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STATE OF FLORIDA
SECOND DISTRICT COURT OF APPEAL

Case No.: 2D23-0637

BEVERLY WHITE, ET AL.,
Appellants,

v.

PLANTATION GOLF AND COUNTRY CLUB, INC., ET AL.,
Appellees.

APPELLANTS' REPLY BRIEF

On Appeal from the Twelfth Judicial Circuit
in and for Sarasota County, Florida

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ARGUMENT

Appellees' Answer Brief maintains summary judgment was proper because the Club could amend its bylaws without limitation. But the question presented by this case does not stop there. Appellees' argument ignores the important distinction between the Club's *ability* to amend its bylaws, albeit only in accordance with its rules for amendment, and the *applicability* of such amendments. While the Club could amend its bylaws, it needed to do so in accordance with those bylaws. Additionally, proper amendments could only be applied to the proper parties. Applying fundamental principles of contract law, 1) the amendments to the bylaws needed to be voted on by the proper people, as identified in the bylaws and 2) any resulting amendments needed to be applied to the proper people: those parties who could participate in the amendments, as such amendments constituted a contract modification.

As argued by Appellees for the first time at summary judgment, the trial court ruled resigned members were "Equity Members" under the bylaws' liquidation provision. But this interpretation ignored the obvious corollary: if resigned members were still equity members for the purposes of the liquidation clause

in the bylaws, then they must have been equity members for purposes described in other clauses of the bylaws, such as voting and amendment. Instead, the trial court arrived at an interpretation where resigned members were member enough to be subjected to the liquidation provisions, but not member enough to vote on bylaw amendments.

I. Arguments presented in the motion for rehearing were properly preserved.

Appellees begin their argument by urging this Court to sidestep the issue of whether the Club breached its contract with Appellants in passing the bylaw amendments without providing resigned equity members notice or an opportunity to vote on the amendments. (Ans. Br. § I(A)) Appellees assert several theories as to how this argument was waived because it was first raised in Appellants' motion for rehearing. Appellees' protests ring disingenuous given that it was Appellees who changed their position *at oral argument on summary judgment*, arguing for the first time there that under the liquidation clause, resigned members continued to be "Equity Members" of the Club until they were paid their refunds and surrendered their membership certificates.

(A.1252) The trial court accepted this interpretation, without applying it to the bylaws as a whole, and granted summary judgment on this reasoning. (A.18-19) Blindsided by Appellees' change in position on the resigned members' status, which was contrary to the Club's prior position and undisputed testimony, Appellants addressed the issue at their first opportunity: the motion for rehearing.

Appellants' motion for rehearing pointed out the disharmony in the trial court order's interpretation of the bylaws and the meaning of equity membership and properly preserved the argument for appeal. Appellees' suggestion that Appellants should have somehow addressed this argument, which contradicted the evidence, before the argument was even raised for the first time, is illogical.

To begin, Appellees' contention that an issue first raised in a motion for rehearing is not preserved for appeal is incorrect. (Ans. Br. 22-23) Appellees cite to a footnote in *Riviera-Fort Myers Master Ass'n, Inc. v. GFH Invs., LLC*, a case involving a motion for reconsideration. (Ans. Br. 22) Tracing the support for this footnote leads to the Florida Supreme Court case of *Lipe v. City of Miami. See*

Riviera, 313 So. 3d 760, 769 n.4 (Fla. 2d DCA 2020) (citing *Sch. Bd. of Pinellas Cty. v. Pinellas Cty. Comm'n*, 404 So. 2d 1178, 1178 (Fla. 2d DCA 1981) (citing *Lipe v. City of Miami*, 141 So. 2d 738, 743 (Fla. 1962))). While restating the unremarkable proposition that "matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by [the Supreme] court on appeal," *Lipe* says nothing about whether matters presented in a motion for rehearing were considered to have been before the trial court. *See also*, *Elser v. Law Off. Of James M. Russ, P.A.*, 679 So. 2d 309, 311-12 (5th DCA 1996) ("…[N]othing in the supreme court's opinion in *Lipe* … alludes to this rule of law. Rather, the court stated it would not consider matters not raised in the trial court below.").

