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DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D23-0760

JAMES H. GREASON, TRUSTEE,

Appellant,

v.

ROLLING GREEN CONDOMINIUM E, INC.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

LOWER TRIBUNAL CASE NO. 2016-33175-CA-01

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

For purposes of this Answer Brief, Appellant, James H. Greason, Trustee, will be referred to as "Appellant" or "Owner." Appellee, Rolling Green Condominium E, Inc., will be referred to as "Association" or "Appellee." Citations to the Initial Brief will be noted as follows: [IB. ___]. Citations to the Appendix accompanying this Brief will be noted as follows: [Appx. ___]. Citations to the Record will be noted as follows: [R. ___]

All emphasis is ours unless otherwise indicated.

PRELIMINARY STATEMENT

Florida Rule of Appellate Procedure 9.210(b)(3) requires all statements of fact to include a reference to the appropriate page of the record. Certain "facts" recited in the Appellant's Statement of the Case and of the Facts fail to include references to the record. For example:

A. The Appellant references the Declaration of Condominium but does not include a record cite. [IB. 2];

B. The Appellant states that he paid the assessments and penalties accrued since his purchase in November 2017 but does not include a record cite. [IB. 4];

C. The Appellant references an estoppel he received from the Appellee but does not include a record cite. [IB. 4]

In addition, throughout the Initial Brief, Appellant references a Florida Bar proceeding brought against the Association's initial counsel, Alba Varela. The Florida Bar proceedings were outside of the record and the lower court never took judicial notice of same.

This Honorable Tribunal should disregard any "facts" recited in the Initial Brief that are not accompanied by a record cite, including any reference to the Florida Bar proceedings. *Krock v. Rozinsky*, 78 So.3d 38, 42 (Fla. 4th DCA 2012)(A party may not go outside the record in making appellate arguments).

Further, in the Facts section of the Initial Brief, Appellant states that the Appellant "misled" the lower court at the hearing on entitlement by: (1) stating that the Appellant had failed to pay assessments when he had already done so, and (2) failing to disclose the existence of the Bar proceedings. [IB 11] There are no record cites

to support what occurred at that hearing as there is no transcript of that hearing. Consequently, this Court should disregard these "facts." *See, Stainless Marine, Inc. v. Cobra Sport Fishing Boats, Inc.*, 778 So.2d 1026, 1027 (Fla. 3d DCA 2001)(This Court declined to disturb order under review where plaintiff contended that the trial court made errors of procedure and substance in considering a motion but did not provide a transcript of the hearing).

ANSWER STATEMENT OF THE FACTS AND CASE

On March 6, 2015, the Appellee recorded a claim of lien against unit E-412 in Rolling Green Condominium E (the "Unit"). [R. 24] On November 17, 2015, Appellant became owner of the Unit by virtue of a certificate of title issued by the clerk of court following a judicial sale. [R. 22] On May 9, 2016, the Appellee recorded a second claim of lien against the Unit. [R. 26]

On December 29, 2016, Appellant filed a lawsuit against Appellee for declaratory judgment. [R. 19] More specifically, Appellant asked that the lower court declare that (1) he was not liable for "pre-purchase assessments, late fees, costs and attorney fees" and (2) the claims of lien were void. [R. 20] The Complaint included a demand

for attorneys' fees in the prayer for relief but did not set forth the contractual or statutory basis for such an award. [R. 20]

On May 7, 2017, Appellee filed an Answer, Affirmative Defenses and Counterclaim. [R. 40] In the Answer, the Association stated that the March 2015 claim of lien was not authorized by it. [R. 40; ¶4] The Association also stated that the March 2015 claim of lien "is in the process of being released and/or amended as to said Unit to reflect the amounts still due and owing by the Plaintiff for his failure to pay monthly maintenance assessments *since November 2015*." [R. 40; ¶5] (emphasis added) The Association released the March 2015 claim of lien on May 8, 2017. [R. 85]

So, as of the filing of the Answer, the Association was not taking the position that the Owner owed any charges *prior to* the date he took title to the Unit. [R. 42; ¶6] However, the Owner did owe assessments that came due *after* he acquired title to the Unit, necessitating the filing of a one count counterclaim. [R. 41]

Contrary to the "facts" recited in the Initial Brief [IB 1 & 3], the Association did not take the position that the Owner was liable for

the prior owner's arrearage or file a counterclaim to foreclose a claim of lien.[1]

The counterclaim contained a single count for money damages for unpaid assessments that came due *after* the Owner took title to the Unit. The counterclaim alleged that "This is an action to collect sums due for unpaid Condominium assessments of *less than $15,000.00*." [R. 42; ¶1] The counterclaim sought "assessments, special assessments, and related charges ***that have or will become due from the date of November 2015 through the date of Final Judgments herein***..." [R. 42; ¶6] The counterclaim did not mention a claim of lien and no claim of lien was attached as an exhibit to the counterclaim.[2]

