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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT

NISHAD KHAN PL and
NISHAD KHAN,

Appellants,

******CONSOLIDATED******

v.

CASE NO. 6D23-3551
6D24-0708

NEKA, LLC; AHMED EL HAWARY;
and REGIONS BANK,

Appellees.

INITIAL BRIEF

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PREFACE

This is the Initial Brief of Appellants, Nishad Khan, individually, and his firm, Nishad Khan PL, referred to as "Khan," and "NKPL," respectively. Appellee NEKA, LLC will be referred to as "NEKA," Appellee Ahmed El Hawary will be referred to as "El Hawary," and Appellee Regions Bank will be referred to as "Regions Bank." Other terms will be defined where they appear. References to the record on appeal shall be made as "(R. _____)," references to the transcript of the two-day trial, which was separately provided to this Court, shall be made as "(Tr.1 _____)" or "(Tr.2 _____)," and references to the supplemental record shall be made as "(SR. _____)," each with the appropriate pagination indicated.

This is an appeal from (1) an Amended Final Judgment entered August 24, 2023, *nunc pro tunc* to August 2, 2023, and the Order on Defendants' Motion for Rehearing entered August 24, 2023, and (2) the Final Judgment for Attorney's Fees and Costs entered March 11, 2024, together with two prior related non-final orders, both entered February 6, 2024. The two appeals have been consolidated for all purposes by order of this Court.

STATEMENT OF JURISDICTION

This is an appeal from an Amended Final Judgment entered on August 24, 2023, *nunc pro tunc* to August 2, 2023. (R. 3661–75). Following entry of the earlier judgment on August 2, 2023, the Defendants/Appellants filed a timely Motion for Rehearing that tolled rendition of the order under Rule 9.020(h)(1)(B). (R. 3494–98, 3499–3515). The lower court denied the Motion for Rehearing on August 24, 2023, the same day it issued the Amended Final Judgment. (R. 3529–33, 3534–35). The Defendants/Appellants appeal timely followed. (R. 3661–75).

The trial court's Amended Final Judgment is a final order, appealable to this Court under Rule 9.030(b)(1)(A), for which Appellants timely invoked this Court's jurisdiction, filing their Notice of Appeal within 30 days of rendition. *See* Fla. R. App. P. 9.110(b); *Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002) (describing a final order as one that "ends the litigation between the parties and disposes of all issues involved such that no further action by the court will be necessary").

This is also an appeal from a Final Judgment for Attorneys' Fees and Costs, together with corresponding prior orders regarding entitlement. (SR. 5832-5843). The Final Judgment for Attorney's Fees concluded the litigation of that issue between the parties and was thus an appealable final order under Rule 9.030(b)(1)(A). *See Caufield*, 837 So. 2d at 375. Again, the Defendants/Appellants timely invoked this Court's jurisdiction by filing their notice of appeal within 30 days of rendition. *See* Fla. R. App. P. 9.110(b). The scope of an appeal from a final order allows for review of prior interlocutory orders, rulings, or matters occurring before filing the notice. Fla. R. App. P. 9.110(h); *Saul v. Basse*, 399 So. 2d 130, 133 (Fla. 2d DCA 1981) (holding that an appeal of a final order includes review of prior interlocutory orders). The review of these interrelated matters has been consolidated by this Court, for which jurisdiction for the review of both judgments is established.

STATEMENT OF PRESERVATION

Whether the Final Judgment and Amended Final Judgment contained sufficient factual findings and whether that judgment was supported by the evidence were raised to the lower court by way of a timely Motion for Rehearing, citing evidence from trial. (R. 3499–3513). Detailed challenges to the determinations made by the lower court regarding production of documents, attorneys' fees, solvency, and the appropriate division of assets, were each raised at trial, as well as in the pleadings and the trial briefs. (R. 664–725, 1445–89, 2129–38, 2275–98, 3428–58); (Tr.1–2). Specific citations are included with the arguments herein.

Regarding the Final Judgment for Attorneys' Fees, the issue of whether El Hawary was entitled to fees as the prevailing party under NEKA's Operating Agreement was raised in Khan and NKPL's Response to the Motion for Attorneys' Fees and Costs and the supporting memoranda. (R. 3676–85, 4712–22). Again, specific citations are also included with the arguments.

STATEMENT OF THE CASE AND FACTS

A. Corporate formation and dispute.

1. Formation of NEKA.

In 2013, Khan and El Hawary formed a limited liability company, NEKA, for purposes of acquiring an office building in Orlando, Florida. (R. 2276); (Tr.1 140:24–141:8). Both parties were sophisticated individuals, although at the time, El Hawary had more experience in business and real estate transactions than Khan. (Tr.1 227:23–228:5).

El Hawary was an entrepreneur with a business degree from the University of Central Florida. (Tr.1 41:13–42:6). He had owned or operated multiple businesses, including restaurants and holding companies. (Tr.1 42:20–43:22); (R. 4009–11). Khan was a real estate attorney and licensed broker, and while he would later become Board Certified by The Florida Bar in real estate law, he was a younger attorney starting off when he met El Hawary. (Tr.1 225:24–226:15). NEKA was Khan's first foray into real estate. (Tr.1 228:2).

Each member of NEKA had an equal share of the company. (R. 60, 4007). Each member made a nominal initial capital contribution

of $100.00. (R. 4007). The parties intended to equally share the expenses and the income, but no further capital contributions would be required unless agreed in writing. (R. 3982); (Tr.1 230:11-15, 234:10-19). NEKA was a member-managed company, and no member could unilaterally transact business or incur expenditures on the company's behalf. (R. 3982, 3985–86).

After closing on the office building, both members occupied portions of the space with the remainder leased to tenants. (Tr.1 54:2-10, 118:23-25); (R. 4151–56). The arrangement was flexible, and the portions occupied by the companies owned by El Hawary and Khan changed over time. (Tr.1 54:11-24, 119:11-21, 234:20–235:15).[1] Neither had a written lease for their own space, although both made payments. (Tr.1 55:4–56:4, 119:1–122:9). NEKA also collected payments from other tenants, which it classified as rental income. (R. 3835, 4152–56).

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[1] During his rebuttal testimony at trial, El Hawary disagreed that Khan's "rental agreement" was fluid, but he had acknowledged earlier that the spaces occupied by Khan changed over time, as did the spaces occupied by El Hawary. (Tr.1 54:2-10); (Tr.2 42:10-18).

2. El Hawary seizes control.

In 2016, NEKA refinanced the property through Regions Bank. (R. 3859–75); (Tr.1 230:18-20). That same year, El Hawary assumed responsibility for the company's books. (Tr.2 36:24–37:3). He also stopped paying rent for the space he occupied. (Tr.2 37:11). Khan testified that he was kept in the dark and denied access to financial records despite multiple requests. (Tr.1 236:5-12). Khan continued funding the company, including by making direct payments for utilities, repairs, and renovations. (Tr.1 237:9–239:20); (R. 3966, 3976, 4013). El Hawary, on the other hand, made unilateral disbursements to himself, credited on Khan's side as rent payments. (Tr.1 105:10–106:25).

Khan wanted to sell the building, but El Hawary was not interested. (R. 4392). On March 27, 2019, El Hawary responded to an email about a listing for the property by unilaterally demanding a "cash call" of $250,000.00. (R. 4392). This was the first time such a demand was made. (Tr.1 242:16–243:2). El Hawary claimed they had to pay for utilities, mortgage, taxes, and major repairs, but he offered no specific explanation or documentation for the costs. (R.

4392); (Tr.1 243:9-16). El Hawary followed up on the "cash call," but Khan declined to send the demanded payment, as the demand was not authorized by the Operating Agreement. (R. 3901, 4438, 4477, 4606).