More appropriate is the rule discussed in *Pisano v. Mayo Clinic Fla.*, 333 So. 3d 782, 788 (Fla. 1st DCA 2022). There, the Court recognized that a "motion for rehearing may be required to preserve errors that appear for the first time in a written order" and reiterated arguments could be preserved by a motion for rehearing. *Id.*

Such is the case here. Appellants' motion for rehearing raised the incongruity and error arising on the face of the summary judgment ruling. The ruling inconsistently applied the new interpretation of the bylaws argued by PGCC's counsel at summary judgment that resigned members were equity members of the Club until their certificates were redeemed. (A.18-19, 231) Under this interpretation, the resigned members should have been given notice and the opportunity to vote on the bylaw amendments. (A.242) It is undisputed that they were not permitted to do so. (Ans. Br. 32) (A.523, 673-74)

This Court has also found that points raised for the first time in a motion for rehearing are considered "properly presented to the trial court . . . and thus preserved for appellate review." *Goetz v. AGB Tampa, LLC*, 335 So. 3d 228, 231 (Fla. 2d DCA 2022); *Waksman Enters. v. Oregon Props., Inc.*, 862 So. 2d 35, 42 (Fla. 2d DCA 2003) (trial court is bound to consider matters raised for the first time in a motion for rehearing by a party against whom summary judgment has been entered).

Appellees' other claims of waiver must likewise fall by the wayside. Appellees first contend the rehearing arguments were

waived because Appellants did not file an avoidance to Appellees' affirmative defenses stating they complied with their bylaws. (Ans. Br. 19-20) Because an avoidance is not required to deny an affirmative defense, and Appellants' argument simply denies the affirmative defense of compliance, this argument fails. *See* Fla. R. Civ. P. 1.140; *Derouin v. Universal Am. Mortg. Co., LLC*, 254 So. 3d 595, 601 (Fla. 2d DCA 2018) (reply to affirmative defense only required to avoid the substantive allegation of the affirmative defense) (citing *Kitchen v. Kitchen*, 404 So.2d 203, 205 (Fla. 2d DCA 1981)).

Appellees also argue Appellants should have submitted factual evidence on whether the resigned members were still equity members prior to the summary judgment hearing, ignoring both the fact that it was Appellees, not Appellants, who changed their position on this issue and that the trial court's ruling was a matter of contract interpretation, not a factual finding based on record evidence. (Ans. Br. 21-22) (A.18-19, 1251-52)

Finally, Appellees argue, without record citation, that Appellants took too long to point out the problems with the trial court's order. (Ans. Br. 23). However, there is no dispute that the

motion for rehearing was timely filed. *See* Fla. R. Civ. P. 1.530(b). Accordingly, Appellees' various claims of waiver are insufficient to overcome Appellants' proper preservation of the issues raised.

II. The Club could only amend its bylaws in compliance with the bylaws.

Appellees argue in their Answer Brief §I(B) that the Club had a right to amend its bylaws, without limitation, and apply amendments to resigned equity members up until the resigned members surrendered their membership certificates. Appellees further contend that any rights to a refund enjoyed by resigned members were not "vested." While the issue of vested rights was not raised in the Initial Brief, Appellees are correct to an extent: the refund rights contained in the bylaws were modifiable in accordance with the terms of the bylaws. The fact that the bylaws could only be modified by a majority vote of *all equity members* runs afoul of the issue created by the change in PGCC's argument at summary judgment: if the resigned members were member enough to be subject to the liquidation clause, they were member enough to receive notice and vote on amendments. The Appellees handwave this argument, stating class members "read too much into the trial

court's statement" that the resigned members continued to be equity members until their certificates were repurchased. (Ans. Br. 28)

Rather, Appellees contend the critical wording in the trial court's rulings was that membership status was "irrelevant" because the "bylaws could be amended regardless of a member's status." (Ans. Br. 28) However, this statement fails to apply the rulings' interpretation to the bylaws as a whole. *See KRG Oldsmar Project Co., LLC v. CWI, Inc.*, 358 So. 3d 464, 467 (Fla. 2d DCA 2023) (interpret contract provisions harmoniously to give meaning to each provision). While the bylaws may have been subject to amendment, regardless of who had resigned, the ruling implicated questions of whether the amendments were passed in accordance with the bylaws and to whom the amendments applied. Thus, the trial court's ruling addressed the issue of the Club's *ability* to amend its bylaws without regard to membership status but failed to address the important role membership status played in who could vote on amendments and to whom those amendments applied. If the resigned members were still "Equity Members" under the terms of the bylaws, then they possessed the rights attendant to that

membership, including the right to vote on amendments. (A.227) Alternatively, if they were not equity members, they were not subject to any amendments that occurred after they left. *See* §C, *infra* and Initial Br. §IV(C). It can be one or the other, not half of each.

