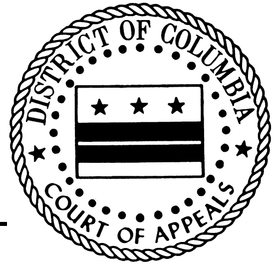
Nos. 21-CV-665 & 21-CV-666



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DISTRICT OF COLUMBIA
COURT OF APPEALS

HENRIETTA CONDOMINIUM ASSOCIATION, et al.,

Appellants/Cross-Appellees

v.

S2 U STREET, LLC

Appellee/Cross-Appellant.

On Appeal From The Superior Court Of The District Of Columbia
Civil Division
No. 2020 CA 003007 (R)(RP)

INITIAL BRIEF FOR APPELLEE/CROSS-APPELLANT S2 U STREET, LLC

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CERTIFICATE REQUIRED BY RULE 28 (a)(2) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned counsel of record for appellee certifies that the following listed parties appeared, or their interests were represented below:

Henrietta Condominium, a District of Columbia Condominium and the owners of individual units of the Condominium: Melissa J. Haupt, Nancy T. Montoya, Belkines Arenas Germosen, Victoria and Pamela Flattau.

The above parties are represented by Ray M. Aragon of Press, Dozier & Hamelburg, LLC. They were originally represented below by Vanessa Carpenter Lourie of the Law Offices of Vanessa Carpenter Lourie until July 2021, when Mr. Aragon was substituted as counsel.

S2 U Street, LLC, represented by Carol S. Blumenthal, Esq and Kathryn Erklauer, Esq. of Blumenthal, Cordone and Erklauer, PLLC

The original case below was brought by Lester Reese, represented by Richard W. Luchs, Gwynne L. Booth and Gabrielle A. Best Husband of Greenstein, Delorme & Luchs, P.C. Mr. Reese sold the subject property to S2 U Street, LLC who was then substituted as Plaintiff below.

These representations are made in order that judges of this court, *inter alia*, may evaluate possible disqualification or recusal.

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STATEMENT OF ISSUES

(a) Whether the trial court correctly granted reconsideration and summary judgment to Plaintiff S2 U Street, when the motion for reconsideration (filed by predecessor Plaintiff Reese) ("Reese/S2 motion") cited the facts that: (a) that the trial court had applied the incorrect legal standard when denying Reese's motion for summary judgment; (b) Reese's motion for summary judgment was supported by the land records and affidavit by Reese; (c) Henrietta Appellant's opposition to Reese's motion for summary judgment contained no cognizable evidence or affidavits sufficient to establish that any material fact was in dispute.

(b) Whether the trial court properly denied Henrietta Appellants' motion for reconsideration of the order granting summary judgment in favor of S2 U Street, when the motion attempted to introduce "new evidence" (in the form of affidavits from witnesses previously known to them, or whom could have easily been known) and other evidence that was readily available at the time of the Reese's motion for summary judgment.

(c) Whether Henrietta Appellants can legitimately claim outrageous behavior, breach of duty or pattern of neglect of their prior attorney when (1) only one of five individual appellants (Haupt) gave an affidavit that prior counsel did not inform her of the filing of Reese/S2 motion for reconsideration; (2) the

affidavit admits that Haupt was informed by prior counsel of the Reese/S2 motion for reconsideration six days before ruling on the motion; (3) there is no evidence that any instructions were given to prior counsel to supplement or correct the opposition to Reese/S2 motion for reconsideration prior counsel had filed, or to ask for more time to do so; and (4) the witnesses and information upon which Henrietta Appellants belatedly sought to rely were readily available at all times during the pendency of the litigation.

(d) Whether Henrietta Appellants are even eligible to claim common law "adverse possession" of land when the Condominium Act requires that a condominium identify all its property in its condominium declaration and documents filed among the land records of the District of Columbia, something Henrietta has never done regarding the Disputed Area that is the subject of this case.

(e) As to the Cross-Appeal: Whether the trial court erred in summarily denying any damages or costs to S2 U Street without a hearing or specific findings.

STATEMENT OF THE CASE

Procedural History of Case

The Henrietta Condominium ("Henrietta") and S2 U Street, LLC ("S2 U Street") own neighboring properties which border on the 300 block of U Street, NW in the District of Columbia. This case involves a piece of property consisting

of a small parking pad, a short masonry wall, a chain link and wooden fence, and a small grassy area ("Disputed Area"). It is uncontested that the land records of the District of Columbia identify the Disputed Area as part of the S2 U Street property. The Disputed Area affords space for a maximum of 4 cars parked in tandem, which Henrietta members used for parking.

The case below was filed on July 6, 2020, by S2 U Street's predecessor. Lester Reese, asking to court to quiet title, and for ejectment, declaratory judgment, damages in trespass, and injunctive relief against Henrietta and the owners of individual units of within Henrietta: Melissa J. Haupt, Nancy T. Montoya, Belkines Arenas Germosen, Victoria and Pamela Flattau (Henrietta and the individuals are collectively "Henrietta Appellants"). Henrietta Appellants counterclaimed for adverse possession, prescriptive easement, and declaratory judgment.

Reese filed a motion for summary judgment on January 11, 2021. App. 19-333. Discovery closed on February 18, 2021. Henrietta Appellants filed an opposition to the motion for summary judgment on February 23, 2021. App. 333-344. The motion for summary judgment was denied on March 16, 2021. App. 345-348. In denying the motion for summary judgment, the trial court found a single fact in dispute: namely, that Henrietta Appellants alleged that the chain link fence had been in existence since at least 1999 and was built to identify the

Disputed Area as part of the land now owned by Henrietta. App. 348. The Henrietta Appellants, however, had not supported that assertion with any affidavit, nor did they submit any evidence of exclusive use of the Disputed Area.