On November 26, 2019, Khan received two versions of a letter that purported to expel him from membership in the company and terminate his tenancy in the building, based on his alleged failure to meet capital and rental commitments. (R. 4440–44, 4655–58). The letters were sent by Attorney William Huseman on behalf of El Hawary, as owner and manager of NEKA. *Id.* Khan spoke with Huseman about the situation, arguing there had been no default and El Hawary lacked the authority to take unilateral action on NEKA's behalf. (R. 3760). Khan also explained that he had been paying company expenses for some time, but he had been denied access to the records that would show how those payments were applied. *Id.* Khan said Huseman understood and agreed to try to get the information. (Tr.1 240:21–241:12). He did not. *Id.*

The next month, Khan had his counsel, Christopher Skambis, contact Huseman in response to the unauthorized action taken by El

Hawary to deprive Khan of his membership interest in NEKA and to evict him from the property despite documented payments for company expenses. (R. 3763–65).

As to the records that El Hawary refused to tender, Skambis wrote:

> Khan has previously demanded the company books and records pursuant to section 605.0410, Florida Statutes, and El Hawary has consistently refused to provide them. On behalf of Khan, I again make the demand for those records required to be kept under section 605.0410(1) and those records described in section 605.0410(2), Florida Statutes. Those records should include all bank statements, cancelled checks, deposits, invoices, and all other documentation of income and expenses for NEKA. If the required records are not provided within a reasonable period of time, Khan will seek a court-ordered inspection of the records pursuant to section 605.0411, [Florida Statutes], which will require NEKA to pay Khan's legal fees associated with that action.

(R. 3765). Huseman sent some documents the next day, but he did not provide several legally required documents, omitting bank statements and other supporting records. (R. 3800–17); (Tr.1 165:20–167:18).

B. Litigation.

1. The claims for breach of lease and eviction.

While Skambis was working to reach a non-litigated resolution between the parties, El Hawary engaged litigation counsel – on NEKA's behalf – to proceed with two lawsuits against Khan's law firm, NKPL: an action for damages for breach of an oral lease and an action for eviction. (R. 27–37); (SR. 5862-72). NKPL responded to each lawsuit, filing an Answer, Affirmative Defenses, and Counterclaim, and a Motion to Dismiss. (R. 27–37); (SR. 5527-90, 5873-5926). NKPL also started making deposits into the court registry to avoid a default for the eviction, even though Khan disputed entitlement. (SR. 6006, 6007, 6011, 6012, 6013, 6014); (R. 3944–51). Although no order was entered requiring rent payments, NEKA moved to obtain possession if payments were late, which required the parties to spend additional funds litigating these motions. (R. 656–60, 1341–45).

Because NEKA's parallel lawsuits were based on the same set of facts, they were ultimately consolidated into a single proceeding. (R. 27–37, 170–72, 383–85); (SR. 6008-10). NEKA filed an Amended Complaint for Commercial Eviction and Damages, and NKPL

responded by filing its Answer and Affirmative Defenses, as well as a Counterclaim with Khan as Counter-Plaintiff and El Hawary as Counter-Defendant. (R. 173–84, 296–357). Through the Counterclaim, Khan and NKPL sought declaratory judgments against NEKA and El Hawary, requesting declarations establishing that:

- No member of NEKA had the right to demand capital contributions from the other;
- Khan's purported expulsion was wrongful, and Khan remained a member of NEKA;
- Khan faced injuries, including misappropriation of assets and the potential for foreclosure;
- El Hawary lacked the authority to file any lawsuit on behalf of NEKA; and
- NEKA should be dissolved and wound up due to a deadlock in management.

(R. 306, 307–09). The Counterclaim also included claims for an accounting, relief under Section 605.0410, Florida Statutes, and damages for unjust enrichment. (R. 309–17). NEKA and El Hawary filed their Answer and Affirmative Defenses to the Counterclaims, while NEKA filed a Reply to the Answer. (R. 386–400, 401–02).

In addition to filing an Answer, Affirmative Defenses, and Counterclaim, NKPL moved to dismiss the Amended Complaint with prejudice on grounds that NEKA's purported statutory three-day

notice was defective, which was fatal to the claim. (R. 358–80). NEKA had sent two versions of its three-day notice: one dated November 19, 2019, and the other dated November 26, 2019. (R. 372–80). Neither specified the precise amount of rent claimed to be due, the entity responsible for the payment, nor a consistent date for termination of the lease. *Id.*

The trial court was receptive to NKPL's arguments when the Motion to Dismiss was heard on August 11, 2020, with the court stating, "I don't know that you can seek possession without the proper three-day notice, so I think I'm leaning in the direction of the complaint needs to be dismissed with prejudice [for failure to comply with] conditions precedent[.]" (SR. 5633:9-13). As to NEKA's claim for damages for breach of oral lease, the court continued, "I don't think he can[,] under the way that it is structured at this point, so I think the only way to do that is to go back to square one, serve your proper notices, and move forward from there." *Id.* Despite these statements (and the style of the order), the trial court granted the Motion to Dismiss without prejudice to give NEKA an opportunity to amend. (R. 540, 542).

NEKA filed its Second Amended Complaint for Commercial Eviction and Damages on August 20, 2020, raising similar claims as it had before based on the three-day notice dated November 26, 2019. (R. 543–55). The next day, it filed a Motion to File Supplemental Complaint to add a new claim for eviction based on a new three-day notice dated August 14, 2020. (R. 639–55). Legal authority filed in support of the motion indicated this "Supplemental Complaint" was intended to cure the defects the court had identified at the recent hearing. (R. 1386).

Meanwhile, Khan moved for a summary order of production pursuant to sections 605.0410 and 605.0411, Florida Statutes. (R. 556–638). Khan argued that despite repeated requests, NEKA had still not provided all the financial information required by law. *Id.* NEKA opposed the motion, but the court granted relief, reserving its ruling on fees for later. (R. 842–1330, 1331–32, 1333–34).

NKPL filed its Answer and Affirmative Defenses to the Second Amended Complaint, with Khan joining in the Counterclaims, as before. (R. 664–725). Also as before, NKPL moved to dismiss with prejudice due to the defective three-day notice. (R. 726–70). While

the Motion to Dismiss the Second Amended Complaint for Eviction and Damages was pending, the trial court granted the Motion to File Supplemental Complaint over Khan and NKPL's objections. (R. 1346–60, 1404–05). The court explained its ruling as "the most efficient course of action," since NEKA had a right to file a new case based on the new three-day notice and could seek to consolidate once that happened. (R. 1404–05).

2. The foreclosure proceeding.

As Khan and NKPL continued their defense of NEKA's Supplemental Complaint for Eviction, NEKA's loan with Regions Bank fell into default. (R. 3840–42). Around that time, El Hawary obtained an EIDL loan on NEKA's behalf to infuse cash into the company, but he used the funds primarily in transfers to other companies he owned and to pay his litigation counsel. (R. 4479–80); (Tr.1 74:21–75:9).

Regions Bank filed its Complaint for Foreclosure against NEKA, NKPL, Khan, and El Hawary on January 14, 2021. (R. 3848–99). The Foreclosure Complaint included a claim for appointment of a receiver. (R. 3848–99). Regions Bank followed that claim with a

verified motion, requesting the receiver be immediately appointed to *inter alia*:

- Take possession of the Subject Property and to thereafter operate, insure, protect, preserve, manage, secure, and maintain the Subject Property, while preventing deterioration of the same; and
- Actively market the Subject Property for sale and, subsequently, sell it.

(SR. 5490–5526).

El Hawary and Khan filed separate Answers and Affirmative Defenses to the foreclosure action, each purporting to represent NEKA's interests. (SR. 5527–5590, 5591–5593). As the case moved forward, the court granted Regions Bank's Motion to Appoint Receiver. (SR. 5709–5716). The Order gave the Receiver broad powers to protect the Subject Property, including by marketing it for sale. (SR. 5709–5716).