Appellant admits that he paid the Association $7,012.71 in past due assessments and penalties that "accrued since his purchase in order to bring the account current" during the course of the underlying litigation. [IB 4, 8] On or about July 7, 2018, Appellant

[1] This is a blatant misrepresentation, the importance of which will be demonstrated later in this Brief.
[2] It is important to note that the claims of lien were in the amounts of $18,594.50 and $22,629.75, respectively, both well above the $15,000.00 maximum amount alleged in the counterclaim.

paid the Appellee an additional $2,740.23 in past due assessments and penalties. [R. 363] So, all told, through July 2018, Appellant paid Appellee $9,752.94 in assessments and penalties that came due *after* he took title to the Unit.

Because the Appellee paid the past due amounts, there was nothing left to litigate over. On July 8, 2018, an agreed order was entered whereby the lower court determined that (1) the issues identified in the complaint and counterclaim concerning payment of assessments have been resolved, (2) the only issue remaining for the court to rule upon concerned entitlement to and award of attorney's fees and costs. [R. 115] The order required the parties to file any motion for attorney's fees within thirty days. [R. 115]

On August 7, 2018, Appellant filed a motion for attorney's fees based on Florida Statutes §718.303 and §718.116. [R. 117] On January 25, 2019, the lower court entered an order setting the Appellant's motion for attorney's fees for hearing on March 29, 2019. [R. 131] The order also required the Appellee to file a response to the motion within 20 days. [R. 131] On February 14, 2019, Appellee filed its Response to the Appellant's motion for attorney's fees. [R. 132]

On March 29, 2019, the lower court conducted a case management. Based thereon, the lower court entered an order that dismissed the action but reserved jurisdiction to decide any claim for attorney's fees. [R. 156] The order also gave the Appellee an additional ten days to file a motion for attorney's fees.

On April 3, 2019, the Appellee filed its timely Motion for Entitlement and Award of Attorney's Fees and Costs. [R. 158] Therein, the Appellee argued that it was entitled to recover attorney's fees as the prevailing party because it succeeded on the significant issue in the case, to wit: whether the Owner owed the Association past due assessments.

On May 15, 2019, the lower court entered a "Preliminary Order Regarding Hearing on Motion to Tax Costs and Award Attorney's Fees" setting forth the procedure for dealing with the competing motions for attorney's fees. [R. 183] Pursuant to this Order, each side had ten days to provide the other side with their time records. Thereafter, the other side had ten days to "respond in writing to each item of cost and fees." The response had to state whether the party

agreed or objected to each item. The Order required that each objection "shall state the basis and cite supporting authority."

On May 21, 2019, Appellee filed its Affidavit of Attorney's Fees and Costs. [R. 186] Therein, Appellee requested 18.2 hours at $275.00 per hour for a total attorney's fee of $5,005.00. The Affidavit attached the Appellee's counsel's time entries. [R. 188-205]

On May 31, 2019, Appellant filed his Objections to Defendant's Claimed Fees and Costs. [R. 217] The Objections did not (a) respond to each fee item, (b) state the basis for the objection for each item, or (c) cite to supporting authority.

On June 25, 2020, the lower court conducted a special set hearing on the competing claims for attorney's fees. On June 27, 2020, the lower court entered a "Final Order on Entitlement to Attorneys' Fees." ("Entitlement Order")[R. 398] Therein, the lower court found that the Owner had no basis for entitlement to attorney's fees. Accordingly, the Owner's fee request was denied. In that same order, the lower court found that the Association was the prevailing party and was therefore entitled to attorney's fees pursuant to Florida Statutes §§718.116 and 718.303.

On July 11, 2020, Appellant filed a Verified Motion for Rehearing and Incorporated Memorandum of Law directed to the Entitlement Order. [R. 316]

On March 27, 2023, the lower court entered its "Order Resolving all Post Judgment Motions" which, in essence, denied the Verified Motion for Rehearing. ("Post-Judgment Order") [R. 400]

On April 25, 2023, Appellant filed a Notice of Appeal of the (i) Entitlement Order, and (ii) Post Judgment Order. [R. 397]

On April 25, 2023, Appellant also filed a Motion for Relief from Final Order Awarding Fees and Costs. [R. 374]

On May 23, 2023, the lower court entered an Order on Appellee's Motion for Award of Attorney's Fees and Costs. [Appx. 1] The Order gave the Appellee two days to provide its time records to the Appellant. Thereafter, Appellant had ten days to respond in writing to *each item* of cost and fees. The Order further stated that:

(a) the response shall state whether the charge is agreed or contested,

(b) for each contested item, the basis for the objection and supporting authority shall be identified,

(c) **any item not addressed shall be deemed agreed to and any objection thereto waived**, and

(d) **a failure to timely object shall constitute a *waiver and approval* of all fees and costs requested**.