Conversely, Reese, who had lived at his property since 1984, had supplied an affidavit based on his personal knowledge of the history and use of the adjacent parcels. App. 44-46. In the affidavit, Reese swore that he had used the Disputed Area for parking and that the existing chain link fence was not the same fence as the one that existed in 1999, which was in a different location. The Henrietta Appellants admittedly had no personal knowledge of the site pre-dating 2010, when the first condominium units were sold.

Reese filed a Motion for Reconsideration ("Reese/S2 motion") on April 7, 2021, App. 349-363; the Henrietta Appellants filed an opposition, App. 364-371, and Reese filed a reply. The Reese/S2 motion argued that the trial court had used the wrong legal standard (one applicable to a motion to dismiss) in deciding the motion for summary judgment. App. 354. Reese argued that for a motion to dismiss the trial court must assume that all statements in the initial complaint (or counterclaim) are true; however, in opposition to a motion for summary judgment supported by affidavit, Henrietta Appellants were obliged to bring forward a counter-affidavit to establish a material fact for trial. App. 356-57. The only sworn evidence before the court was that of Reese, who had also submitted

documents from the land records of the District of Columbia and Henrietta Appellants' Responses to Request for Admissions.

On May 12, 2021, the court granted the Reese/S2 motion for reconsideration and entered an order in favor of S2 U Street. App. 372-381. The court, in its May 12, 2021 Order, states that it reviewed the record of all pleadings in the case, and concluded that reconsideration was warranted because "the record does not contain sufficient evidence from defendants [Henrietta Appellants] to refute plaintiff's [Reese] material assertions of fact." App. 376.

On June 9, 2021, (28 days after issuance of the judgment in favor of S2 U Street) the Henrietta Appellants filed a motion for reconsideration of the May 12, 2021 Order ("Henrietta Appellants' F"). App. 382-400. For the first time, in that motion, Henrietta Appellants offered affidavits which they claimed were "new evidence" from previously unknown witnesses. Henrietta Appellants offered no explanation why the affidavits (each dated within 24 hours of filing of their motion for reconsideration) could not have been produced earlier as part of their opposition to Reese's motion for summary judgment. Henrietta Appellants blamed the delay on the failure of their former attorney to tell them about the filing of the Reese/S2 motion for reconsideration until "after" summary judgment was entered, a statement contrary to the affidavits submitted with their motion.

On July 13, 2021, after full briefing by both sides, the trial court denied Henrietta Appellants' motion for reconsideration. App. 400-406. The court found that Henrietta Appellants did not claim any error of law on the part of the court, did not present "newly discovered evidence," nor claim any intervening change in law, demonstrate that the decision was based on a manifest error of law, or was clearly unjust. Rather, the motion was simply an attempt to file "new evidence" under the disguise of dissatisfaction with counsel.

On August 3, 2021, S2 U Street submitted a Statement of Monetary Damages. Supp. App. 35-76. Henrietta Appellants filed an Opposition. On August 20, 2021, the trial court orally denied the request for damages, without hearing argument or evidence or making any specific findings.

This appeal and cross-appeal followed.

STATEMENT OF FACTS

This case involves two adjacent properties. S2 U Street is the owner of the land, apartment building, and other improvements located at 350 U Street, NE, Washington, D.C. (Lot 804 in Square 3563[1]) ("the Subject Property"). Henrietta owns an adjacent parcel of land at 2002 4th Street, NE, Washington, DC, (Lot 802

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[1] Lot 804 has since been subdivided and is now known for purposes of assessment and taxation as Lots 133, 134 and 135

in Square 3563) where the Henrietta Condominium building, comprised of 4 condominium units, is located.

History of Properties

S2 U Street's assignor, S2 Development, LLC, entered into a contract to purchase the Subject Property in January 2020; S2 U Street settled on the purchase on April 26, 2021. The Subject Property had previously been owned by Reese, who acquired in in 1984. Reese owned the Subject Property from 1984 until April 2021. App. 43-46 at para. 3.

The title history to the Henrietta Appellants' parcel of land was submitted into evidence as part of the Reese motion for summary judgment. See App. 34-39. As of August 29, 1988, the Henrietta Appellants' parcel of land, 2002 4th St. NE, which is adjacent to the Subject Property, was owned by the Boys & Girls Club of Greater Washington, Inc. App. 244-245. In 1998 the Boys and Girls Club ceased its use of the property and the parcel of and became vacant. According to the Affidavit of Lester Reese, based on his personal knowledge, the Henrietta Appellants' property was vacant from 1998 until at least 2008. App. 44.

In 2001, the Henrietta Appellants' parcel was deeded to Tanya R. Callender, App. 246-247, but she lost it to foreclosure sale. On April 23, 2003, M&T Mortgage Corporation acquired title via trustee's deed. App. 253-56. On October 29, 2003, M&T deeded the property to the Secretary of Housing and Urban

Development ("HUD"). App. 257-259. During this entire period the property remained vacant. App. 44.

On April 1. 2005, HUD deeded the vacant property to Curtina Hoston. App. 260-63. On March 11, 2008, Hoston deeded the property to 2002 4th St. LLC and herself as joint owners. App. 264-266. The property was still vacant at that time. App. 44.

In February 2009, the Henrietta Condominium was created with the execution and filing of a Condominium Declaration, Condominium By-Laws, and Plat and Plans. See App. 276-292, 174-288 ("Declaration"), 289-292 ("By-Laws"), 222-224 ("Plat and Plans"). On May 6, 2009, the D.C. Department of Consumer and Regulatory Affairs approved a vacant property exemption for the full year of 2009. See App. 267-269, 274 and 293-295.

