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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D23-0071

CG TIDES LLC, *et al.*,

Appellants,

v.

SHEDDF3 VNB, LLC,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The trial court granted final summary judgment of foreclosure, damages, and other relief to the appellee, SHEDDF3 VNB, LLC ("Lender"), against the appellants, CG Tides LLC, et al. ("Borrowers"), citing the Borrowers' several defaults under the subject loan documents, including their secret misappropriation of $2,000,000 of insurance proceeds that belonged to the original lender. The trial court awarded the Lender default interest pursuant to the loan documents from the date of that default. On appeal, the Borrowers challenge the trial court's award of default interest and other findings.

The Loan

In October 2014, the Borrowers obtained a $45,000,000 loan from Ocean Bank ("Loan"). (R. 3539). The Loan was evidenced by a promissory note (*id.*, as subsequently amended, R. 3702, "Note"), and secured by, among other things, a mortgage and security agreement (R. 3591, "Mortgage", as subsequently modified, R. 3719), and various guaranty agreements (R. 3659-3700, as subsequently amended, R. 3728-3761, "Guaranties").

The initial maturity date of the Note was October 28, 2017. (R. 3703). However, at the request of the Borrowers, who were unable to timely pay the

initial maturity date Loan balance, Ocean Bank extended the maturity date numerous times, ultimately to December 20, 2020 ("Final Maturity Date"). (R. 279-307). The Borrowers did not repay any portion of the Loan on or after the Final Maturity Date. (R. 3536-37 at ¶¶ 12, 16).

In January 2021, Ocean Bank assigned the Loan and all Loan-related documents ("Loan Documents") to the Lender. (R. 309-318). Thereafter, the Lender discovered that the Borrowers had committed other defaults under the Loan Documents back in November 2017, when the Borrowers misappropriated nearly $2,000,000 of insurance proceeds that belonged to Ocean Bank. (R. 3535-36 at ¶ 10).

The Borrowers' Insurance Proceeds Defaults

In September 2017, Hurricane Irma extensively damaged the primary collateral for the Loan, the Tides Hotel in Miami Beach. (SR. 1) (deposition testimony of Borrowers' principal, Joseph Chetrit, that the Tides Hotel "suffered extensive damage" from Hurricane Irma); (R. 2231) (structural damage report findings); (R. 2285) (correspondence addressing "tremendous amount of water damage that impacted the building from top to bottom, in all suites and common areas"); (R. 2289) (correspondence dated more than a year after Hurricane Irma stating that the "Tides Hotel is closed and has been closed since Hurricane Irma and will remain closed until it has

been fully repaired or restored”). The Borrowers submitted a claim to their insurer for the property damage. (SR. 2).

On November 9, 2017, the Tides Hotel’s insurer issued a $2,000,000 insurance proceeds check for property damage (“Insurance Proceeds”) payable to Ocean Bank, certain Borrowers, and the insurance adjuster. (R. 3382-83). The Borrowers directed the insurance adjuster to send the Insurance Proceeds check to their office. (SR. 3).

The Mortgage required the Borrowers to repair any damage to the Tides Hotel regardless of availability of insurance proceeds. (R. 3599 at § 2.10(a)(iii)) (“Mortgagor shall . . . make or cause to be made, as and when necessary, all repairs and replacements, whether or not insurance proceeds are available therefor”). Section 2.12 of the Mortgage further made clear that:

- Mortgagor “***shall have no claim against the insurance proceeds***”;
- Mortgagor “authorizes and directs any affected insurance company ***to make payment under such insurance. . . to Mortgagee instead of to Mortgagor and Mortgagee jointly***, and Mortgagor appoints Mortgagee as Mortgagor’s attorney-in-fact ***to endorse any draft thereof***”; and

- Ocean Bank "shall have the option, ***in its sole, but reasonable, discretion***, of paying or applying all or any part of the insurance proceeds to: (i) reduction of the Liabilities, (ii) restoration, replacement or repair of the Property . . .; or (iii) Mortgagor."