Two months after entry of the Order Appointing Receiver, Regions Bank filed a Motion to Compel Compliance from NEKA and El Hawary, claiming they were interfering with the Receiver's actions by ignoring repeated requests for information and access to NEKA's books and records. (SR. 5717–5720). The motion was heard on

August 9, 2021, alongside a Motion for Entry of Final Judgment of Mortgage Foreclosure in favor of Regions Bank. (SR. 5721–5722, 5723–5724). The court entered a Stipulated Final Judgment for Regions Bank. (SR. 5726–5734). The Final Judgment gave Regions Bank immediate possession of the Subject Property and directed Khan and NKPL to vacate by September 15, 2021. *Id.* After that date, the Receiver was directed to sell the property to the highest bidder. *Id.* There was no indication that El Hawary or his counsel had played or would play any role in relation to the sale. *Id.*

The Receiver retained the real estate auction firm of Tranzon Driggers ("Tranzon") to serve as Special Master to conduct a sale to maximize proceeds. (SR. 5726–5734). Tranzon was imbued with the discretion to hold a public auction for the Subject Property or to sell it through private sale, if Tranzon thought a private sale of the Subject Property would garner a higher sale price. *Id.* Tranzon ultimately found a private buyer to pay a fair purchase price, resulting in a surplus of $1,083,549.67. (SR. 5735–5746). Again, there was no indication that El Hawary or his counsel played any role in the process. (SR. 5735–5746).

Once the sale was approved by the court, NEKA and El Hawary filed a Motion for Recovery of All Excess Foreclosure/Receiver Sale Net Proceeds. (SR. 5749–5816). They filed this same document in the pending civil action against Khan and NKPL, redescribing this motion as a "Supplemental Complaint for Recovery of All Excess Foreclosure/ Receiver Sale Net Proceeds." (R. 2057–2125).

As both the Motion for Recovery and the "Supplemental Complaint" were based on the same set of facts, Khan and NKPL again sought consolidation. (SR. 5821–5827). The court approved, and an order was entered on February 10, 2022, consolidating the Regions Bank Foreclosure into the Civil Action for Eviction/Damages for purposes of disposition. (R. 2143–44). Thereafter, Khan and NKPL obtained leave of court to amend their Answer and Affirmative Defenses so they could correct certain representations using information obtained during discovery and add counterclaims for declaratory relief and violation of section 605.0411, Florida Statutes. (R. 2153–76, 2177, 2200–01, 2202–20).

3. The consolidated bench trial.

The newly consolidated case was set for a non-jury trial. (R. 2145–52). The parties submitted a Joint Pretrial Statement that identified the issues of fact and law the court was to decide. (R. 2275–98). NEKA and El Hawary identified two issues:

> 1. Was Khan lawfully expelled from NEKA pursuant to the NEKA Operating Agreement?
>
> 2. What is the proper division of the excess sale net proceeds from the Regions Bank Foreclosure/ Receiver Sale of approximately $1,083,549.67?

(R. 2276, 2277). Khan and NKPL added other issues, including whether El Hawary was authorized to make a unilateral demand for a capital call, take unilateral distributions from NEKA corporate funds, or expel Khan from the partnership, and if Khan was unlawfully expelled, what impact it had on the proceedings. (R. 2276–77, 2277–78). Khan and NKPL also asked the court to decide questions related to Khan's demand for financial records under section 605.0410, Florida Statutes, and his statutory right to attorney's fees and costs. (R. 2276–77, 2277–78).

NEKA and El Hawary claimed they were entitled to 100% of the surplus funds from the sale. (R. 2278). Khan and NKPL asked the

court to declare that El Hawary's actions were without authority, to find that the loan would not have fallen into default absent El Hawary's illegal actions, to reinstate Khan as a member of NEKA, and to credit Khan for the improvements he made to the property when dividing assets. (R. 2278–79). The parties agreed that entitlement and amount of attorney's fees and costs would be reserved for post-trial motions. (R. 2280).

As the date for trial approached, transcripts of the depositions of El Hawary and Khan were filed with the court, and both sides filed trial briefs. (R. 2622–2932, 2939–3406, 3407–27, 3428–58). As they had in the Joint Pretrial Statement, NEKA and El Hawary raised only two issues in their trial brief: (1) that Khan was "duly expelled" from NEKA, and (2) El Hawary was entitled to all sale proceeds as the company's sole owner. (R. 3420–22). Khan and NKPL explained that Khan's expulsion was improper, and he was entitled to all proceeds because the property would have sold for far more if El Hawary had not caused the foreclosure. (R. 3441–54). Alternatively, Khan asked to recoup contributions he made for maintenance and other expenses. (R. 3454–55). He also outlined his arguments regarding

El Hawary's violation of section 605.0410, Florida Statutes. (R. 3438–41).

The case was tried on June 21, 2023. (R. 2620–21). At the start of the proceedings, the parties stipulated to the admissibility of their documentary exhibits. (R. 3485–87). The court heard opening statements, followed by testimony from El Hawary, Huseman, Khan, Skambis, and an expert accountant Khan retained, Paul Bauman. (R. 3487–89). After the parties had completed their cases in chief, the court elected to approach the case by first deciding the threshold issues of whether Khan was legally expelled from the company and whether NKPL was a tenant at will in the building. (Tr.2 35:23–36:13). The court heard closing arguments on these issues and announced its findings: Khan's expulsion from NEKA was invalid and NKPL was a tenant of the building with an oral lease. (Tr.2 44:4–75:10, 75:11–76:9).

Following a break in the proceedings, the court heard additional closing arguments regarding the fair and equitable distribution of NEKA's assets. (R. 3489); (Tr.2 76:22–106:14). El Hawary asked the court to award all proceeds to him, claiming that Khan violated his

fiduciary duties in connection with NEKA. (Tr.2 77:8-15, 77:18–86:7). Alternatively, he asked the court in making its allocation to give him credit for rent, attorney's fees, and tax payments that he outlined in a calculation made "during the lunch hour." (Tr.2 77:15-18, 86:7-11, 86:13–87:13, 87:13–88:17). Khan disagreed those credits were appropriate, and he asked the court to consider his contributions to the property and to further consider El Hawary's failure to provide records, which led to the litigation in the first place. (Tr.2 91:18–101:1). The Court took the matter under advisement. (R. 3489); (Tr.2 106:11-14).

4. The Final Judgment and Rehearing.

Six weeks after trial, the court entered its Final Judgment. (R. 3494–98). Consistent with its oral ruling, the court found that Khan was not lawfully expelled from NEKA and remained a 50% owner of the company. (R. 3495). At the parties' request, the court agreed to dissolve NEKA and to divide its assets between the parties, namely the excess sale proceeds in the amount of $1,083,549.67 and the rent deposited by Khan in the amount of $32,493.07. (R. 3495). The court also found, however, that:

- Khan failed to prove a cause of action for violation of section 605.0410, Florida Statutes, or any damages stemming therefrom.
- The attorneys' fees incurred by NEKA in the defense of the foreclosure and the pursuit of the eviction were necessary regardless of the invalid expulsion of Khan.
- NEKA's financial solvency issues were directly attributable to the inability to collect rent from the portion of the building held by NKPL.

(R. 3496).

Based on these findings, although Khan had not been lawfully expelled from the company and remained a 50% owner, the court divided the assets unequally with $866,471.70 awarded to El Hawary and $249,511.04 awarded to Khan. (R. 3497). There was no explanation for this calculation. (R. 3497).

Khan and NKPL filed a Motion for Rehearing, advising the court that its allocation of funds failed to align with the legal and equitable rights of a 50% owner, failed to address Khan's contributions, and failed to recognize Khan's challenge to the credits El Hawary requested at trial, specifically for holdover rent. (R. 3499–3513). At the trial court's request, El Hawary and NEKA filed a response in opposition to the Motion for Rehearing. (R. 3514–16, 3517–28). The

court denied the motion less than a day later and issued an Amended Final Judgment, identical in all respects to the original except to correct a numerical discrepancy in the division of funds. (R. 3529–33, 3534–35).

This appeal timely followed. (R. 3661–75).