On October 16, 2009, a foreclosure notice was issued against the owners, Ms. Hoston and 2002 4th Street, LLC. On December 23, 2009, Evergreen Ventures LLC acquired title via trustee's deed, with the property remaining vacant until the condominium units were sold. See App. 318-319, 320-322.

In 2010, the first two of the condominium units were sold to Belkines Arenas Germosen (Unit 3) and Victoria and Pamela Flautus (Unit 4), respectively. See App. 111.

The Disputed Area

In 2009, the owner of the Henrietta Appellants' parcel constructed a concrete drive pad and built a fence in the area which encroaches on the S2 U Street property where Reese had previously parked his vehicle. See App. 45. The property location survey performed on May 14, 2020, App. pp. 327-330 and Supp. App. at pp. 4-5, identifies the Disputed Area and shows that the pad and fence encroach upon the Subject Property by more than 28 feet. The Disputed Areas includes a concrete drive pad, a short masonry wall, a chain-link fence, and a wooden fence.

STANDARD OF REVIEW

The standard of review as to the granting of summary judgment is de novo. *McMahon v. Anderson, Hibey and Blair*, 728 A.2d 656, 657 (D.C. 1999).

The standard of review for motion for reconsideration under Super. Ct. Civ. R. 59 and 60(b) is abuse of discretion. "The decision whether to grant or deny a motion to alter or amend judgment under Rule 59(e) lies within the broad discretion of the trial court." *Wallace v. Warehouse Employed Union #730*, 482 A.2d 801 (D.C. 1984). The trial judge has a broader degree of discretion in handling a motion for reconsideration after the original decision had already been made. "[T]he trial judge was not required in the Motion for Reconsideration to give the matter full de novo review as if the original motion itself were before him." *Perry v. Sera*, 623 A.2d 1210, 1218 (D.C. 1993). Appellants' likelihood of

success on the merits if they are permitted to raise new defenses is not the standard of review of a court's failure to set aside a judgment under Rule 60(b). *Alger Corp. v. Wesley*, 355 A.2d 794 (D.C. 1976). The decision of a trial court to vacate a judgment and award a new trial should not be reversed absent a clear abuse of discretion. *Ohio Valley Constr. Co. v. Dew*, 354 A.2d 518, 521 (D.C. 1976), (citing *Citizens Bldg. & Loan Ass'n v. Shepard,* 289 A2d 620, 623 (D.C. 1972)).

The standard of review for review of a ruling under Super. Ct. Civ. R. 54(b) (regarding order of final judgment) is abuse of discretion and the appellate court review must be deferential. *Peoples v. Warfiled & Sanford, Inc*., 660 A2d 397 (D.C. 1995).

S2 U Street contends that the trial court erred as a matter of law when it denied damages and costs. The standard of review of a question of law is de novo. *Campbell & Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 55 A.3d 379, 388-89 (D.C. 2012).

SUMMARY OF ARGUMENT

1. The trial court properly reconsidered its original denial of summary judgment, when Reese/S2 filed a timely motion for reconsideration citing an error in the trial court's application of law to the facts.

2. On reconsideration, the trial court properly found that there is no dispute of material fact raised during the full briefing of the Reese motion for

summary judgment, the Reese/S2 motion for reconsideration, or elsewhere in the record. The trial court properly found that the Reese/S2 motion for reconsideration had demonstrated through affidavit and other evidence that its claims for relief were warranted, and that Henrietta Appellants' counterclaim must fail. Henrietta Appellants failed to bring forward any admissible evidence sufficient to establish a disputed material fact for trial.

3. Henrietta Appellants were not entitled to post-judgment relief on the basis of "new" evidence, nor did they demonstrate any outrageous action or violation of duty by their former attorney that would justify post-judgment submission of evidence that could have been brought forward earlier.

4. The Henrietta Appellants were not entitled to relief on their claim as a matter of law. Pursuant to the District of Columbia Condominium Act, D.C. Code §42-1901.01 et seq., a condominium comes into existence upon filing of a Declaration and By-Laws, which must include a plan "of every structure which is located on any portion of condominium land." D.C. Code § 42-1902.14(b). No easements can be added after formation of the condominium without recording of an amended plat. D.C. Code § 42-1902.14(e). The Henrietta Condominium Declaration filed in the land records does not include the Disputed Area as part of condominium common elements or units, nor does it show the parking pad, masonry wall or fences as located on the condominium land. It does not show

parking places as part of the condominium regime at all. Henrietta Appellants have not amended the declaration or plat. Therefore, Henrietta Appellants cannot claim that the Disputed Area is part of the condominium's property.

5. As it relates to the Cross-Appeal, S2 U Street relied on the public record and survey when it agreed to purchase the Subject Property under the January 2020 contract. Henrietta Appellants' subsequent counterclaim for adverse possession and continued trespass created a cloud on title to the Subject Property and caused damages to S2 U Street, as the contract beneficial owner. Henrietta's tortious conduct delayed purchase for over a year, required S2 U Street to obtain more expensive financing, and has caused S2 U Street to incur property taxes on land it cannot use and suffer loss of parking revenues as well as other damages and costs. S2 U Street was the prevailing party below and is entitled the damages that flow from Henrietta Appellants' tortiously conduct. The trial court erred in denying all the damages and costs as speculative without a hearing or specific findings.