[Appx. 1](emphasis supplied)

On May 24, 2023, Appellee filed its Affidavit of Attorney's Fees and Costs wherein it sought 40.4 hours at $275 per hour and 3.8 hours at $350 per hour for a total attorney's fee of $12,440.00 based on 44.2 hours. [Appx. 2]

On June 2, 2023, Appellant filed his "Objections to Defendant's Claimed Fees and Costs." [Appx. 3] Therein, Appellant made a blanket objection to "all time claimed in November and December of 2018" (consisting of eleven time entries totaling 4.3 hours).

On July 5, 2023, the Association filed its Expert Affidavit as to Reasonableness of Attorney's Fees and Costs. [Appx. 4]

On July 7, 2023, the lower court entered a "Final Judgment of Attorney's Fees and Costs" wherein it reduced the Appellee's time by 12.4 hours to 31.8 hours and awarded the Appellee $8,745.00 in attorney's fees ("Final Judgment") [Appx. 5] The Final Judgment

made specific findings as to Appellee's entitlement to attorney's fees, the reasonableness of the time expended and the reasonableness of the hourly rates charged. The Appellant did not file a motion for rehearing as to the Final Judgment.

On July 28, 2023, Appellant filed an Amended Notice of Appeal of the: (i) Entitlement Order, (ii) Post Judgment Order, and (iii) Final Judgment. [Appx. 6]

SUMMARY OF ARGUMENT

The lower court properly considered the Appellee's motion for attorney's fees. The July 8, 2018 Agreed Order was not a settlement agreement. It was simply an interlocutory order setting forth an agreed to procedure for seeking attorney's fees. This procedure was altered by the lower court's March 29, 2019 Order, which allowed the Appellee to file a motion for attorney's fees.

A trial court has inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of final judgment or order terminating the action. *Silvestrone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998); *Berrien v. State*, 189 So.3d 285,

287, fn. 1 (Fla. 1st DCA 2016). Consequently, the Appellee's motion for attorney's fees was authorized and timely.

Further, the July 8, 2018 Agreed Order was not a final judgment or order terminating the action. It was an interlocutory order. Consequently, Rule 1.525 did bar the Appellee's later filed motion for attorney's fees. Unlike the July 8, 2018 Agreed Order, the March 29, 2019 Order was, in fact, a final order as it dismissed the action and reserved jurisdiction to consider the competing fee motions. Appellee filed its motion for attorney's fees less than a week later, thereby complying with Rule 1.525.

The lower court correctly determined that the Appellee was the prevailing party. A party is determined to be the "prevailing party" if it succeeds on the significant issue and achieves some of the benefit sought in bringing the action. *Mortitz v. Hoyt Enterprises, Inc.*, 604 So.2d 807, 809 (Fla. 1992)(citing to *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)); *Munao v. HOA of La Buona*, 740 So.2d 73, 78 (Fla.4th DCA 1999). As noted by the lower court, the sole issue in this case was whether the Appellant was responsible for past due assessments. Appellant admitted that he paid past due assessments

that were owed after he took title to the Unit during the course of the litigation. Thus, the issue in the litigation was resolved in Appellee's favor.

For these reasons, this Honorable Court should affirm the orders on appeal.

STANDARD OF REVIEW

There are three orders on appeal: (1) June 27, 2020, Final Order on Entitlement to Attorneys Fees, (2) March 27, 2023 Order Resolving All Post Judgment Motions, and (3) July 7, 2023 Final Judgment of Attorney's Fees and Costs. [Appx. 6][3]

Appellant asserts that the standard of review as to each of the above orders is de novo. He is not correct.

Appellant correctly states that a determination of entitlement to attorney's fees based on the interpretation of a statute or contract is subject to de novo review. *Gilbert v. Gilbert*, 305 So.3d 735, 739 (Fla.

[3] On October 10, 2023, this Court entered an Order directing the Appellant to file an Amended Notice of Appeal that contains the July 7, 2023 final judgment of attorney's fees and costs. The Appellant did not comply with the Court's order, presumably because he filed an Amended Notice of Appeal with the lower court on July 28, 2023 that included this judgment. For some reason, the Amended Notice of Appeal is not part of the Record.

3d DCA 2020)(citing *Burton Family P'ship v. Luani Plaza, Inc.*, 276 So.3d 920, 922 (Fla. 3d DCA 2019)). The de novo standard of review would apply to the portion of the June 27, 2020 Final Order on Entitlement to Attorneys Fees that determined Appellant was not entitled to attorney's fees based on the lower court's review of Florida Statutes Sections 718.303, 718.116 and 57.105.

However, the de novo standard of review does not apply to the portion of the June 27, 2020 Final Order on Entitlement to Attorneys Fees that determined Appellee was entitled to attorney's fees as this determination was *not* based on the lower court's interpretation of a statute or contract. The decision was based on the lower court's determination that Appellee was the prevailing party.