5. The award of attorney's fees.

Notwithstanding the pending appeal, proceedings continued before the lower court with El Hawary and NEKA[2] seeking to recover attorneys' fees and costs pursuant to NEKA's Operating Agreement as the prevailing parties in litigation. (R. 3536–56). Khan and NKPL opposed the motion, arguing that the Operating Agreement did not provide for fees and NEKA and El Hawary were not prevailing parties. (R. 3676–85).

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[2] Although NEKA had been dissolved by the Amended Final Judgment, the Motion for Attorneys' Fees and Costs was filed on its behalf, claiming "as prevailing parties in this case, NEKA and El Hawary [were] entitled to recover their attorneys' fees and costs … pursuant to Paragraph 18.11 [of the Operating Agreement]." (R. 3537). NEKA and El Hawary reported that they incurred attorney's fees and costs of $243,866.06. (R. 3537). Recognizing that $100,000.00 of those fees had been accounted for in the Amended Final Judgment, they sought to recover $143,866.06. *Id.*

After a hearing, the trial court granted the motion, finding the parties' pretrial statement, the resulting ruling by the trial court, and NEKA's Operating Agreement established a basis to find the "Plaintiff" was entitled to recover fees and costs. (R. 4728–29). The court later entered its Final Judgment, awarding an additional $120,000.00 to El Hawary. (SR. 5828–31).

An appeal of this separately entered Final Judgment for Attorneys' Fees and Costs timely followed. (SR. 5832–5843). This Court, on stipulation of the parties, subsequently consolidated these interrelated appeals, both for purposes of the record and the briefing, resulting in the consolidated appeal now before this tribunal.

SUMMARY OF THE ARGUMENT

The lower court rejected the strong-arm tactics of El Hawary, finding that Khan retained equal ownership in NEKA, a company that required judicial dissolution. The lower court then erred, however, by dividing NEKA's assets in an unequal and inequitable manner and without an articulated explanation. The decision was both arbitrary and contrary to law, requiring reversal.

There is no evidence to support the lower court's unequal division. While the parties disagreed over their respective rent payments and obligations to NEKA during its operation, it is indisputable that El Hawary's actions both contributed to the company's failure and significantly drove up expenses in litigation. Yet, the lower court appeared to award all the "credits" he asked for without recognizing Khan's documented contributions. To the extent the lower court relied solely on El Hawary's requested "credits," as its incomplete findings suggest, this Court must also reverse because the findings and resulting division are contrary to the facts presented and the applicable law.

First, Khan proved a cause of action for violation of Section 605.0410, Florida Statutes, which at a minimum required the court to "credit" the reasonable attorney fees incurred in seeking the order of production in Khan's favor, if not to award the entirety of the assets to Khan through the court's equitable jurisdiction because the litigation would not have been necessary if El Hawary had provided access to the company's financial records, as requested and statutorily required.

Next, the attorney's fees incurred by NEKA in the defense of the foreclosure proceeding and in pursuit of the eviction were not necessary, as NEKA could have avoided foreclosure. There was no evidence that El Hawary or his counsel had a role in securing the surplus, and the eviction was instituted without authority or proper pre-suit notice. Thus, any expenses El Hawary chose to incur on his own behalf and improperly on behalf of NEKA should not have been credited in his favor when NEKA's assets were divided.

In addition, El Hawary did not establish that NEKA's financial solvency issues were directly attributable to its collection of rents from NKPL. Khan's expert testified the company was solvent, and

the evidence demonstrated El Hawary's actions contributed significantly to the company's ultimate financial situation. The lower court should not have solely penalized Khan for NKPL's perceived shortfall in rent when dividing the assets. Instead, it should have accounted for rent from both parties, recognizing that there was no basis for double rent, and considered Khan's other documented contributions.

Finally, the lower court erred by awarding attorneys' fees to El Hawary as the "prevailing party" where the contract did not provide for prevailing party fees and El Hawary did not prevail on the issues identified for trial. Independent of its decision regarding the Amended Final Judgment, this Court must reverse the lower court's Final Judgment for Attorneys' Fees and Costs.

STANDARD OF REVIEW

This appeal from a judgment entered after a bench trial is subject to a mixed standard of review. The lower court's findings of fact are reviewed for competent, substantial evidence, while its legal conclusions are reviewed *de novo*. *Bedoyan v. Samra*, 352 So. 3d 361, 365 (Fla. 3d DCA 2022); *see also Harris v. Bank of N.Y. Mellon*, 311 So. 3d 66, 69 (Fla. 2d DCA 2018) (reviewing *de novo* a final judgment determining entitlement to attorney's fees based on Florida Statutes and a fee provision in the mortgage). To the extent that evidentiary decisions of the lower court are deemed discretionary in nature, that determination is reviewed under an abuse of discretion standard. *Rivera v. State*, 260 So. 3d 920, 925 (Fla. 2018).

Even where determinations are discretionary, the Supreme Court cautioned that a court's discretionary power has never been intended for exercise in accordance with whim or caprice, it must be reasonable, meaning there must be logic and justification for the result. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In cases where the trial court's key findings were unsupported by the record, appellate courts have not hesitated to reverse. *U.S. Bank N.A.*

v. Rodriguez, 206 So. 3d 734, 737 (Fla. 3d DCA 2016) (reversing a trial court's discretionary dismissal where the record did not support its findings). Moreover, because the matter was entirely conducted as a bench trial, the standard of review requiring legal de novo review and factual review for competent, substantial evidence applies. *Bailey v. Covington*, 317 So. 3d 1223, 1227 (Fla. 3d DCA 2021) (The appellate court reviews the record for substantial, competent evidence to support the trial court's findings of fact, and the standard of review for the trial court's conclusions of law is de novo.).

Finally, while a trial court's calculation of attorney's fees would be reviewed for abuse of discretion, an order or judgment for entitlement is reviewed *de novo* because it concerns a question of law. *Nationstar Mortg. LLC v. Faramarz*, 331 So. 3d 738, 742 (Fla. 4th DCA 2021); *Mihalyi v. LaSalle Bank, N.A*, 162 So. 3d 113, 114 (Fla. 4th DCA 2014) ("where entitlement depends on the interpretation of a statute or contract the ruling is reviewed *de novo.*"). Here, where the entitlement was wrongly assessed based upon an incorrect interpretation of the parties' Operating Agreement, this Court should apply a de novo review and reverse.

ARGUMENT

I. THE LOWER COURT ERRED BY RENDERING AN UNSUPPORTED, INEQUITABLE, AND INCORRECT DISTRIBUTION OF ASSETS.

The lower court got it right, before it got it wrong. The critical threshold issue was whether El Hawary's unilateral expulsion of his business partner, Khan, from the business, NEKA, was unlawful. The lower court applied the evidence to the law and determined that the expulsion was unlawful, and that Khan rightfully remained a 50% owner. (R. 3495). Since the owners were deadlocked, the court agreed to dissolve the company and equitably apportion its assets – yet it failed to do so. The division of assets ordered in the Final Judgment and Amended Final Judgment is neither factually or legally supported on the record presented and several of the court's findings are patently erroneous. This Court must reverse the Amended Final Judgment and remand accordingly.

A. The division of assets in the Amended Final Judgment was arbitrary.

Having found that El Hawary and Khan remained equal members of NEKA, the lower court erred by dividing NEKA's assets upon dissolution without a clear rationale. (R. 3497, 3532). This

argument was specifically raised in the Motion for Rehearing, but the lower court failed to correct the error, requiring reversal. (R. 3499–3512).

The formation and operation of a limited liability company is governed by Florida's LLC Act. Chapter 605, Florida Statutes; *Espinosa v. Pavel Pardo Invs., LLC*, 296 So. 3d 949, 951 (Fla. 3d DCA 2020). The Act specifically provides a process for dissolution when, among other occurrences, members become deadlocked in the management of the company's activities and affairs and irreparable injury is threatened or being suffered. § 605.0702, Fla. Stat. (2023).