ARGUMENT

I. The Trial Court Properly Entered Summary Judgment in Favor of S2 U Street

According to *Kibunja v. Alturas, LLC,* 856 A.2d 1120, 1127-28 (D.C. 2004):

> The party moving for summary judgment bears the initial burden of identifying portions of the record that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Wash. Inv. Partners of Del., LLC v. Sec. House, KSCC,* 28 A.3d 566, 573 (D.C. 2011). Once the movant makes the requisite showing, the burden shifts to the non-movant party to present sufficient evidence to support a conclusion that a factual dispute exists, such that a judge or jury must resolve the conflicting assertions at a trial. *See Clay Props., Inc. v. Wash. Post Co.,* 604 A.2d 890, 893-94 (D.C. 1992). To survive a request for summary judgment, the non-movant "must set forth specific facts showing that there is a genuine issue for trial," and cannot rely upon conclusory statements in its pleadings. (emphasis added).

Specifically, when reconsidering a previously denied motion for summary judgment, the District of Columbia Court of Appeals has noted that:

> Where the moving party supports the motion for summary judgment with affidavits, sworn or certified copies of documents, answers to interrogatories, deposition responses or other evidence submitted under oath, the opposing party may not rely on general pleadings or a denial, but rather must respond similarly by setting forth specific, material facts under oath which raise genuine issues of fact for trial.

Tobin v. John Grotta Co., 886 A.2d 87, 90 (D.C. 2005) (citing Super. Ct. Civ. R. 56 (e); *New 3145 Deauville, L.L.C. v. First Am. Title Ins. Co*., 881 A.2d 624 (D.C. 2005); *Teru Chang v. Inst. for Public-Private P'ships, Inc*., 846 A.2d 318, 323-324 (D.C. 2004)).

Although the court must view the record in the light most favorable to the non-moving party, *see Deutsch v. Barsky*, 795 A.2d 669, 673 (D.C. 2002), conclusory allegations alone are insufficient to avoid summary judgment. *See*

LaPrade v. Rosinsky, 882 A.2d 192, 196 (D.C. 2005). Indeed, the non-moving party must do more than assert "[t]he mere existence of a scintilla of evidence . . . there must be sufficient evidence on which the jury could reasonably find for the [non-moving party]." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)); *see also* Super. Ct. Civ. R. 56 (e).

The Reese motion for summary judgment was supported by a sworn affidavit based on personal knowledge and by deeds and documents from the land records of the District of Columbia. See generally, App. 19-332. In their opposition to the motion for summary judgment, Henrietta Appellants failed to submit evidence from anyone at all with personal knowledge of the Disputed Area as of 15 years earlier (the statutory period required for an adverse possession claim), even though the prior owners of the Henrietta property were known to them and named in the Reese motion. See generally App. 333-344.

Henrietta Appellants opposition to the motion for summary judgment was filed after discovery had closed. Henrietta Appellants' responses to the Request for Admissions were attached as an exhibit to the motion for summary judgment, evidencing that Henrietta Appellants could not admit or deny Reese's contentions. See generally App 47-167. Certainly, they produced no admissible evidence countering Reese's sworn statements. Accordingly, there was no genuine issue of material fact to try and, therefore, Reese was entitled to summary judgment.

Nevertheless, the trial court denied the Reese motion for summary judgment, stating that there was a contested fact concerning whether the existing chain link fence had been in existence in 1999 and whether it had been built to claim the Disputed Area for the Henrietta property. App. 345-348.

In the Motion to Alter or Amend Judgment filed by Reese ("Reese/S2 Motion"), App. 349-363, Reese argued that the court had committed an error of law denying the motion for summary judgment, an error warranting reconsideration under Rule 59(e), *see Household Finance Corp. III v. First American Title,* 669 A.2d 703 (D.C. 1995).

The trial court had initially used the wrong standard by which to judge the Reese motion for summary judgment. The standard that the trial court had actually applied was appropriate with respect to a motion to dismiss, where the court is obliged to take the facts alleged in the complaint as true. *Casco Marina Development, L.L.C. v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). That standard is not applicable to a motion for summary judgment that followed the completion of discovery and included a sworn affidavit based on personal knowledge sufficient to prove the claims and establish that there is no material fact in genuine dispute.

The Reese/S2 motion for reconsideration pointed out that in order to defeat a motion for summary judgment, the nonmoving party must present *affirmative*

evidence sufficient to demonstrate the existence of a material fact as to which there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). The non-moving party must do more than assert "[t]he mere existence of a scintilla of evidence… there must be sufficient evidence on which the jury could reasonably find for the [non-moving party]." *Id.* at 252 (emphasis added).

The Henrietta Appellants provided no evidence to support a conclusion that a factual dispute exists. Indeed, Henrietta Appellants failed to identify any admissible evidence whatsoever in the record demonstrating a genuine issue of material fact, relying instead on conclusory allegations about a prior existing fence. In their brief on appeal, Henrietta Appellants complain, inter alia, that the Reese motion for summary judgment cites Henrietta Appellants' numerous responses to Requests for Admission, which state that they "Cannot admit or Deny" the request. Henrietta Appellants argue that these responses were erroneously cited to the trial court as supporting undisputed statements of fact in the Reese/S2 U Street motion for reconsideration. Henrietta Appellants Br. at 8, 28. The argument is misplaced. The references to the responses to the Requests for Admission merely highlight the fact that the Henrietta Appellants admittedly had *no evidence* to counter the sworn statements and evidence put forward in the Reese motion for summary judgment.

Rather, the record before the trial court was that Reese's sworn affidavit was sufficient to defeat Henrietta Appellants' claim of adverse possession, and in response the Henrietta Appellants merely stated that the "cannot admit or deny" Reese's evidence. Henrietta Appellants' inability to admit or deny the evidence does not create a genuine disputed material fact for trial. Accordingly, reconsideration of the March 16, 2021 Order was warranted and Reese/S2 U Street was entitled to judgment as a matter of law.