A trial court's determination as to which party prevailed on the significant issues tried before it is reviewed under the abuse of discretion standard. *See, Collins Condo. Ass'n, Inc. v. Riveiro*, 348 So.3d 8, 9 (Fla. 3d DCA 2022). In fact, a case cited by the Appellant in his Initial Brief supports this position. [IB 24] *See, Zhang v. D.B.R. Asset Management, Inc.*, 878 So.2d 386, 388 (Fla. 3d DCA 2004)("Under these circumstances, clearly there was no abuse of

discretion in the trial court's well reasoned decision."). Further, deference should be given to the trial court in deciding who is the prevailing party. *Gilbert v. Gilbert,* 305 So.3d 735, 740 (Fla. 3d DCA 2020).

The March 27, 2023 Order Resolving All Post Judgment Motions simply served to deny the Appellant's pending Motion for Rehearing. [R. 406] The standard of review of an order denying a motion for rehearing is abuse of discretion. *Prime Prop. & Cas. Ins., Inc. v. Allied Trucking of Fla., Inc.*, No. 3D22-1616, 2023 WL 6278829, at *1 (Fla. 3d DCA Sept. 27, 2023).

With regard to the July 7, 2023 Final Judgment, the standard of review on appeal is abuse of discretion. *See, Babun v. Stok Kon + Braverman*, 335 So.3d 1236, 1240 (Fla. 3d DCA 2021)(The appellate standard of review for an awarded amount of attorney's fees is abuse of discretion); *See, also, 41 Acquisition Holdings, LLC v. Haff*, 365 So.3d 1181, 1183 (Fla. 3d DCA 2023)(A trial court's ruling on a motion for attorney's fees is a matter committed to sound judicial discretion which will not be disturbed on appeal absent a showing of clear abuse of discretion).

In *Gidwani v. Roberts*, 349 So.3d 917, 921 (Fla. 3d DCA 2022), this Court held that judicial discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. *Id.* If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.*

ARGUMENT

I. THE LOWER COURT PROPERLY ALLOWED THE ASSOCIATION TO FILE A MOTION FOR ATTORNEY'S FEES

A. *The Association's motion for attorney's fees was not time barred*

Here, Appellant argues that the Appellee's motion for attorney's fees was untimely as it was not filed within 30 days of the lower court's July 8, 2018 Order as required by Florida Rule of Civil Procedure 1.525. [IB. 14] The July 8, 2018 Agreed Order stated:

1. The issues identified in Plaintiff's Complaint and Defendant's Counterclaim concerning payment of assessments have been resolved.
2. The only issues remaining for the Court to rule upon concern entitlement and award of fees, and the Court reserves jurisdiction to rule upon said issues.

3. Motions for entitlement to attorney's fees and costs may be filed by Plaintiff and/or Defendant within thirty (30) days of the date of this Agreed Order.
4. The Non-Jury Special Set Trial scheduled for July 13, 2018 at 3:00 P.M. is hereby cancelled.

Rule 1.525 states: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party."

For Appellant's argument to be correct, this Court must find that the July 8, 2018 Order constituted a "judgment" or a "judgment of dismissal." It was neither. The July 2018 Order did not dismiss the action or close the case.

While the use of discrete verbiage is "not essential," the order must contain such phrases as " 'hereby enters' a judgment," or "similar unequivocal language of finality." *Coral Gables Imports, Inc. v. Suarez,* 306 So. 3d 348, 350 (Fla. 3d DCA 2020).

Appellant relies on the case of *Finnegan v. Compton*, 154 So.3d 370 (Fla. 4th DCA 2014). The facts in the *Finnegan* case do not apply

here. In *Finnegan*, the lower court entered a final order approving a settlement agreement and reserving jurisdiction to enforce it. *Id.* at 371. Thereafter, one party defaulted and the other party obtained a final judgment that retained jurisdiction "in order to enter further orders as are proper" but did not specifically mention attorney's fees. *Id.* Several months later, the judgment creditor moved for attorney's fees. *Id.*

The appellate court determined that a court order reserving jurisdiction to enforce a settlement agreement does not eliminate the Rule 1.525 requirement to file a motion for attorney's fees within 30 days of the final order. *Id.* Consequently, the appellate court affirmed the order denying the judgment creditor's fee motion as untimely. Id.

Here, the July 2018 Order is not analogous to the final order in the *Finnegan* case. The order in the *Finnegan* case was a final order as there was no judicial labor that remained to be done. Here, the July 2018 Order clearly reflects that judicial labor remained to be done. [See R. 115, ¶¶2&3]

However, the March 29, 2019 Order was a "judgment of dismissal" as contemplated by Rule 1.525. The March 2019 Order

actually dismissed the action. At the same time, the lower court gave the Association ten days to file a motion for attorney's fees, which it did.