After dissolution has occurred and affairs are wound up, the Act directs any surplus funds to be distributed to each person owning a transferable interest that reflects contributions made and not previously returned, then to members in the proportions in which they shared before dissolution. § 605.0710, Fla. Stat. (2023). The Act does afford a court with discretion to order other remedies upon a showing of good cause. § 605.0703, Fla. Stat. (2023). But the court's discretion cannot be exercised arbitrarily; it must be supported and within the limits of proof. *Savers Fed. Sav. & Loan*

Asso. v. Sandcastle Beach Joint Venture, 498 So. 2d 519, 521 (Fla. 1st DCA 1986).

Here, after dissolving the company pursuant to the parties' stipulation and the court's authority under section 605.0703(4)(c), Florida Statutes, the lower court divided NEKA's assets between its two members, but instead of a proportional 50/50 split, the lower court's division awarded 78% to El Hawary and awarded only 22% to Khan. (R. 3497, 3532). This distribution fails to align with the evidence presented or with Khan's legal and equitable rights as a 50% owner. *See, e.g.*, § 605.0710, Fla. Stat. (2023). To be clear, although both parties asked for judicial dissolution, the stipulation and agreement referenced in the Final Judgment did not address how the assets were to be divided. (R. 2275–81); (Tr.2 76:22–106:14). The lower court offered no explanation for its calculation, whether at trial or in response to the Motion for Rehearing, and there is no intrinsic justification from the evidence presented. *Id.* The lower court's calculated division is neither an equitable split nor is it even what El Hawary proposed. While the lower court's distribution is similar to that proposed by El Hawary on the last day of trial, it does not align

exactly, nor account for or even address factual and legal issues with El Hawary's proposal. (R. 3499–3513).

El Hawary will likely argue, as they did in response to the Motion for Rehearing, that the lower court's division of assets was somehow supported by the sparse findings made in paragraphs 6 through 9 of the Final Judgment. (R. 3514–16, 3517–28). A review of these findings, however, provides no articulated mathematical premise for the uneven decision chosen by the lower court. Neither conclusions regarding Khan's claim for violation of section 605.0410, Florida Statutes, nor the litigation of the foreclosure and the eviction claims, nor any other provision in the lower court's thin findings provide any justification for the specific, calculated division ordered in the Final Judgment. (R. 3494–98, 3529–33). In addition, as explained below, these conclusions are contrary to both the facts presented and the applicable law. Section I.B., *infra.*

From any reasonable perspective, the Amended Final Judgment fails to include sufficient findings to justify the disproportionate division of assets ordered. (R. 3529–33). The lower court's action was arbitrary, erring when it rendered its calculated division without

sufficient findings, and then erred again when denying the Motion for Rehearing specifically raising that lack of findings to the lower court's attention as a critical and erroneous omission. *See Savers Fed. Sav. & Loan Asso. v. Sandcastle Beach Joint Venture*, 498 So. 2d 519, 521 (Fla. 1st DCA 1986) (reversing lower court's impermissibly arbitrary calculation). This Court should reverse the improper and arbitrary division of assets ordered in the Amended Final Judgment.

B. The lower court lacked evidence to justify its division, as its "Findings" are contrary to both the facts presented and the applicable law.

There is no evidence that could support the grossly inequitable division of assets adopted by the lower court in this case. To the extent it applied the "credits" requested by El Hawary, as its findings could suggest, the court erred because its conclusions as to the production of documents, attorney's fees, and rent were contrary to the facts and the law. As explained below, these arguments were repeatedly raised to the lower court's attention, having been raised prior to trial, raised again in the trial briefs, stated yet again during closing arguments, and renewed in the Motion for Rehearing. (R. 664–725, 2202–20, 3428–58 and 3499–3512); (Tr.2 91:18–101:1).

1. **Khan proved a cause of action for violation of section 605.0410, Florida Statutes, which the lower court erroneously failed to account for when dividing assets.**

First, the lower court erred by finding that Khan failed to prove a cause of action for violation of section 605.0410, Florida Statutes, or any damages therefrom, where the record showed consistent demands for necessary financial information, a lack of compliance by the company, and the resulting damages. (R. 3496). This statutory argument was raised in the pleadings, the trial brief, and at trial. (R. 664–725, 2202–20, 3428–58); (Tr.2 96:8–97:19, 98:17–99:16).

Section 605.0410, Florida Statutes, requires a limited liability company to keep certain information, including copies of the LLC's income tax returns and copies of financial statements from the last three years. § 605.0410(1), Fla. Stat. (2023). Upon demand from a member, the company must furnish information concerning its activities, affairs, financial condition, and other circumstances. § 605.0410(2)(b)(2), Fla. Stat. (2023). The statute details the timeframe and mandatory compliance required by the company, specifying that:

> Within 10 days after receiving a demand pursuant to [this section], the company *shall* provide to each member who made the demand

> a record of: (1) the information that the company will provide in response to the demand and when and where the company will provide such information, and (2) for any demanded information that the company is not providing, the reasons that the company will not provide the information.

§ 605.0410(2)(c), Fla. Stat. (2023) (emphasis added). If the company does not allow access, the remedy is to request a circuit court to order inspection and copying of the records demanded at the company's expense. § 605.0411(1), Fla. Stat. (2023). The statute further mandates that the circuit court shall also order the company to pay the costs, including reasonable attorney's fees, reasonably incurred by the member to obtain the order and enforce its rights. § 605.0411(2), Fla. Stat. (2023).

Here, the evidence showed that Khan repeatedly sought records from NEKA after El Hawary took control of its books. (Tr.1 236:5–237:21, 240:16–241:12); (R. 3760). He was repeatedly denied access. (Tr. 240:16-29, 243:9-16). On January 16, 2020, Khan's counsel made a formal written request, citing § 605.0411, Florida Statutes, as the ground for production. (R. 3763). Instead of producing the records to which Khan was entitled within 10 days, as the statute

required, NEKA (through El Hawary) initiated litigation. (R. 27–37); (SR. 5862-72). These facts plainly establish the elements for recovery under the LLC Act. *See* §§ 605.0410, Fla. Stat. (describing an LLC's obligation to keep and produce records), and 605.0411, Fla. Stat. (authorizing the trial court to order an inspection of records at the company's expense if the company fails to provide access). Indeed, the lower court reached this determination on October 4, 2020, when it granted Khan and NKPL's Motion for Summary Order of Production and ordered NEKA to produce certain categories of documents, including bank statements. (R. 1333–34).

Khan was clearly damaged by the lack of access, as it foreseeably, inevitably led to litigation and ultimately the loss of the property through foreclosure. (Tr.1 235:20–241:23). Thus, consistent with its ruling of October 4, 2020, the lower court should have found that Khan proved a cause of action for violation of section 605.0410, Florida Statutes, and that he was entitled to – at a minimum – a credit or offset for the attorneys' fees and costs incurred by NEKA for the efforts Khan had to take to enforce his rights. *See* §§ 605.0410 and 605.0411(2), Fla. Stat. (2023). Beyond this

minimum recovery, the lower court could have used its equitable jurisdiction to award all or at least half of the proceeds to Khan, as the litigation would not have been necessary if El Hawary and NEKA had simply complied with its corporate statutory duties and produced the company's financial records when Khan first asked for access. § 605.0703(4)(c), Fla. Stat. (2023). This Court should reverse the Amended Final Judgment consistent with the proper application of Chapter 605, Florida Statutes.

2. The attorney's fees incurred by NEKA in the foreclosure and eviction were neither authorized nor necessary.

Next, the lower court erred by finding NEKA's attorney's fees from the eviction and foreclosure were "necessary" where NEKA lacked authority to retain counsel, and its actions were avoidable, redundant, and ineffective. (R. 3496). This issue was raised both prior to trial and at the conclusion of the trial. (R. 2275–98 and 3428–58); (Tr.2 92:24–96:24).