II. The Trial Court Did Not Abuse its Discretion in Denying Henrietta Appellants' Motion

The Henrietta Appellants filed for reconsideration of the court's order granting the Reese/S2 motion for reconsideration and summary judgment, App. 382-399, claiming that: (1) Henrietta Appellants had not been informed by their attorney that a motion for reconsideration had been filed, and that (2) Henrietta Appellants had discovered "new evidence" sufficient to demonstrate continuous and exclusive use of the Disputed Area for more that the statutory time required, and, thus, raising a material fact sufficient to require a trial.

The first of these contentions is untrue based on the documents the Henrietta Appellants submitted with their motion. The second contention is based on a faulty interpretation of "new evidence" and is, therefore, unavailing to their cause, as more fully discussed below.

A. The Henrietta Appellants Were Aware of the Filing of the S2 Motion Prior to the Award of Summary Judgment.

In their brief, the Henrietta Appellants stress repeatedly that they did not know about the filing of the Reese/S2 motion for reconsideration until *after* summary judgment was granted. See Henreitta Appellants' Br. 2, 4, 15, 19, 31. This contention, however, is belied by the affidavits submitted with the Henrietta Appellants' motion for reconsideration. See Supp. App. 5-8.

Of the five individual appellants, four submitted affidavits with the motion for reconsideration. See Supp. App. 1-8. Nancy T. Montoya did not submit an affidavit. Belkines Arenas Gemosen, Supp. App. 3-4, and Pamela and Victoria Flattau, Supp. App. 1-2, say nothing in their affidavits about whether or not they knew of the filing of the Reese/S2 motion for reconsideration. Only Haupt mentions the Reese/S2 motion for reconsideration, claiming that she and the others did not know of the Reese/S2 motion for reconsideration until May 6th the date on which she spoke to counsel and learned of the filing. Supp. App. 5-8.

The order granting the Reese/S2 motion for reconsideration and summary judgment, however, was only entered on May 12th, see Docket #53, App. 11 – six days after Haupt purports to have learned of the Reese/S2 motion for reconsideration. Thus, there was sufficient time to supplement the Henrietta opposition to the Reese/S2 motion for reconsideration or move the court for more time to supplement or correct the opposition. Haupt's affidavit does not state that

she gave any instructions to her counsel to do so. Her statement about the lack of prior knowledge of others is, on its face, mere hearsay, and in any event, the Flattaus, and Germosen have spoken for themselves in their own affidavits but are silent on the subject. In short, there is no evidence whatsoever to support the repeated claims of Henrietta Appellants' counsel that his clients were unaware of the filing of the Reese/S2 motion for reconsideration until after summary judgment was entered. To the contrary, Haupt knew no later than May 6th, and all other appellants are silent on the issue.

The gravamen of the Henrietta Appellants' entire appeal is, consequently, based on a false assertion that they were unable to produce any evidence to defeat the Reese/S2 motion for reconsideration because they did not know of it. The trial court was correct in concluding that the Henrietta Appellants motion for reconsideration was "nothing more than an attempt to present evidence that could have been advanced earlier disguised as dissatisfaction with former counsel." App. 400-406.

B. Reconsideration was Not Warranted under S.C.R. 59(e), 60(b), and 54(b)

(1) Super. Ct. Civ. R. 59(e) Does Not Apply

In their Motion to Alter or Amend Order Granting Summary Judgment, Henrietta Appellants did not argue that the trial judge had made an error of law. Super. Ct. Civ. R. 59(e) provides relief in the case of an error of law. In *Wallace*

482 A.2d at 804, the court explains the difference between Rules 59(e) and 60(b) in terms of "whether for the first time, the movant requests consideration of additional circumstances." If so, the motion must be filed under Rule 60(b).

In this case, Henrietta Appellants, for the first time, brought forward allegedly "new" evidence in their Motion to Alter or Amend Order Granting Summary Judgment and sought reconsideration on the basis of the "new" evidence. Accordingly, Rule 59(e) was not applicable to their motion, as it does not permit alteration of the judgment or order because of an improper factual basis. *Id*.

2. Super. Ct. Civ. R. 60(b) Is Not a Proper Basis for the Relief Requested by Henrietta Appellants

(i) <u>Prior Counsel Did Not Act Outrageously or Disregard Instructions</u>

Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for a list of six enumerated reasons. Henrietta Appellants argued below that they sought relief pursuant to the sixth and final basis, namely "any other reason that justifies relief." App. 382-399. Their "other reason" was that their prior attorney had not informed her clients of the Reese/S2 motion for reconsideration and, therefore, they had been denied the opportunity to present their evidence in opposition. As stated

above, this "other reason," is contradicted by the record and, thus, was a false premise upon which to base their request for reconsideration.

In any event, any acts or omissions of counsel are generally imputed to the client even though they may be detrimental to the client's cause. An exception exists where the conduct of counsel is outrageously in violation of express instructions or the attorney's action violates her implied duty to devote reasonable efforts in representing the client. *Clark v. Moler,* 418 A2d 1039, 1043 (D.C. 1980). There is no evidence that prior counsel for the Henrietta Appellants committed any such outrageous conduct or violated her duty to the client. Certainly the affidavits submitted with the Henrietta Appellants motion for reconsideration do not support such a conclusion.

Henrietta Appellants claim of impropriety on the part of their prior counsel fails to take into account that each of the Henrietta Appellants participated in discovery, individually and collectively, by responding to Requests for Admissions, Request for Production of Documents, and Interrogatories. See Docket entries of 9-15-20 (#11), 10-9-20 (#16) and 1-8-21 (#22), App. 5-7 and App. 47-167. Their evidence could have been presented in response to the Reese motion for summary judgment (about which they admittedly knew), but it was not. Henrietta Appellants were not dissatisfied with their attorney's performance in

opposing the Reese motion for summary judgment and do not now complain of her performance in that regard.