The fact that judicial labor was not completed at the time the July 2018 Order was signed is further evidenced by the fact that there were no less than eighty-eight (88) docket entries after the July 2018 Order was signed and before the final judgment awarding attorney's fees was entered. [R. 8-14].

For these reasons, the Appellee's motion for attorney's fees was not barred by Rule 1.525.

B. The July 2018 Order was not a settlement agreement

Alternatively, Appellant argues that the July 2018 Order was a settlement agreement that required the Appellee to file its fee motion within 30 days. Appellant asserts that the successor judge did not have the authority to modify the "settlement agreement" and allow the Appellee to file a fee motion by virtue of its March 2019 Order. [IB 17]

The July 2018 Order was not a settlement agreement. It was an interlocutory order that set forth an agreed to procedure for seeking

attorney's fees. The lower court had the right to enter a subsequent order allowing the Appellee time to file a fee motion. *See, Deemer v. Hallett Pontiac, Inc.*, 288 So.2d 526, 527 (Fla. 3d DCA 1974)(where one circuit judge has made an interlocutory order, and is not able to continue to preside, another judge of the circuit court can vacate the prior order when the case is pending and has not gone to final judgment); *Tingle v. Dade Cnty Bd. of Cnty Comm'rs*, 245 So.2d 76, 78 (Fla. 1971)(successor judge may "vacate or modify the interlocutory rulings or orders of his predecessor in the case."); *Berrien v. State*, 189 So.3d 285, 287, fn. 1 (Fla. 1st DCA 2016).

The cases cited by the Appellant in support of this argument all relate to situations where a successor judge changes a *final judgment* entered by a predecessor judge. These cases stand for the proposition that a successor judge cannot review, modify or reverse, upon the merits on the same facts, *final orders* of predecessor judges.

Appellee takes no issue with these cases. They simply do not apply to the facts in this case as the March 2019 Order did not review, modify or reverse a final order of a predecessor judge on the merits.

C. The Fee Entitlement Order was not "vitiated" by any misconduct

Next, Appellant argues that the Fee Entitlement Order was "vitiated" because he was not advised that Appellee's "first counsel" (Alba Varela): (1) had not initially credited his wire to her trust account, and (2) had a conflict of interest because she represented investors seeking to purchase units in foreclosure. [IB 17]

Appellant improperly references a Florida Bar proceeding that was not part of the record. [IB 19] Appellant also references a June 10, 2019 Verified Motion for Reimbursement filed by Varela (the "Varela Motion"). [IB 19; R. 166-69] However, the Varela Motion *was not granted by the lower court and is not the subject of this appeal.* Consequently, it is of no import.

Appellant argues that he was "mortally injured" because the Appellee's attorneys did not advise the lower court that Varela had retained his payments in her trust account at the June 25, 2020 hearing on the competing attorney's fee motions. [IB 19-20] Appellant fails to explain how he was "mortally injured" by this supposed non-disclosure. In fact, he was not.

By June 2020, the parties had already resolved the past due assessments. Appellant paid the Appellee what was owed and all that remained was for the lower court to determine who was the prevailing party and then award attorney's fees accordingly. The fact that Varela may have held payments in her trust account has absolutely no bearing on this issue as there was no dispute about these payments. The "undisclosed" fact was irrelevant. All sides had already agreed that the payments were made.

The cases relied on by the Appellant simply have no application to this case. In *Collection & Recovery of Assets, Inc. v. Patel*, 276 So.3d 494 (Fla. 5th DCA 2019), a bank obtained a judgment against two guarantors, Chandra and Patel. *Id.* at 495. Chandra formed a company (CRA) which purchased the judgment from the bank. *Id.* at 496. CRA sought to collect the full amount of the judgment from Patel. *Id.* Patel sought relief from the judgment, arguing that it would be inequitable for CRA to collect the full amount of the judgment against him. *Id.* The trial court invoked its equitable powers and ruled that Patel was only responsible for half of the judgment. *Id.*

The appellate court affirmed, noting that Chandra formed CRA "as an artifice to collect the entire amount of the judgment against Patel." *Id.* The appellate court ruled that the trial court did not abuse its discretion by ensuring that Patel would only be responsible for half of the judgment, just as he was before Chandra formed CRA and bought the judgment. *Id.* The appellate court would not allow CRA to receive a windfall based on principles of equitable contribution. *Id.* at 498.

The case of *Weitzman v. F.I.F. Consultants, Inc.*, 468 So.2d 1085 (Fla. 3d DCA 1985) is equally unavailing. In *Weitzman*, Weitzman obtained a judgment in New York against Stein based on an "outrageous stock fraud" perpetrated on him. *Id.* at 1085. A broker obtained a judgment against Weitzman in Florida for commissions due from the purchase of stock Weitzman made in reliance on Stein's fraud. *Id.* A company owned by Stein (F.I.F.) purchased the Florida judgment and took steps to collect it. *Id.* The lower court denied Weitzman's motion for relief under Rule 1.540. *Id.* at 1086.