It is a fundamental tenet of corporate law that in member-managed limited liability companies, "each member's vote is proportionate to that member's then-current percentage or other

interest in the profits of the limited liability company owned by all members, and *the affirmative vote or consent of a majority-in-interest of the members is required to undertake an act*[.]". *Akerman LLP v. Cohen*, 352 So. 3d 331, 338 (Fla. 4th DCA 2022) (citing § 605.04073(1), Fla. Stat.) (emphasis added). Acts taken without the requisite authority are deemed "ultra vires," and "[t]hey are characterized as void on the basis that no power to act existed, even when proper procedural requirements are followed." *New Horizons Condo. Master Ass'n v. Harding*, 336 So. 3d 796, 801 (Fla. 3d DCA 2022).

Here, the lower court determined that Khan was not legally expelled from NEKA, and he remained a 50% owner. (R. 3495, 3530). From this conclusion, it must follow that Khan as an equal co-owner, was entitled to notice and his consent was necessary to retain counsel both for the eviction and for the foreclosure. *Akerman*, 352 So. 3d at 338. Without that consent, the acts taken on NEKA's behalf were ultra vires and void. *New Horizons*, 336 So. 3d at 801. In other words, absent consent from its 50% owner Khan, NEKA could not

retain counsel for litigation; the expenses incurred should not have been credited to El Hawary when dividing the remaining assets. *Id.*

El Hawary had asked the lower court for a credit of $50,000, representing half of the attorneys' fees incurred by his counsel in the eviction and foreclosure actions. (R. 3513); (Tr.2 87:13–88:12). While the lower court did not indicate that it accepted that figure, it found the attorney's fees incurred by NEKA in both the foreclosure and the eviction were "necessary," regardless of Khan's invalid expulsion. (R. 3496, 3531). Not only is this determination an invalid application of corporate law, this determination is also contrary to the evidence, which showed that counsel's actions in the foreclosure and the eviction were avoidable, redundant, and ineffective.

For the foreclosure proceeding, there was evidence indicating not only that NEKA had funds in its bank account, but also that El Hawary had obtained an EIDL loan that could *and should* have been used to protect the property from foreclosure instead of as transfers to other companies or for attorney's fees and costs.[3] (R. 2278–79,

[3] At trial, El Hawary's counsel informed the court that the EIDL loan was to be "paid by our side." (Tr.2 101:4-24). However, it is undisputed that those funds were used to pay a portion of the

3436–52, 3833–38, 4479–81). Indeed, Khan had argued that it was improper under the CARES Act to use any EIDL funds to pay attorney's fees incurred in litigation against a member of the company. (Tr.1 34:21–35:20); (R. 2306–2608). Regardless of the EIDL loan, El Hawary cannot profit from his own failure to use available means to stave off foreclosure.

Even if the foreclosure had not been avoidable, El Hawary should not have been credited for the expenses of representation. (R. 3496, 3531). While El Hawary and his counsel argued repeatedly that the surplus funds recovered in the foreclosure were a result of their efforts and their relationship with the foreclosing bank, there was no evidence to support that claim. (Tr.2 87:13–88:12). In fact, the record demonstrates otherwise, as it showed minimal activity by El Hawary and NEKA in the early part of the foreclosure, and an adversarial effort to compel their compliance and cooperation by the end. (SR. 5591-93; 5717-20). El Hawary's counsel was not even the only attorney representing NEKA's interests in the foreclosure, as

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attorneys' fees incurred early in the litigation, which El Hawary later sought, successfully, to recover through his Motion for Attorney's Fees and Costs. (R. 3536–56, 4480).

Khan's counsel also had made an appearance to protect his client. (Tr.2 32:16-25). Even El Hawary himself proved skeptical of the claim that he impacted Region Bank's determinations, commenting at deposition, "I'm flattered once again that you think I could alter Regions' decisions of what they're going to do and not do." (R. 2927).

Considering the potential to avoid foreclosure, the absence of any substantial competent evidence that counsel's efforts secured the surplus funds at issue, and the redundancy of that representation, the lower court erred in finding that fees incurred by El Hawary in defense of the foreclosure were "necessary" and by giving him credit for those fees when dividing the assets. (R. 3496–97 and 3531–32).

As for the eviction, even if NEKA had the right to initiate litigation to address NKPL's alleged failure to pay rent or relinquish possession (it did not), its efforts here were inflated and flawed from the start. (R. 27–37). NEKA filed its action for eviction of 50% partner Khan in parallel with an action for breach of oral lease, thereby increasing both parties' expenses as they litigated two cases. *Id.* Neither complaint showed compliance by NEKA with the

condition precedent of notice before initiating litigation. *Dream Closet, Inc. v. Palm Beach Mall, LLC*, 991 So. 2d 910, 911–12 (Fla. 4th DCA 2008) (describing the statutory provision of three-days notice as a necessary element of a cause of action for eviction).

The lack of notice was fatal to NEKA's recovery, a concern NEKA appeared to recognize when it served new notice after the hearing on Khan's Motion to Dismiss and sought leave to file a "Supplemental Complaint" for eviction based on the new three-day notice. (R. 639–55, 1383–1403). Khan and NKPL argued that the new three-day notice was still invalid, but the issue became moot before the lower court could rule. (R. 1145–89). Still, because the posture of this case shows that at least half of the expenses in the eviction were improper for lack of notice, the lower court erred by finding those fees were "necessary" and by crediting those fees to El Hawary. *See Dream Closet, Inc.*, 991 So. 2d at 911–12.

In sum, where NEKA acted ultra vires by hiring counsel without the consent of the majority of NEKA's members, and where the record showed that the actions of counsel were avoidable, redundant, or inherently ineffective, the lower court erred by finding the defense of

the foreclosure and the pursuit of the eviction were "necessary" and by using that determination to affect the division of assets upon dissolution. *E.g.*, *Akerman*, 352 So. 3d at 338; *New Horizons*, 336 So. 3d at 801. This Court should reverse the erroneous Amended Final Judgment and remand accordingly.

3. NEKA's financial solvency issues were not directly attributable to the collection of rent from NKPL.

Third, the lower court erred by finding NEKA's financial solvency issues were directly attributable to its collection of rent from NKPL when the competent and substantial evidence demonstrated that any solvency issues faced by NEKA were attributable in whole or in part to El Hawary. (R. 3496). This issue was raised multiple times below, both in the trial brief and during trial. (R. 3449–52); (Tr.1 177:9–184:8).

Under section 726.103, Florida Statutes, a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. § 726.103(1), Fla. Stat. (2023). A debtor who is not paying its debts as they become due is presumed insolvent absent contrary evidence. § 726.103(3), Fla. Stat. (2023).

Here, while El Hawary claimed that NEKA was insolvent due to its inability to collect rent from the portion of the building occupied by NKPL, he offered no proof beyond his personal complaints. (Tr.1 41:10–145:22); (Tr.2 36:21–43:25). Khan, on the other hand, presented actual evidence through expert testimony that the company was not insolvent when the subject litigation began because its assets exceeded its liabilities, and that it was paying its debts as they became due. (Tr.1 182:7–184:7). NEKA's biggest expense was for its mortgage, $7,186.93 per month. (R. 4212–15). The evidence shows that NEKA regularly paid that expense, at least through the start of litigation. (Tr.1 182:18–183:9).

According to the testimony of Mr. Bauman, both members contributed capital to NEKA, and when including rent, "Khan paid a lot more." (Tr.1 189:16–190:25). The building was comprised of approximately 21,000 square feet. (Tr.1 47:23–48:3). Khan was the largest tenant, ultimately occupying 6,000 square feet as the "anchor tenant." (Tr.1 54:2-24). El Hawary also occupied space in the building. (Tr.1 54:2-17) (stating he had two offices in the 615 side, which totaled approximately 5,000 square feet); (Tr.1 119:11-21)

(acknowledging that he occupied an area of the property comprised of 5,200 square feet, but he rented half). Beyond these two members, NEKA rented to other tenants as well. (R. 4151–26).