Rather, it was not until nearly a month after the order granting summary judgment in favor of S2 U Street that Henrietta Appellants sought to introduce "new" evidence, including affidavits from themselves and others signed only 24-48 hours prior to filing of the motion with no explanation of why the evidence could not have been ascertained earlier.

Haupt states in her affidavit that she learned of the filing of the Reese/S2 motion for reconsideration on May 6th, but she does not state that she told her counsel to take any action at all, or that the wrong photograph had been submitted with the opposition to the Reese motion for summary judgment (a fact which she complains of in her affidavit); or that she gave her counsel any information or corrective evidence that she would like to see put before the court. See Supp. App. 5-8.

In short, there is no record evidence that the Henrietta Appellants were kept totally in the dark by their prior attorney, as repeatedly argued in their appeal brief. Certainly, they have not put forward any evidence that their prior attorney acted outrageously or disregarded instructions.

(ii) The Henrietta Appellants' Evidence Was Not "Newly Discovered"

At the same time, the "new" evidence Henrietta Appellants sought to belatedly admit was not newly discovered in any sense of the word. The evidence includes their own personal declarations from three of the Henrietta Appellants, two neighbors, and one person employed across the street from the condominium, all of whose testimony could have, by reasonable diligence, been obtained at any time during the pendency of the case. Two of the "new" declarations were from witnesses identified on the Witness List filed on December 8, 2020, by Henrietta Appellants, Docket entry #21 of 12/8/20, App. 7, yet the Declaration of those witnesses, Alan Nash and Cutrina Hoston, were only taken on June 8, 2021, within 24 hours of the filing of the Henrietta Appellants' Motion to Alter or Amend Summary Judgement Order. See Defendant's Opposed Motion to Alter or Amend Order Granting, Declaration E & G (filed June 8, 2021). The Reese motion for summary judgment identifies the former ownership of the Boys & Girls Club of Washington, which now operates across the street and is where a third declarant works, *id.* Declaration of Michael Pickering, Declaration F. Two of the affidavits are from neighbors living close to the Henrietta Condominium, *id.* Declarations of James Lee and Diane Shuler, Declarations D and H, yet were executed only a day or two before filing of the motion with no explanation of why that evidence was not previously available.

Contrary to Henrietta Appellant counsel's claim that these third-party witnesses were "previously unknown," Henrietta Appellant Br. 2, they were well known, previously identified during discovery and/or could easily have been located and deposed before close of discovery in this case. Indeed, the "evidence" put forth by the Henrietta Appellants only after judgment was entered against them was not new at all. "[W]here reconsideration is sought on the basis of 'newly discovered evidence," the movant must demonstrate it could not reasonably have been discovered in advance of trial and would likely to produce a different result at a new trial." *Forgotson v. Shea, 491* A.2d 523, 528 (D.C. 1985) (citations omitted). The alleged "newly discovered evidence" was readily available at any time since the filing of the Reese motion for summary judgment in January 2021, and prior to then. As the court noted in its order denying the Henrietta motion for reconsideration, newly discovered evidence is not evidence that was not brought forward due to "lack of diligence" or evidence "readily capable of being learned. . . in the course of pre-trial discovery." *Oxendine v. Merrell Dow Pharmaceuticals,* 563 A.2d 330, 334 (D.C. 1989).

Although the Henrietta Appellants argue that their "new" evidence is outcome determinative, that is not the standard by which their appeal should be judged when readily available evidence was not brought forward earlier. Appellants' likelihood of success on the merits if they are permitted to raise new

defenses is not the standard of review of a court's failure to set aside a judgment under Rule 60(b). *Alger,* 355 A.2d at 798. Rather, there must be an abuse of discretion on the part of the trial court in order to reverse the court's ruling. *Id.*

In this case, the trial court did not abuse its discretion in declining to accept the "new" evidence that was always readily available but brought forward only after entry of judgment without any explanation of why it could not, with reasonable diligence, have been put before the court earlier (other than an unsubstantiated and generalized claim of prior counsel misconduct).

C. Henrietta Appellants are Not Entitled to Relief Under Rule 54(b)

As the trial court quoted in its order granting summary judgment, "it is well-established that motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Ali v. Carnegie Institute of Washington,* 309 F.R.D. 77, 81 (D.D.C. 2015). Henrietta Appellants, in their Motion to Alter or Amend Order on Summary Judgment, improperly attempted to do just that, i.e., to "present theories or arguments that could have been advanced earlier." Therefore, their motion was properly denied by the trial court.

III. Henrietta Appellants are Not Entitled to Relief as a Matter of Law

As argued below in opposition to the Henrietta Appellants motion for reconsideration, Henrietta Appellants are not entitled to claim adverse possession of the Disputed Area under the Condominium Act. D.C. Code § 42-1901.01 et seq.[2] Condominium ownership is a form of ownership of real property unknown at common law. 4B Powell on Real Property (Part III) pp. 599, 633 et seq. (1976). The ability for a condominium to exist as a legal entity is created by statute, The Condominium Act, D.C. Code § 42-1901.01 et seq. (The "Act"). Under the Act, no condominium shall come into existence, except by recordation of condominium instruments, including declarations and certifications set forth in the Act. D.C. Code § 42-1902.01. "There shall also be recorded, promptly upon recordation of the declaration, a plan of every structure … which is located on any portion of the submitted land…." D.C. Code § 42-1902.14(b). Further, no easements or land can be added to a condominium after it has come into existence without meeting requirements under the Act, inter alia, recordation of an amended plat. D.C. Code § 42-1902.14(e). Plats must be recorded showing not only the dimension of any existing improvements, but also the intended location and dimension of any contemplated improvement. D.C. Code § 42-1902.14(a).