The appellate court determined that allowing F.I.F. to collect the Florida judgment would reward a wrongdoer and penalize a victim.

Id. Accordingly, the appellate court cancelled the judgment. *Id.* at 1087.

The facts of this case do not in any way resemble the facts in *Patel* or *Weitzman*. The Association is not a wrongdoer. The Owner is not a victim. There was no fraud. And, the Association did not receive a windfall. It was paid what it was admittedly owed. There simply was no misconduct that would "vitiate" the Fee Entitlement Order.

D. The Association is not estopped from claiming attorney's fees

Here, Appellant argues that Appellee is estopped from seeking attorney's fees by virtue of its failure to comply with the July 2018 Order. [IB. 20] Appellant does not explain the nature of the estoppel.

Appellant relies on one case to support this estoppel argument, *Clarke v. Global Guaranteed Goods and Services, Inc.*, 364 So.3d 1135 (Fla. 6th DCA 2023). The *Clarke* case has nothing to do with estoppel. The *Clarke* case stands for the proposition that a court cannot ignore a payment default provision in a settlement agreement and give the defaulting party additional time to pay, thus amending the settlement agreement.

As argued infra, the July 2018 Order was not a settlement agreement. It was an interlocutory order setting forth an agreed to procedure. *See, U.S. Bank Nat'l. Ass'n. for Registered Holders of First Franklin Mortg. Loan Tr., Mortg. Loan Asset-Backed Certificates, Series 2007-FF1 v. Rodriguez*, 256 So.3d 882, 884 (Fla. 4th DCA 2018)(A court has the inherent authority to revisit an interlocutory agreed order at any time prior to final judgment).

Appellant also argues that Appellee waived its claim to attorney's fees based on a November 16, 2018 estoppel certificate. [IB. 21] First, the estoppel certificate was not part of the record and should not be considered by this Court.

Second, Appellant points out that the "estoppel" states that the collection of unpaid assessments is not at an attorney's office. At the time the estoppel was issued, this action was active and had been pending for over two years. So, the Appellant knew full well that the collection was in the hands of an attorney.

Third, the Appellant was also well aware that the May 9, 2016 claim of lien had not been satisfied or released. Therefore, any reliance on the "estoppel" would be unjustified. *See*,

Fla.Stat.§718.116(8)(c)("An association waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who *in good faith* relies upon the estoppel certificate…").

E. The Appellee's claim for attorney's fees was not paid

Here, Appellant argues that he had paid/satisfied the Appellee's attorney fee claim when he paid the past due assessments and penalties. [IB. 22] This argument is based on Florida Statute §718.116(3), which states that payments received from a unit owner must be applied to interest, administrative fees, costs, attorney's fees, then delinquent assessments. So, according to the Appellant, the payments he admittedly made during the pendency of the action had to be applied to attorney's fees *before* delinquent assessments. This argument is disingenuous.

First, this argument has been waived. It was not raised below and cannot be raised for the first time on appeal. Second, if this is correct, then the Appellant would still owe past due assessments as the payments that were credited to delinquent assessments would have to be re-allocated to attorney's fees. Third, if this is correct, why

did the July 2018 Order allow both parties to file motions for attorney's fees? It is obvious that this argument has no merit.

F. The Appellee's fee claim is not barred by the Condominium Act

Here, Appellant argues that Florida Statute §718.116(6)(b) bars the Appellee's fee claim.

First, this argument has been waived. It was not raised below and cannot be raised for the first time on appeal.

Second, Appellant contradicts himself when he argues that a section of the Condominium Act (the "Act") should be enforced by this Court when it suits his needs while in other sections of his Brief, he argues that the Act does not control because the applicable Declaration of Condominium does not incorporate existing law. [IB. 25-6] This hypocrisy should not be lost on the Court.

Third, assuming this law applies, the Appellant intentionally quotes a small section of this law out of context in an effort to mislead this Court. Section 718.116(6)(b) states that if an association does not give a pre-suit demand before a foreclosure action is filed, and if the unpaid assessments, including those coming due after the claim of lien is recorded, are paid before the entry of a final judgment of

foreclosure, the association shall not recover attorney fees or costs. There is no record evidence that the Appellee *did not* give this notice.

Lastly, this argument was not raised as an affirmative defense to the counterclaim. [R. 77] Therefore, even if valid, the defense was waived. *Dober v. Worrell*, 401 So.2d 1322, 1323 (Fla. 1981)(An appellant cannot raise an affirmative defense for the first time on appeal); *Heartwood 2, LLC v. Dori*, 208 So. 3d 817, 821 (Fla. 3d DCA 2017)(It is well-settled law in Florida that affirmative defenses not raised are waived).