El Hawary controlled the books for the company beginning in 2016, and he made several unilateral decisions that impacted NEKA's finances. (Tr.1 120:3-5, 236:5-12). He stopped paying rent, he started paying his own company a "management fee," and he unilaterally took distributions for his own purposes. (Tr.1. 104:22–106:3, 119:22–121:21, 122:10–123:20); (R. 3832–38, 4151–4226).[4] Meanwhile, Khan testified that he was making payments for NEKA's expenses during this time, many to the vendors directly. (Tr.1 237:22–239:13); (R. 3967, 3976, 4013). As Khan was denied access to the financials, he was not aware of the company's overall financial picture until after litigation began. (Tr.1 135:20–137:21, 241:5-11).

On this record, there was no evidence, competent, substantial, or otherwise, for the lower court to find NEKA's financial solvency issues, if any, were directly attributable to its ability to collect rent

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[4] While El Hawary claimed he was excused from rental payments by agreement, no such agreement was offered into evidence. (Tr.1. 119:22–121:21); (R. 3704–4658).

from the portion of the building held by Khan or to penalize Khan's recovery based on such an assessment. (Tr.1 *passim*); (Tr.2 90:10–91:2, 92:5-18); (R. 3832–38, 3967, 3976, 4013, 4151–4226, 4607–53). This Court should reverse the Amended Final Judgment because of this lack of competent substantial evidence to support these findings by the lower court, and remand accordingly.

4. The lower court's allocation failed to account for documented rents and contributions when dividing the assets.

The lower court's division of assets remains unelucidated, having not split the proceeds 50/50, nor shown a mathematical basis for a deviation from an equitable distribution. Nor do the amounts awarded match the specific suggestion of either party. They are, however, in the provided "neighborhood" of a suggestion that El Hawary offered for the first time at the close of trial. (Tr.2 86:7-11); (R. 3499–3513). To the extent the lower court roughly based its findings on El Hawary's closing argument, the lower court erred not only because it was based on flawed findings, as argued infra, but also because it miscalculated rental obligations and failed to account for other payments. (R. 2275–98, 3407–24). The argument regarding

rental obligations and payments was raised in the pleadings prior to trial, in closing arguments, and in the Motion for Rehearing. (R. 664–725, 2202–20, 3428–58, 2278–79, 3454–55, and 3499–3512); (Tr.2 91:18–101:1).

As discussed, Florida's LLC Act requires a court to distribute the surplus funds of a company to each contributor, reflecting their contributions made and not returned, then to the members in the proportion they shared before dissolution. § 605.0710, Fla. Stat. (2023). While a court is afforded discretion to order another remedy upon a showing of good cause, it must operate within the limits of proof and of the law. *See* § 605.0703, Fla. Stat. (2023); *Savers Fed. Sav. & Loan Asso. v. Sandcastle Beach Joint Venture*, 498 So. 2d 519, 521 (Fla. 1st DCA 1986).

The law applicable to non-residential tenancies recognizes that a lease without a written agreement is held at will with the term determined based on the period in which rent is payable. § 83.01, Fla. Stat. (2023). The tenancy may be terminated upon notice, which for a month-to-month tenancy shall be not less than 15 days prior to the end of any monthly period. § 83.03, Fla. Stat. (2023). A landlord

may demand double rent if and only if a tenant refuses to relinquish possession at the end of a lease without a bona fide claim of right. § 83.06, Fla. Stat. (2023); *West's Drug Stores v. Allen Inv. Co.*, 170 So. 447, 449 (Fla. 1936). Courts have found this statutory authorization to be penal in nature and subject to strict construction. *Wagner v. Rice*, 97 So. 2d 267, 269 (Fla. 1957). Thus, rent may be doubled if the tenant refuses to relinquish possession at the timely expiration of a term, but not in response to a declaration of default. *Id.*

El Hawary's trial proposal asked the court to split the surplus funds from the foreclosure sale in half, but then to credit him (and penalize Khan) for the rent that he claimed NKPL had failed to pay. (Tr.2 86:11–87:13); (R. 3513). El Hawary calculated this figure to be approximately $500,000.00, including $365,255.52 of "holdover rent" imposed based on a purported three-day notice from November 2019. *Id.* This request was problematic for three reasons: (1) it was improperly one-sided; (2) it was incorrect; and (3) it failed to account for documented payments made.

First, the proposal was improperly one-sided, because it was limited to the rent allegedly owed by NKPL. (R. 3513). While it was

undisputed that NKPL had made payments that were classified as "rent," it was equally undisputed that El Hawary paid "rent" as well. (R. 4152–54). El Hawary claimed that he stopped paying rent "by agreement" because his space was smaller and more difficult to use, but there was no competent substantial evidence of any such agreement offered or entered into evidence by El Hawary. (Tr.2 41:17–42:9); (R. 3485–93). Without evidence to the contrary, the lower court erred by assessing rent against Khan while simultaneously failing to assess any rent against El Hawary for the portion (or percentage) of the building he occupied for *four years* without paying rent – particularly where NEKA had collected rent of varying amounts from other tenants. (R. 4152–56).

Next, El Hawary's proposal was incorrectly calculated, as it failed to properly account for the alleged rent that could have been owed by NKPL. (R. 3513). El Hawary claimed that it was "undisputed" that NKPL owed approximately $8,600.00 per month for its space. (Tr.2 86:11–87:13). However, the evidence showed that while NKPL paid this amount into the court registry during the pendency of the eviction, it paid between $3,941.50 and $10,450.00,

with a median payment of $7,195.75, for the space prior to litigation. (R. 3934–51, 4228). More importantly, El Hawary included "double rents" in its proposal based on the purported pre-suit notice from November 2019, but the lower court expressly found this notice was ineffective and therefore did not provide a basis for any holdover penalty. (Tr.2 86:22–87:3); (R. 3513, 4015–23); (SR. 0-5632).[5] Even if El Hawary did not have the threshold failure to provide notice, there was no basis under § 83.06, Florida Statutes, for a holdover penalty where NEKA attempted to evict NKPL for an alleged breach of lease rather than a breach following its timely conclusion, and where NKPL had a bona fide claim of right to maintain possession due to NEKA's lack of authority to act unilaterally. (Tr.2 92:19–93:5); (R. 3505–06, 3977–4007); *see also Wagner*, 97 So. 2d at 269 (finding double rent may be imposed at the timely conclusion of a lease, rather than in

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[5] El Hawary and NEKA appeared to concede that their notice was deficient when they filed their Motion for Leave to File Supplemental Complaint, based on a new three-day notice. (R. 639–55). This new three-day notice was dated August 20, 2020, and while it demanded that NKPL relinquish the property within three days, it claimed the right to double rents for the past six months. Thus, even if "notice" was subsequently given, the timeline for calculation of a holdover penalty was erroneously not adjusted to account for a much later start date.

response to a breach). The lower court failed to follow the plain language of § 83.06, Florida Statutes, and erred when it – apparently – assessed double rents against NKPL in distributing assets.

Finally, El Hawary's proposal failed to account for other documented payments. (R. 3513). While El Hawary asked the court to credit payments he had made on behalf of the company, he made no reference to any other payments. (R. 3513); (Tr.2 86:13–89:14). Khan, however, had submitted uncontroverted evidence of payments he made for renovations, payments he had asked the lower court to consider from the inception of litigation when it divided NEKA's assets. (R. 3968, 3976, 4013); (R. 46–99, 296–357, 664–725, 1445–89, 2129–38, 2202–20, 2275–98, 3428–58). The LLC Act required the court to divide NEKA's assets in a manner that reflected contributions made and not returned; it should have done so here by crediting Khan for his documented contributions. § 605.0710, Fla. Stat. (2023). Failure to account for these contributions was a mathematical and legal error, requiring reversal.

In sum, the lower court stated that it intended to consider rent as part of an equitable division of assets. (Tr.2 92:5-18). Any

equitable division, however, should have addressed both parties' obligations (without any holdover penalty), along with evidence of contributions, such as those made by Khan for renovations to the property. *See* § 605.0710, Fla. Stat. (2023); *Wagner*, 97 So. 2d at 26. This Court should reverse the Amended Final Judgment as either being fundamentally arbitrary, or for adopting the flawed proposal from El Hawary that misapplied the outstanding rents and failed to account for other contributions, and remand accordingly.