(R. 3600 at § 2.12(b)) (emphasis added).

The Mortgage further provided that insurance proceeds were the "Property" of and belonged to Ocean Bank. (R. 3591-92 at 2-3 (D), (F)) (granting Ocean Bank all of Borrowers' right, title, and interest in and to the "Property", which includes "all insurance policies" and "proceeds of insurance" then owned or thereafter acquired). Section 2.6 of the Mortgage expressly prohibited the Borrowers from transferring any "Property" of the lender (including insurance proceeds), without the lender's "***prior written consent***." (R. 3597-98 at § 2.6) ("Without the prior written consent of Mortgagee in each instance, Mortgagor shall not cause or permit any transfer of the Property or any part thereof . . ..").

Any breach of §§ 2.12 or 2.6 of the Mortgage described above would result in an "Event of Default" thereunder, and a cross-default under the Note. (R. 3609 at §§ 7.2, 7.3; R. 3710-11 at § 11(c)).

Despite the foregoing Mortgage provisions, on November 10, 2017, without informing Ocean Bank, the Borrowers secretly deposited the check

for the Insurance Proceeds into an out-of-state (non-Ocean Bank) bank account, without Ocean Bank's required endorsement or prior written consent ("Insurance Proceeds Defaults"). (R. 3382-83) (reflecting that check was deposited into "Sterling Natl Bank # 183" without Ocean Bank's signature); (R. 3486 at ¶ 26) ("Q. . . . you deposited the [$2 million] check into the Sterling Bank account, right? . . . A. [Borrowers' principal, Joseph Chetrit] Yes, sir."); (SR. 5) ("Q. . . . [I]sn't it true that Ocean Bank's signature doesn't appear anywhere on the back of this check? A. No [it does not], sir.").

In December 2017, the Borrowers transferred $1,200,000 of the $2,000,000 Insurance Proceeds to the personal bank accounts of Joseph Chetrit ("J. Chetrit"), and his brother, Meyer Chetrit ("M. Chetrit"), a Loan guarantor. (SR. 4) ("Q. And then you directed $1.2 million of that [the $2 million check] to go to you personally, right? . . . . THE WITNESS [J. Chetrit]: Yes, sir."); (R. 3486 at ¶ 26) (citing Sterling National Bank statement reflecting transfers on 10/4/2017 of $950,000.00 and $250,000.00 to the Chetrits' personal accounts).

Unaware that the Borrowers received and misappropriated the Insurance Proceeds, Ocean Bank sent ***seven*** emails to the Borrowers from June 2018 to January 2020 requesting updates on the property damage claim for the Tides Hotel. (R. 3346-3359). On each occasion, the Borrowers

either misrepresented the status of the claim or ignored Ocean Bank's requests. *Id.*

For example, in June 2018—nearly seven months after their receipt of the Insurance Proceeds—the Borrowers told Ocean Bank: "We have been working with our insurance adjuster ***and still have not received the monies requested for BI [business interruption] or for damages to the property***." (R. 3347) (emphasis added). In internal correspondence, the Borrowers' representative stated, "I think it's better and will sound better to them [Ocean Bank] that we've now had to involve a law firm." (R. 3833). In October 2018, the Borrowers merely told Ocean Bank that they "have been working with an insurance attorney for a couple of weeks." (R. 3800-06). The Borrowers continued to keep Ocean Bank in the dark and simply ignored Ocean Bank's requests for status updates in 2019 and 2020. (R. 3801-06).

In all the email correspondence with Ocean Bank about the status of the insurance claim, the Borrowers never once mentioned their receipt of the $2,000,000 or their transfer of more than half of such proceeds to the Chetrits. Nor did the Borrowers argue or produce any evidence below that they obtained Ocean Bank's ***prior written consent*** to transfer the Insurance Proceeds to themselves or the Chetrits, as required by § 2.6 of the Mortgage.