In support of their position, Appellees rely on *Fiddlesticks Country Club, Inc. v. Shaw*, 363 So. 3d 1177, 1181 (Fla. 6th DCA 2023) to state that where an organization's bylaws allow amendment, a member's rights can be changed by amendment. (Ans. Br. 24-5) Appellees similarly cite to *Hamlet Country Club v. Allen*, 622 So. 2d 1081, 1082 (Fla. 4th DCA 1993) for this point. (Ans. Br. 26) Once again, however, these cases address only a club's *ability* to amend its bylaws. *Fiddlesticks* at 1178-79, 1184; *Hamlet* at 1082. Neither analyze whether the bylaws were properly amended in accordance with their provisions on who could vote and whether those members received notice and an opportunity to vote. Nor did these cases evaluate the application of amendments to members who could not vote. Indeed, these cases each involved members with the opportunity to vote on the amendments to which they objected. *Fiddlesticks* at 1180 (homeowners disputed

assessment against their future equity refunds after amendment passed by majority vote); *Hamlet* at 1182 (members sued to resign and redeem their memberships after bylaws amended). Rather than supporting Appellees' position, these cases underscore the errors in the summary judgment order.

Appellees seek to bolster their argument by raising two factual arguments. Appellees first suggest that they complied with the bylaws because some class members voted on the amendments. (Ans. Br. 29-32) It is evident from the argument itself that the members who voted did not do so because the notice and opportunity to vote was extended to all resigned members as equity members. Rather, those members who voted had only resigned a part of their equity membership (e.g., their golf membership) but had not completely resigned. (Ans. Br. 29) These members were still equity members recognized by the Club for their continued tennis or social membership, albeit with fewer votes. (A.231, 673-74) The fact that some active members, who had partially resigned, received notice and voted – with reduced votes - is unavailing. Per the trial court's ruling, all resigned members were equity members and under the bylaws, any amendments were to be voted on by all

equity members. If the entire category of resigned members, as equity members, were not given notice and an opportunity to vote on amendments, as Appellees acknowledge, then the amendments did not comply with the bylaws. (Ans. Br. 32, A.523, 674)

Appellees additionally attempt to counter the trial court's interpretation of the bylaws with a factual argument that resigned members, by not paying dues, forfeited their right to vote. (Ans. Br. 31-32) Rather than citing to the bylaws or other governing documents, the record evidence cited in support of this argument is the testimony of the Club's representatives, who also testified that the resigned members were not members at all. (Ans. Br. 32 citing R.360-61, 1799) (A.983) Other record evidence indicates that there was a distinction between equity and non-equity members. (A.428-30) While both classes of membership paid dues in exchange for access to club facilities, only equity members had the right to vote under the bylaws. (A.231, 233-34, 242) Thus, the payment of dues had no bearing on the right to vote on bylaw amendments and this factual argument lacks merit.

III. The trial court's interpretation rendered the contract illusory.

Appellees raise several arguments contending the trial court's interpretation of the bylaws did not render them an illusory contract. (Ans. Br. §II) Procedurally, Appellees suggest, without citation, that Appellants either failed to plead an illusory contract or failed to reply to or avoid an affirmative defense (which affirmative defense is not identified). These arguments fail for the reasons set forth in §A, *supra*.

As to the purported failure to plead an illusory contract, once again, the issue did not arise until the summary judgment ruling adopted Appellees' anomalous argument that resigned members were equity members under the bylaws. *See Spaulding v. Spaulding*, 326 So. 3d 186,187 (Fla. 1st DCA 2021) (plaintiff must raise issues that appear for the first time in a court's summary judgment order in a motion for rehearing). Further, since the interpretation of the bylaws adopted by the trial court was urged by the Appellees, the issue was tried by consent. *Id.*

On the unidentified affirmative defense, the lack of specificity in this argument makes a reply difficult. However, if Appellees

pleaded an affirmative defense stating the bylaws were not illusory, a simple denial of such affirmative defense would suffice, and an avoidance would be unnecessary. As a party is not required to plead the denial of an affirmative defense, there would be no waiver of this argument. *See* Fla. R. Civ. P. 1.140; *Derouin* at 601.