II. THE LOWER COURT ERRED BY AWARDING FEES TO EL HAWARY WHERE NO CONTRACTUAL BASIS OR PREVAILING PARTY STATUS EXISTED.

The lower court awarded fees and costs to NEKA and El Hawary where there was no contract permitting the award and no basis to characterize NEKA or El Hawary as the prevailing parties. Because the law does not permit an award in such circumstances, this Court should reverse the Final Judgment for Attorneys' Fees and Costs in Favor of El Hawary, together with the prior orders regarding entitlement, and it should remand with instructions to deny these improper fee requests. This argument was raised in Khan and NKPL's Response to the Motion for Attorney's Fees and again in their

Response to NEKA and El Hawary's Memorandum of Law. (R. 3676–85, 4712–22). Review for the issue based upon interpretation of a contractual agreement is de novo. *Mihalyi v. LaSalle Bank, N.A*, 162 So. 3d 113, 114 (Fla. 4th DCA 2014).

Florida follows the long established "American Rule," which provides that attorney's fees are recoverable in litigation only where a statute or contract expressly provides for that relief. *E.g.*, *Erorentals, LLC v. Yu*, 275 So. 3d 746, 747 (Fla. 3d DCA 2019). Since fee shifting provisions are in derogation of common law, they must be strictly construed. *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 376 (Fla. 2013). Thus, to allow for recovery, the provisions authorizing the award of attorney's fees must be clear, specific, and unambiguous. *Islander Beach Club Condo. v. Skylark Sports, L.L.C.*, 975 So. 2d 1208, 1211 (Fla. 5th DCA 2008) (internal citations omitted); *see also Sunshine Bottling Co. v. Tropicana Prods., Inc.,* 757 So. 2d 1231, 1233 (Fla. 3d DCA 2000) (explaining that in the absence of a clear and unambiguous contractual provision or a statutory right, there is no right to attorney's fees).

Here, El Hawary and NEKA sought to recover attorney's fees based on a provision of NEKA's Operating Agreement involving indemnification. (R. 4005). The cited provision stated:

> To the fullest extent permitted by law, each Member shall indemnify the Company, each other Member, and hold them harmless from and against all costs, liabilities, damages, and expenses they may incur on account of any breach of this member agreement.

(R. 4005). Neither NEKA nor El Hawary, however, incurred any expenses on account of a breach of the *Operating Agreement*. (R. 543–55, 1408–14, 2057–2125). As alleged, their claims against Khan and NKPL were based instead on breach of an oral rental obligation. *Id.* Thus, the cited provision of the contract, under the plain language of the contractual terms, would apply only to a breach of the Operating Agreement, not to a breach of an unwritten rental obligation. *E.g.*, *Sunshine Bottling Co.,* 757 So. 2d at 1233. Because neither the cited clause of the Operating Agreement nor any other contractual provision allowed for recovery of prevailing party attorney's fees, there was no basis for them to recover fees at the conclusion of the litigation. This Court should apply its de novo

review to this entitlement issue, apply the plain language of the contract and reverse accordingly.

Even if this contract and provision somehow applied to the separate oral lease agreement, however, NEKA and El Hawary were not entitled to recover their fees in the litigation because they were not prevailing parties. *See* § 57.105(7), Fla. Stat. (2023). As stated, NEKA sued NKPL for breach of an oral lease and eviction. (R. 173–84, 543–55, 1408–14). After the property at issue was foreclosed, the case became about the division of surplus funds among the company's members. (R. 2057–2125). This question turned on whether Khan was legally expelled from the company following allegations of a default on rent and a failure to meet a mandatory "cash call." (R. 2057–2125, 2129–38, 2202–20).

At trial, NEKA and El Hawary identified only two questions in their pretrial statement and their trial brief for the court to resolve; they asked the court to find (1) that Khan was lawfully expelled as a member of NEKA, and (2) that El Hawary was entitled to all surplus proceeds as the only remaining member of the entity. (R. 2275–98, 3407–27). This was consistent with their presentation at trial, which

focused on Khan's membership with the company, and El Hawary's entitlement to the surplus proceeds. (Tr.1 16:15–27:23, outlining their case in opening statements). The lower court, however, found *against* them on both of these issues, deciding that Khan was *not* lawfully expelled as a member and El Hawary was *not* entitled to all proceeds from the sale. (R. 3494–98, 3529–33, emphasis added). Thus, El Hawary did not prevail on the questions presented, and he was not entitled to recover his attorney's fees and costs, nor was NEKA, which was dissolved in the Final Judgment. *Id.*

El Hawary and NEKA may argue as a "tipsy coachman," as they attempted below, that they are entitled to recover fees and costs because Khan breached the Operating Agreement by failing to comply with Florida law. (R. 4660–4711). In their memorandum of law in support of their Motion for Attorneys' Fees and Costs, El Hawary and NEKA noted that the law required each member of an LLC to act with a fiduciary duty of loyalty and care, to refrain from committing any act in violation of the agreement, and to refrain from possession of company property. (R. 4662–63, citing section 605.04091, Fla. Stat. (2023)).

While these statements of corporate governance may be true, they have no impact on NEKA and El Hawary's entitlement to fees because the Operating Agreement does not authorize an award for violation of these or any other provisions. (R. 3978–4007). Section 18.07 of the Operating Agreement, titled "Governing Law," states only that the agreement itself is governed by and shall be construed in accordance with the law of the State of Florida. (R. 4005). It does not state that the alleged violation by a member of any Florida law could result in the recovery of fees and costs. (R. 4005). Moreover, while the lower court determined (incorrectly) that NEKA's financial solvency issues were directly attributable to Khan and NKPL, it never expressly found they breached the Operating Agreement, nor did it find that Khan or NKPL had violated any statute. (R. 3496, 3526). In fact, the court expressly stated that it was not making a legal determination as to NKPL's rental obligations, and it found Khan was not legally expelled from the company under the Operating Agreement. (Tr.2 92:8-11); (R. 3495, 3525).

Since NEKA's Operating Agreement did not allow for an award of fees in this case and NEKA and El Hawary were not prevailing

parties on the issues they designated for trial (or on any other issue arising from the Operating Agreement), the lower court should not have found them entitled to recover attorney's fees and costs or entered judgment in their favor. Moreover, the reversal required for any of the issues raised in Issue I, *infra*, would further require the concordant reversal of the fee judgment, because neither NEKA nor El Hawary would be prevailing parties under the Operating Agreement or anything else. Whether this Court reverses the underlying Amended Final Judgment, however, this Court should reverse the Final Judgment of Attorney's Fees and Costs for each of the reasons cited above, and remand with instructions to deny the Motion for Fees.

CONCLUSION

For each of the foregoing reasons, this Court should reverse the Amended Final Judgment because it divided the assets of the dissolved company in an unsupported, inequitable, and incorrect manner, and it should remand accordingly with instructions to make a more appropriate and equitable division based on the controlling law applied to the evidence presented.

This Court should also reverse the Final Judgment for Attorney's Fees and Costs because the Operating Agreement, Joint Pretrial Statement, and court findings, do not authorize an award of fees and costs in this case. To the contrary, the Operating Agreement did not apply to the subject litigation, and El Hawary did not prevail on the questions designated for trial.

On the record presented, there was no basis for El Hawary to recover attorney's fees or to receive the grossly inequitable share of

NEKA's assets that the lower court awarded. This Court must reverse.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 21, 2024, I electronically filed the foregoing with the Clerk of the Sixth District Court of Appeal by utilizing the Florida Courts E-Filing Portal which will send a notice of electronic filing and a true and correct copy of the foregoing to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045(b) and Fla. R. App. P. 9.210(a)(2)(B), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style 14-point font and complies with the applicable font and word count limit requirements.

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