II. THE LOWER COURT WAS EMINENTLY CORRECT WHEN IT DENIED THE APPELLANT'S MOTION FOR ATTORNEY'S FEES

The Appellant's Motion for Award of Attorney Fees and Costs sought attorney's fees as the prevailing party pursuant to Florida Statutes §718.303 and §718.116. [R. 117] In the alternative, Appellant argued he was entitled to attorney's fees pursuant to Florida Statute §57.105.

The lower court denied the Appellant's Motion for Attorney's Fees finding that the Appellant had "no statutory basis under §718.303, §718.116 or §57.105 Fla. Stat. to seek entitlement to an

award of Attorney's Fees and Costs as the Complaint did not seek injunctive releif [sic] or damages and was not a summary procedure." [R. 404] In that same Order, the lower court denied the Appellant's August 7, 2018 Motion for Sanctions and February 10, 2020 Supplemental Motion for Sanctions finding that the Appellant had no statutory basis for attorney's fees as the Appellee conceded the relief sought by the Appellant in its first pleading in the case and simultaneously filed a release of lien. [R. 404; ¶2]

A. The Appellant was not the prevailing party

In this section of the Initial Brief, the Appellant conducts a detailed legal analysis as to why he was not responsible for payment of assessments that came due *before* he purchased the Unit at the judicial sale. This analysis is totally unnecessary.

The issue of whether the Appellant was liable for assessments that came due before he became owner of the Unit was never litigated. There was no ruling on this issue, one way or the other.

Had the lower court considered this issue, it would have determined that the Appellant was liable for assessments that came

due before he became the owner of the Unit. Section 8.5 of the subject Declaration of Condominium states:

> "However, any person who acquires an interest in an apartment, except through foreclosure of an institutional first mortgage of record, as specifically provide din this paragraph immediately preceding, including, without limitation, persons acquiring title by operation of law, including persons who become **purchasers at judicial sales**, shall not be entitled to occupancy of the apartment or enjoyment of the common elements, or of the recreational facilities **until such time as all unpaid assessments due and owing by the former owner have been paid**."
> [R. 255-6](emphasis added)

So, had the lower court considered this issue, it would have found that the Appellant was responsible for assessments that came due before he became the owner.

As the lower court found in its June 27, 2020 Order, the Appellee conceded the relief sought by the Appellant in its first pleading in the case and simultaneously filed a release of the lien relating to assessments owed *before* the Appellant owned the Unit. [R. 404; ¶2] At that point, the issue of whether the Appellant owed assessments *before* he became owner was rendered moot[4].

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[4] Appellant admits this: "The Association released the recorded lien for the unpaid assessments within days of filing its Answer, thereby *mooting* the [Appellee's] claim to void the lien." [IB 27](emphasis added)

Thereafter, the Appellee counter-sued the Appellant for assessments that came due *after* he owned the Unit. The counterclaim was litigated, resulting in Appellant eventually paying the Appellee the amounts it claimed were due. This is why the lower court found that the Appellee was the prevailing party.

Appellant claims that the "issue of liability for the prior owner's arrearage was the significant, and only, contested issue in the case." [IB. 27-8] Appellant argues that the Appellee continued to assert a claim for assessments due before he owned the Unit. [IB 27] He further asserts that the Appellee "ultimately dropped its demand for payment of the former owner's arrearage." [IB 27] So, according to the Appellant, he was the prevailing party.

However, there are no record cites to support the Appellant's version of what occurred in the lower court. In fact, the pleadings prove that the Appellant's liability for assessments that came due *after* he became the owner was the only contested issue in the case. This was confirmed by Judge Alan Fine when he found that "The Defendant [Appellant] conceded the relief sought by the Plaintiff

[Appellee] in its first pleading in the case and simultaneously filed a release of lien." [R. 404; ¶2]

The counterclaim clearly shows that the Appellee was only seeking assessments that came due after the Appellant became the owner of the Unit. [R. 40, ¶5; R. 41, ¶2; R. 42, ¶6]

See, Padow v. Knollwood Club Ass'n, Inc., 839 So.2d 744 (Fla. 4th DCA 2003)(Condominium unit owner was not the prevailing party within meaning of statute authorizing award of costs to the prevailing party, in action brought by condominium association for unpaid assessments, where condominium unit owner paid association $2,000, which was essentially all that the association sought, and association thereafter filed a voluntary dismissal without prejudice).

Even if Appellant was the prevailing party on his claim, he would not have been entitled to attorney's fees pursuant to Florida Statutes §718.303 or §718.116. Appellant filed a one count complaint for declaratory relief. Appellant did not even plead §718.303 or §718.116 as a basis for attorney's fees in the Complaint. Florida Statutes §718.303 applies to actions for damages or injunctive relief. Appellant sought neither of these remedies. Therefore, there is no

basis for fees under §718.303. *See, e.g., Ares v. Cypress Park Garden Homes I Condo. Ass'n, Inc.*, 696 So. 2d 885, 886 (Fla. 2d DCA 1997)(Section 718.303 does not authorize attorney's fees in an action by a unit owner against a condominium association for an accounting).