Appellees next argue the bylaw amendments did not render the bylaws illusory because the amendments were voted on. (Ans. Br. 33-34) Once again, Appellees hang their hat on the ability to amend but fail to respond to Appellants' primary point – that the amendments were only as good as the persons who voted on them. If resigned members were not equity members permitted to participate in the vote on amendments to their equity refunds, then their contract with the club was illusory because it permitted those who were supposed to pay the refunds to unilaterally determine how much they would pay or, indeed, whether they would pay at all. "I will if I want to" is the quintessential definition of an illusory promise. *E.g.*, *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1331 (11th Cir. 2010) ("A contract is illusory under Florida law when 'one of the promises appears on its face to be so insubstantial as to

impose no obligation at all on the promisor-who says, in effect, 'I will if I want to.'").

The ability to amend the bylaws by an organizational vote does not negate the basic contractual principle that a contract cannot be unilaterally modified. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 382 (Fla. 2004) ("… a party cannot modify a contract unilaterally. All the parties whose rights or responsibilities the modification affects must consent.") Modification of a contract requires mutual consent from both sides of the contract. *Id.* at 382.

Appellants had a contract with the Club. A vote on modifying that contract was still unilateral, regardless of how many members voted, so long as *all* of the equity members, including the resigned members, were not permitted to vote and were impacted by the vote. *See Hospital Corp. of Lake Worth v. Romaguera*, 511 So. 2d 559, 560 (Fla. 4th DCA 1986) (rejecting argument that bylaw amendment by hospital lacked mutuality and was not binding on doctor where doctor participated in meeting where amendment was approved) *cited with approval in Naples Community Hospital, Inc. v. Hussey*, 918 So. 2d 323, 325 (Fla. 2d DCA 2005)). Thus, a vote by an organization to amend its bylaws, as in *Hussey*, only properly

modifies the contracts of those with an opportunity to vote on the amendments. For those with no opportunity to vote, contract law deems the amendments a unilateral contract modification, which renders the contract illusory. *See SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200-01 (Fla. 2d DCA 2012) (contract modification requires the consent of both parties to the contract; a unilateral modification is unenforceable).

Finally, Appellees cite to *Fiddlesticks* for the premise in contract law that the court must not rewrite the parties' agreement or relieve either party of the burden of their bargain. *Fiddlesticks* at 1182. While Appellants did not seek a rewriting of the parties' contract, the point made in *Fiddlesticks* is instructive here. If the trial court's finding that the resigned members are equity members is correct, then the ruling could not relieve the Club of its burdens under the bylaws, including the contractual obligation to provide notice and an opportunity to vote to the resigned members as equity members so that the amended refund provisions could be modified with mutual consent. Alternatively, if resigned members were no longer voting equity members, then the bylaws could not be modified as to their rights because the lack of mutuality in

amending the bylaws rendered the contract illusory. For these reasons, Appellees' argument that a vote was had on the amendments is unavailing.

IV. Member status was relevant to harmonious contract interpretation.

Appellees attempt to defend the summary judgment's ruling claiming that Appellants' status as resigned members was irrelevant in determining breach of contract because the bylaws could be amended regardless of status. (Ans. Br. §III) As discussed in §B, *supra*, this finding only addresses the Club's *ability* to amend its bylaws but fails to account for the issues raised by the ruling as to whether the bylaws were properly amended and to whom those bylaws should apply. While membership status may not be relevant to whether the Club could amend its bylaws, it was key to a determination of who could vote on those amendments and who was subject to the amendments.

Appellees counter Appellants' arguments by asserting the cases cited for general principles of contract law are not applicable because the resigned members have a relationship with the Club. (Initial Br. 37-39, Ans. Br. 38-39) As explained in *Fiddlesticks*,

however, a club and its members have a contractual relationship, and bylaws are evaluated in accordance with contract law. *Fiddlesticks* at 1181. Thus, cases setting forth the applicable hornbook law on contracts are instructive on the issues raised by this appeal.