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[2] Cited provisions of the Condominium Act are included in the Supplemental Appendix at pp. 9-34.

In this case, the Henrietta recorded its declaration among the land records of the District of Columbia on February 23, 2009. App. 174-184. It was on that date that the condominium came into existence. Assuming, without admitting, that Henrietta is capable of asserting an adverse possession claim, and further assuming, without admitting, that the Henrietta can "tack" onto the prior owners' alleged use of the land for purposes of demonstrating a 15-year period of continuous use, the earliest date that Henrietta could have obtained any right whatsoever to the Disputed Area was February 23, 2009.

Henrietta Appellants claim that the Disputed Area contains a parking area owned by the Condominium. The Condominium Declaration definition of the condominium units, however, does not include any parking space as part of any unit, nor does the unit deed declare a parking place as part of any unit. See App. 174-184, 222-224 (admitted as authentic in Responses to Request for Admissions, MSJ, Exh. 2 D #7, E #9, F #11 and G #13). Therefore, any parking area, if owned by Henrietta, must be included as a general or limited common element. The Declaration of Condominium and the plat submitted with it, however, does not include the parking area as part of the condominium, nor indeed is any part of the Disputed Area designated as a general or limited common element. See *id*.[3]

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[3] A parking space reserved for the use of one or more units, but less than all units, would be a limited common element. D.C. Code § 42-1901.02(19).

Under the Act, the Declaration must include all limited common elements by depicting them on the plats and plans submitted with the Declaration. D.C. Code § 42-1902.14 (recordation of plats necessity of recordation with declaration), and D.C. Code § 42-1902.14(e). Indeed, the Declaration of Condominium had to include a description or delineation of any limited common elements not named in D.C. Code § 42-1902.06(5) [such as a parking space] – showing or designating the unit or units to which each is assigned. D.C. Code § 42-1902.10(a)(4), D.C. Code § 42-1902.13(a). Further, any assignment of a limited common element must be recorded. D.C. Code § 42-1902.13(b).

It is undisputed that the parking area is not depicted on the 2009 recorded Declaration of Condominium as part of the condominium, but that would not necessarily be required if claimed as part of the condominium property. If the owner/declarant creating the condominium actually intended to claim the Disputed Area for the condominium by occupying it continuously, openly, notoriously, and under claim of right, the owner/declarant would have been required to include the claim as part of the condominium. "The plats [included with the declaration] shall also show all encroachments by or on any portion of the condominium." D.C. Code § 42-1902.14(a) (emphasis added). The Declaration of Condominium does not do so.

Moreover, upon expiration of the 15-year adverse possession period, in order to perfect ownership, Henrietta was required to record the Disputed Area as part of the condominium among the land records. Under D.C. Code § 42-1902.13(c), if the condominium adds additional land, the declarant is obliged to record new plats of survey. Indeed, no condominium may be expanded except in accordance with the provisions of the declaration. Any addition shall be deemed to have occurred at the time of recordation of the new plats and plans, and recordation of an amendment to the declaration. D.C. Code § 42-1902.19. Henrietta never amended its Declaration or filed new plats and plans as required by statute. Thus, it could never have obtained ownership over the Disputed Area.

The entire thrust of the Act is that the condominium documents "shall disclose fully and accurately the characteristics of the condominium and the units … and shall make known to prospective purchasers all unusual and material circumstances or feature affecting the condominium." D.C. Code § 42-1904.04(a). This requirement includes making known significant terms of "encumbrances, easements, liens and matters of title affecting the condominium." D.C. Code § 42-1904.04(a)(9). If it were intended that there be assigned to purchasers any limited common elements, those were required to be reflected by the condominium instruments and, to the extent feasible, including <u>location and dimension</u> of all easements appurtenant to the, submitted land or otherwise, submitted as part of the

common elements. *See* D.C. Code § § 42-1902.13(a), 42-1902.14(e). Henreitta did not amend its declaration or submit new plats and plans. Therefore, the Henrietta Appellants could not have expanded its ownership or real property beyond that in the original declaration which does not include parking, i.e., it does not include the Disputed Area.

Accordingly, it is clear from the Condominium Declaration that the developer/owner of the condominium did not intend to claim ownership of the parking pad, fences or masonry wall as it is uncontested that none of those structure was claimed in the Declaration or on the plats and plans submitted therewith, nor is the Disputed Area included in the deeds to any individual owner.

IV. Cross-Appeal – S2 U Street is entitled to an Award of Damages

It the Order of May 12, 2021, the court set further hearing for purposes of determining monetary damages. Thereafter, on August 3, 2021, S2 U Street submitted its Statement of Damages, Fees & Costs with supporting affidavit of Lee Simon and exhibits. Supp. App. pp. 43-48. Henrietta Appellants filed an Opposition Statement, generally claiming that the damages requested were speculative. The court agreed, and on August 27, 2021, in open court, summarily denied any monetary award to S2 U Street without further elaboration or any specific finding of facts. Docket entry #96 of 8/27/21, App. p. 18.