On the contrary, the evidence showed that Ocean Bank was completely unaware of the Borrowers' receipt, deposit, and transfers of the Insurance Proceeds due to the Borrowers' misrepresentations. (R. 4010-11) (declaration of Ocean Bank's Vice President stating that Ocean Bank did not learn of the Borrowers' receipt or transfers of the Insurance Proceeds until after the Loan was assigned to Lender in 2021, and never authorized such actions).

The Borrowers' Insurance Coverage and Maturity Defaults

In October 2020, two months before the Loan matured, the Borrowers breached the Loan Documents yet again by allowing the property insurance to lapse during hurricane season, even though the Tides Hotel had previously sustained severe storm damage. (R. 3595-96 at § 2.3) (requiring borrower to maintain various types of insurance on the Tides Hotel and provide mortgagee with 30-days' prior notice of any policy cancelation or renewal); (R. 3455-71) (email correspondence reflecting lapse in policy on October 28, 2020, stating "the insured has advised he is not planning to bind the coverage").

The Borrowers also failed to repay any portion of the Loan at the Final Maturity Date in December 2020 (R. 3536 at ¶ 12), thereby further defaulting under the Loan Documents. (R. 237 at § 11(a)) (defining "Event of Default"

to include "the failure of Borrower to pay any amount of principal or interest hereunder on or before ten (10) days after the date same becomes due and payable.").

The Lender's Default Interest Demand

After acquiring the Loan from Ocean Bank, the Lender discovered the Borrowers' Insurance Proceeds Defaults, which violated §§ 2.6 and 2.12 of the Mortgage. (R. 3535 at ¶ 10). Such breaches were "Events of Default" under the Note and Mortgage. (R. 3609 at §§ 7.2, 7.3; R. 3710-11 at § 11(c)).

Accordingly, the Lender demanded that the Borrowers pay default interest from the date of their defaults in accordance with the "Default Rate" provision in § 8 of the Note, which permits the lender to apply the default interest rate "***from and after the occurrence of an Event of Default*** hereunder, irrespective of any declaration of maturity, [to] ***all amounts remaining unpaid*** or thereafter accruing hereunder . . . ." (R. 3707 at § 8) (emphasis added); (R. 3825). The Borrowers failed to pay this or any other amount due.

The Action Below

As a result of the Borrowers' defaults under the Loan Documents, the Lender filed a complaint against the Borrowers seeking: damages for breach of the Note and Guaranties, including default interest from the date of the

Insurance Proceeds Defaults; foreclosure of real and personal property; and transfer of contacts, licenses, permits, and rents (R. 31), which complaint was subsequently amended. (R. 2363, 2368). The Borrowers filed their answer, affirmative defenses, and counterclaim (R. 2672), which was later amended. (R. 2770) ("Counterclaim").

The Borrowers' Counterclaim asserted seven counts against the Lender: breach of contract; breach of the implied covenant of good faith and fair dealing; defamation; promissory estoppel; abuse of process; violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); and a Civil Remedies for Criminal Practices Act ("CRCPA") claim. *Id.* The Borrowers' Counterclaim largely centered on their contention that the Lender was not entitled to default interest from the date of the Insurance Proceeds Defaults.

Summary Judgment Proceedings and Ruling

The Lender moved for partial summary judgment on all its claims, including its entitlement to default interest from the date of the Insurance Proceeds Defaults.[1] (R. 3476). The Borrowers filed a competing summary judgment motion on the Lender's claims and a response to the Lender's

[1] The Lender's partial summary judgment motion did not seek a determination of the specific amounts due from the Borrowers under the Note. The amounts due were later addressed in the Lender's motion for final summary judgment.

partial summary judgment motion. (R. 3923; 5490). Notably, the Borrowers did not dispute that they never obtained Ocean Bank's endorsement or "***prior written consent***" to the transfers of the Insurance Proceeds to themselves or the Chetrits, as required by the Mortgage.

