that should occur here. Although Ms. Gil said attorney Calejo assured her he would handle the matter, the motions to vacate simply do not explain why he did not. They also do not explain why Ms. Gil did nothing but make a few phone calls to attorney Calejo's office between May 2010, when she received the default, and August 2010, when attorney Calejo dropped Defendant as a client. Ms. Gil did not give any reason for not taking any other action for nearly four months after receiving notice of the default. Thus, Ms. Gil's complacency is more along the lines of gross neglect, which is not excusable. *See, e.g., Fischer v. Barnett Bank of S. Fla., N.A.*, 511 So. 2d 1087, 1087 (Fla. 3d DCA 1987) (concluding that gross negligence or neglect is not excusable neglect (citations omitted)). Nevertheless, because Defendant did not establish excusable neglect at any time, the trial court did not abuse its discretion by denying the various motions.

Likewise, the trial court properly denied the various motions to set aside the default because they did not establish the required elements of due diligence or a meritorious defense. In the first motion, Defendant alleged, in a conclusory fashion, that it had a meritorious defense. Defendant did not file the actual answer and affirmative defense of lack of ownership, which was not even verified, until some eight months after Defendant received notice of the default and nearly four and one half months after it filed the first motion to vacate. That affirmative

defense, however, challenged only ownership and control, not maintenance. (A1:6) As a result, the late-filed affirmative defense did not even establish a meritorious defense to all of Plaintiff's allegations in the complaint. Also, at no time has Defendant explained the August to January delay in filing that incomplete affirmative defense. Thus, Defendant's delayed submission of its unsworn affirmative defense does not establish the required elements of meritorious defense and due diligence. *See Ugarte*, 91 So. 3d at 936.

In addition, the Third District has stated that, in deciding due diligence, the court should look not only at the length of the delay, but also at the reason for the delay. *Apolaro v. Falcon*, 566 So. 2d 815, 817 (Fla. 3d DCA 1990). Indeed, "swift action must be taken upon first receiving knowledge of any default. Further delay in excess of the time reasonably necessary to prepare and file a notice to vacate should prove fatal absent some exceptional circumstance." *Trinka v. Struna*, 913 So. 2d 626, 628 (Fla. 4th DCA 2005) (citation omitted). In this case, none of the motions explained why Defendant took no action to set aside the default for nearly four months, from early May to late August 2010, and then only asserted a meritorious defense some five months later. Thus, the timing of the motions and defenses fails to establish that Defendant acted with due diligence in seeking to set the default aside.

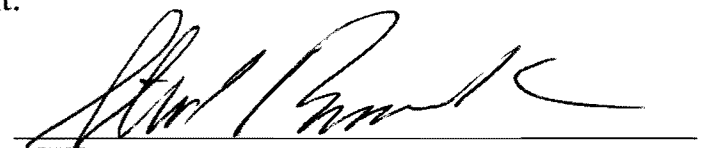
Although there is no bright line test to determine whether a party has acted with due diligence, the case law establishes that a nearly four-month delay from notice of the default until the filing of a motion is too long to be considered duly diligent. *See, e.g.*, *Lazcar Int'l, Inc. v. Caraballo*, 957 So. 2d 1191, 1191 (Fla. 3d DCA 2007) (concluding that waiting six weeks after entry of default to move to vacate was not duly diligent); *Fischer*, 511 So. 2d at 1088 (five-week delay not excusable); *Bayview Tower Condo. Ass'n, Inc. v. Schweizer*, 475 So. 2d 982, 983 (Fla. 3d DCA 1985) (one month delay not duly diligent); *B.R. Fries & Assocs., Inc. v. Meagher*, 448 So. 2d 1211, 1212 (Fla. 3d DCA 1984) (three month delay); *Sunshine Terminal Servs., Inc. v. Nat'l Life Ins. Co.*, 412 So. 2d 419, 419 (Fla. 3d DCA 1982) (over four-month delay); *Seay Outdoor Adver., Inc. v. Locklin*, 965 So. 2d 325, 327 (Fla. 1st DCA 2007) (ten-week delay); *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, 302 (Fla. 2d DCA 2004) (seven-week delay); *Bailey v. Deebold*, 351 So. 2d 355, 356 (Fla. 2d DCA 1977) (six-month delay); *Hepburn v. All Am. Gen. Constr. Corp.*, 954 So. 2d 1250 (Fla. 4th DCA 2007) (four-month delay); *Trinka*, 913 So. 2d at 628 (one-month delay). Due diligence is generally found when a party acts within days, not months, of receiving notice of a default. *See, e.g.*, *B.C. Builders Supply Co., Inc. v. Maldonado*, 405 So. 2d 1345, 1347 (finding due diligence where motion filed within four days of notice of default); *Lindell Motors, Inc. v. Morgan*, 727 So. 2d

1112, 1113 (Fla. 2d DCA 1999) (one week delay reasonable); *Goodwin v. Goodwin*, 559 So. 2d 109, 109-10 (Fla. 2d DCA 1990) (six-day delay reasonable); *Marshall Davis, Inc. v. Incapco, Inc.*, 558 So. 2d 206, 207 (Fla. 2d DCA 1990) (fifteen-day delay reasonable); *Ponderosa, Inc. v. Stephens*, 539 So. 2d 1162, 1163 (Fla. 2d DCA 1989) (next-day filing reasonable). Because it took Defendant nearly four months to move to set aside the default and nearly another four months to file an unsworn, alleged meritorious defense, Defendant did not act with due diligence. Therefore, the trial court properly denied Defendant any relief from the default.

Moreover, the first time Defendant even attempted to establish attorney Calejo's excusable neglect – which it failed to do – was almost a year and a half after the trial court entered the default. (A27;A28:1-2) By waiting nearly a year and a half to even attempt to establish attorney Calejo's excusable neglect, Defendant clearly did not act with due diligence. *See* cases cited *supra*. Therefore, the trial court properly denied all of Defendant's motions to set the default aside. As a result, the final judgment should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Third District's decision and affirm the final judgment.



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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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