In its statement of damages, S2 U Street requested that the Court award it:

- *Interest*: Because of the trespass and cloud on title created by Henrietta Appellants' Counterclaim, S2 U Street had be delayed from taking ownership of the property for over a year, could not develop the property during that time, and ultimately, had to obtain a financing for the purchase of the property at an increased interest rate. The cost of the increase was supported by the Affidavit of Lee Simon and reflected on a loan statement from BB &T bank. Supp. App. p. 49. The increase interest amount was $158,096.27.
- *Loss of Value:* The DC Zoning Administrator had determined that the property could be subdivided into 3 lots as a matter of right. The subdivision increases the value of the land by $750,000. The development of the subdivided lots cannot move forward, however, as a result of Henrietta Appellants' claim[4], nor could S2 U Street use the value of the new lots to support further financing, incurring a yearly loss for S2 U Street of $37,500. This item, too, was supported by affidavit and sale of a comparable property at 2100 4th Street, NE. It is recognized that the owner of land is generally held to be qualified to express his opinion of its value. "He is deemed to have sufficient knowledge of the

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[4] In addition, Henrietta Appellants have failed to comply with the Superior Court's Order to remove the parking pad, masonry wall and two fences.

price paid …and the possibilities of the land for use, to have a reasonably good idea of what it is worth." *Lowrey v. Glassman,* 908 A.2d 30, 37 (D.C. 2006) (quoting *D.C. Redevelopment Land Agency v. Thirteen Parcels of Land*, 534 F.2d 337, 339 n. 4 (D.C. Cir. 1976)).

- *Profit from Development:* Because the purchase was delayed by the Henrietta Appellants' claim, S2 U Street lost a year of its ability to rent out apartments in the 14 unit apartment building on the property. S2 U Street had planned to rent the units to tenants with Housing Choice Vouchers with rental rates set by the D.C. Housing Authority. The District suffers from a severe shortage of affordable housing, and the ability to rent the 14 apartments to voucher tenants is far from speculative, but assured given the existing need and funding levels for the Housing Authority to underwrite vouchers. Again, this item was supported by affidavit. Supp. App. 60 and published rent rates from the Housing Authority. The loss of one year of rent, minus expenses, was $265,459.
- *Property Taxes:* Although the Henrietta Appellants claim they own the Disputed Area, they do not pay the D.C. real estate taxes associated with it. S2 U Street has been forced to pay property tax as owner since the purchase in April 2021. The Disputed Area of the property is 10.3% of

the land, which is taxed at a yearly rate of $863.11. S2 U Street, again, submitted an affidavit and proof of payment of taxes.

- *Parking Revenue:* S2 U Street was denied a year of parking revenue due to Henrietta Appellants claims. S2 U Street lost $7,200 in parking revenues as attested to by Lee Simon who has personal knowledge of parking space rental in the neighborhood.
- *Costs:* S2 U Street, as the prevailing party in the case is entitled to its court costs and filing fees of $265.79, and also requested fees for Lexis research service, copying and parking, for a total of $358.29. Court filing fees are allowed as a matter of course. *Talley v. Varma,* 689 A.2d 547 (D.C. 1997)*;* Super. Ct. Civ. R. 54(d).

Each of the financial losses above were readily foreseeable and caused by the direct action of Henrietta Appellants' continued trespass and claim of adverse possession. It is well established that "[a] person tortiously deprived of property is entitled to damages based upon it special value to him if that is greater than its market value." *Edward M. Craugh, Inc. v. Dep't of Gen Services of D.C.,* 572 A.2d 457, 466 (D.C. 1990). Although a claimant must establish both the fact of damages and the amount with reasonable certainty, the proof need not be mathematically precise; rather, what is required is some evidence which allows the trier of fact to make a reasoned judgment rather than an award based on

guesswork. *Campbell,* 55 A.3d at 388-89. S2 U Street provided the trial court with the Affidavit of Lee Simon as well as supporting documentation to prove its right to an award of damages. This court has recognized that definitive and precise proof of damages is rarely possible and not required. *Id.*

Rather, "rough justice" in determining damages is often required. Thus, "[p]robable and inferential considerations as well as direct and positive proof may provide the basis for an award. *Id.* (citing *Hawthorne v. Canavan,* 756 A.2d 397, 401 (D.C. 2000); *NCRIC, Inc. v. Columbia Hosp for Women Med. Ctr.,* 957 A.2d 890, 904 (D.C. 2008); *Trs. Of the Univ. Of D.C. v. Vossoughi,* 963 A.2d 1162, 1175, 77-78 (D.C. 2009)) (internal citations and quotations omitted).

In this case, S2 U Street presented at least "some evidence" to support the reasonableness of their claim for damages, even if the assumptions identified for the calculations may be subject to questions at trial, that point goes to the weight to be given to S2 U Street witness' testimony, rather than to the admissibility of its evidence. *See NCRIC, Inc.,* 957 A.2d at 906.

The trial court erred as a matter of law when it determined that S2 U Street was not entitled to damages. The review of a question of law is de novo. Since S2 U Street submitted at least some evidence as to its claim for damages, summary denial was inappropriate, and the issue should have been held over for trial.

CONCLUSION

Based on the above arguments and the record herein, the trial court's decision below in granting summary judgment to S2 U Street and denying Henrietta Appellants Motion to Alter or Amend judgment should be affirmed, and the case remanded to the trial court solely on the issue of damages.

Respectfully submitted,

/s/ Kathryn Erklauer

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, a copy of the Brief of Appellee and Brief of Cross Appellant and Supplemental Appendix was served on all counsel of record through e-filing.

/s/ Kathryn Erklauer

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

    - An individual's social-security number
    - Taxpayer-identification number
    - Driver's license or non-driver's' license identification card number
    - Birth date
    - The name of an individual known to be a minor
    - Financial account numbers, except that a party or nonparty making the filing may include the following:

      (1) the acronym "SS#" where the individual's social-security number would have been included;
      (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
      (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
      (4) the year of the individual's birth;
      (5) the minor's initials; and
      (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Kathryn Erklauer
Signature

21-CV-0665 and 21- CV-0666
Case Number(s)

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Name

9/16/22
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