Pivoting, Appellees assert the cases of *Hamlet, Share*, and *Fiddlesticks*, which address challenges to bylaw amendments raised by active club members, are not "meaningfully distinguishable" from this case. (Ans. Br. 39-40) While these cases discuss a club's right to amend its bylaws, it is precisely because of their factual differences that they do not reach the additional issues of whether resigned club members were improperly disenfranchised and whether the amendments applied to persons not permitted to vote. Because these cases involve members with the opportunity to vote on the amendments, they had no need to proceed beyond the threshold question of whether a club could amend its bylaws to change members' refund rights.

At bottom, this is a case of contract interpretation and should be analyzed through the lens of the basic tenets of contract law. Contract law dictates the equity member definition adopted on

summary judgment be applied consistently throughout the bylaws, thereby rendering a members' status relevant to a claim of breach of contract based on the bylaw amendments. *See KRG Oldsmar* at 467 (interpret contract provisions harmoniously to give meaning to each provision).

V. The liquidation provision does not negate the Club's breach of the bylaws.

Returning to fundamental contract principles, summary judgment was erroneous because the sale of the Club eliminated the equity refund waiting list, thereby rendering impossible performance of the condition precedent requiring resigned members to reach the top of the list to be paid. Appellees counter that the liquidation provision permitted the cessation of the waiting list and the sale of the Club to Concert was a liquidation. (Ans. Br. 41-42)

Appellees' argument again focuses on the bylaws permitting liquidation but fails to examine whether the liquidation complied with the bylaws. It didn't. The trial court ruled resigned members were equity members for purposes of the liquidation clause. (A.18-19) But the Club deemed resigned members to be non-members, who were not entitled to notice or the opportunity to vote when the

Club members voted on the sale of the Club. (A.135-36, 520, 918-19, 983-84, 1032-33)

Notably, the liquidation clause called for the proceeds of liquidation to be distributed pro rata to all equity members. Here, the Club structured the liquidation so that "payment" in part took the form of "millions of dollars in capital contributions to improve the Club's facilities." (Ans. Br. 42, A.1364-65) While this "payment" resulted in no funds to be distributed to resigned members, it accrued solely to the benefit of active members who could enjoy improved Club facilities. (Ans. Br. 42)

VI. Summary judgment below did not finally resolve the defenses of release and waiver.

In their Answer Brief §V, Appellees request the summary judgment rulings as to claims of unjust enrichment, fraudulent transfer, account stated, and the affirmative defenses of release and waiver be affirmed as not appealed. (Ans. Br. 44-45) Appellants reply only to comment on the preclusive effect of the rulings on release and waiver.

The trial court found an avoidance of these affirmative defenses was not properly pleaded. (A.31-32) The trial court further

found that the releases at issue were ambiguous and unenforceable, but for the procedural pleading issue. (A.32-35) Appellees' dismissal of their cross-appeal on this ruling waives their challenge to that finding. *State v. City of Westin*, 316 So. 3d 398, 408 (Fla. 1st DCA 2021).

Appellants sought leave to amend their answer to plead the avoidance per Fla. R. Civ. P. 1.190(a) which provides leave for amendments "shall be given freely…" (R.1819) Appellants renewed that request in a motion filed April 18, 2022. The trial court never ruled, leaving the issue open, and not ripe for review. However, if this panel reverses and remands this matter to the trial court, the motion for leave to amend is ripe for ruling by the trial court.

As the trial court has not resolved the issue of whether Appellants may amend their answer to include an avoidance to the defenses of release and waiver and as it previously ruled the releases were ambiguous and unenforceable, Appellants submit the trial court has authority to permit amendment of the answer on remand.

CONCLUSION

By adopting a new interpretation of the bylaws and the membership status of resigned members, the ruling on summary judgment erroneously created inconsistencies and disharmony in its interpretation of the bylaws in contravention of contract law. While the Club may have had the ability to amend its bylaws, it was required to do so in accordance with the bylaws, giving notice and an opportunity to vote to all equity members. If equity members were not permitted to vote, then any amendments amounted to a unilateral contract modification, rendering the contract illusory. Accordingly, the final summary judgment should be reversed, and this matter remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2024, a true and correct copy of the foregoing has been electronically filed with the Clerk of Court by using the Florida Court's E-Filing Portal System, which will send a notice of electronic filing to all counsel of record.

/s/ Jennifer Anne Gore Maglio
Jennifer Anne Gore Maglio

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief complies with the Florida Rules for Appellate Procedure because it contains 3,943 words and was drafted in Bookman Old Style 14-point font.

/s/ Jennifer Anne Gore Maglio
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