Florida Statutes §718.116 relates to the collection of past due assessments. This section provides for an "Association" to recover its attorney's fees in either a lien foreclosure action or an action to recover a money judgment for unpaid assessments. See, Fla.Stat.§718.116(6)(a). So, the lower court properly found that the Association, and not the Owner, was entitled to attorney's fees pursuant to §718.116.

III. NO EXPERT TESTIMONY WAS REQUIRED

On May 23, 2023, the lower court entered the Order granting Appellee's Motion for Award of Attorney's Fees and Costs. [Appx. 1] The Order required the Appellee to provide all of its time and billing records to Appellant's counsel within two days, which it did. [Appx. 2] Thereafter, Appellant had ten days to file a written response to "each item of cost and fees." The Order goes on to state that "Any

item not addressed shall be deemed agreed to and any objection thereto waived. A failure to timely object shall constitute a waiver and approval of all fees and costs requested."

On June 2, 2023, Appellant filed his objections to the Appellee's time records. [Appx. 3] The objection specifically referenced only fifteen time entries (in November and December 2018) totaling 4.3 hours (translating to $1,557.50). [See Appx. 3, pages 11-13] The Appellant failed to object to any other *specific* time entry. As a result, Appellant agreed to the time entries that were not objected to and any objections thereto were waived. *Lanson v. Reid*, 314 So.3d 385, 388 (Fla. 3d DCA 2020)(Appellants waived any objections to the fee award when they failed to appropriately respond to the court's standing order on fees.)

The hearing on the Appellee's Fee Motion occurred on July 7, 2023 from 9:30-10:30 a.m. Appellant did not object to the lack of

expert testimony at or before the hearing[5]. The objection was raised by virtue of a document that was filed *after the hearing* at 5:28 p.m. [Appx. 7] Because the objection was not timely made, it was waived. *See, Klein v. Roman*, 226 So.3d 955, 957 (Fla. 4th DCA 2017)(Appellant did not preserve issue for appeal when he failed to make a *timely, contemporaneous objection at the fee hearing* regarding Appellee's failure to provide independent expert testimony.)(emphasis added); *Diwakar v. Montecito Palm Beach Condo. Ass'n, Inc.*, 143 So.3d 958, 960 (Fla. 4th DCA 2014)(same).

Further, as noted above, the Appellant agreed to and waived any objection to 39.9 hours (44.2 hours minus 4.3 hours) of Appellee's time entries totaling $10,862.50 in attorney's fees. The lower court actually awarded less than the "agreed to" amount – 31.8 hours @ $275.00 per hour = $8,745.00. [Appx. 5] Consequently, no expert affidavit was needed as to those time entries.

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[5] There is no transcript of this hearing. Therefore, Appellant's statement that he raised the objection at the hearing has no record support and should not be considered by this Court. *See, Balsam v. S. Palm Beach Fin. Corp.,* 695 So. 2d 1267, 1268 (Fla. 4th DCA 1997)("[T]he lack of a transcript prevents us from determining whether this issue was properly preserved by objection below.")

If this Honorable Court is inclined to reverse the Fee Judgment on this basis, Appellee respectfully requests that the Court remand the matter to the lower court to conduct a new fee hearing and correct the deficiency. *See, Rodriguez v. Campbell*, 720 So.2d 266, 268 (Fla. 4th DCA 1998)("[W]hen the record contains some competent substantial evidence supporting the fee or cost order, yet fails to include some essential evidentiary support such as testimony from the attorney performing the services, or testimony from additional expert witnesses, the appellate court will reverse and remand the order for additional findings or an additional hearing, if necessary."); *Snow v. Harlan Bakeries, Inc.*, 932 So.2d 411, 413 (Fla. 2d DCA 2006)(same).

CONCLUSION

The lower court's determination that the Appellant was not entitled to attorney's fees was correct. The lower court did not abuse its discretion when it determined that the Appellee was the prevailing party and this, entitled to attorney's fees. Lastly, the lower court did not abuse its discretion when it did not require an expert affidavit to support the attorney's fee awarded to the Appellee.

Accordingly, Appellee respectfully requests that this Honorable Court affirm the July 7, 2023 Final Judgment in the amount of $8,745.00 and award it appellate attorney's fees pursuant to its separately filed motion for same.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Third District Court of Appeal by using the Florida Courts e-Filing Portal and served by using the Florida Courts e-Filing Portal to James H. Greason, Esq. (jhgreason@msn.com) on November 1, 2023.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the above-styled Brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a), in that it contains Bookman Old Style 14 point font and does not exceed 13,000 words or 50 pages.

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