Following two lengthy hearings (R. 4219-96, 4297-4375), the trial court entered an order granting the Lender partial summary judgment on all counts of the amended complaint ("Partial Summary Judgment Order"). (R. 4181-86). In the Partial Summary Judgment Order, the trial court made the following findings relevant to the Borrowers' defaults:

> On November 9, 2017, the Borrowers breached sections 2.6 and 2.12 of the Mortgage by acquiring $2,000,000.00 of the Original Lender's insurance proceeds for property damage to the Tides Hotel caused by Hurricane Irma (the "Insurance Proceeds") and transferring such proceeds to their company bank account without the Original Lender's knowledge, consent, or endorsement, which constituted "Events of Default" under sections 7.2 and 7.3 of the Mortgage and section 11(c) of the Note (the "Insurance Proceeds Defaults").
>
> On December 4, 2017, the Borrowers further breached sections 2.6 and 2.12 of the Mortgage by transferring $1,200,000.00 of the Insurance Proceeds to the personal bank accounts of company principal Joseph Chetrit and Defendant Meyer Chetrit without the Original Lender's knowledge or prior written consent, which constituted "Events of

> Default” under sections 7.2 and 7.3 of the Mortgage and section 11(c) of the Note.

(R. 4183 at ¶¶ 13, 14).

The trial court further found that the Borrowers committed additional Events of Default under the Loan Documents by “allowing the property insurance on the Tides Hotel to lapse for several months” in October 2020 (“Insurance Coverage Default”) and by “failing to pay all amounts owed thereunder by the Loan’s extended maturity date of December 20, 2020” (“Maturity Default”). *Id.* at ¶¶ 15, 16.

Because of the Borrowers’ defaults, the trial court found that “[u]nder the clear and unambiguous terms of the Loan Documents, [Lender] is entitled to default interest ***from and after November 9, 2017—the date on which the Insurance Proceeds Defaults occurred***—at the rate set forth in section 8 of the Amended Note.” *Id.* at ¶ 17 (emphasis added).

The trial court also found that “[Borrowers] have failed to properly support their assertions of fact relating to their alleged affirmative defenses, ***including waiver and estoppel***, and all such defenses fail as a matter of law.” *Id.* at ¶ 20 (emphasis added).

The Lender thereafter filed its motion for final summary judgment, seeking a judgment for the specific amounts due under the Note, foreclosure,

and other relief. (R. 4187). More specifically, and in accordance the "Default Rate" provision in § 8 of the Note, the Lender sought the unpaid principal balance of the Loan ($41,793,694.09), plus default interest from November 9, 2017 on "all amounts remaining unpaid" (R. 3707 at § 8) as of that date, plus force-placed insurance costs. (R. 4191 at ¶ 9).

At the hearing on the Lender's motion for final summary judgment (R. 4420), the trial court agreed with the Lender that default interest applied from the date of the Insurance Proceeds Defaults to "***all*** amounts remaining unpaid", including all unpaid principal as of such date. (R. 4466-67) (THE COURT: "I think that the intent of the parties was quite clear, as reflected in these documents, that the default rate was to apply to all amounts remaining unpaid. And so I think that [Lender] is correct, and the motion for [final] summary judgment is granted.").

Thereafter, the trial court entered a written order granting Lender's motion for final summary judgment (R. 4401-04) and a written judgment (R. 4841-50). The judgment awarded the Lender the unpaid principal balance ($41,793,694.90), plus default interest from and after the November 9, 2017 Insurance Proceeds Defaults (totaling $47,807,634.53), plus force-placed insurance costs. (R. 4842 at ¶ 2). The Borrowers filed this appeal.

SUMMARY OF ARGUMENTS

I.

Contrary to the Borrowers' first argument, the trial court properly found that the "Default Rate" provision in § 8 of the Note clearly and unambiguously permits the Lender to apply the default interest rate from and after the ***occurrence*** of an Event of Default, in this case the date of the Insurance Proceeds Defaults, to "***all amounts remaining unpaid***", which includes all unpaid principal. (R. 3707). As they did below, the Borrowers are asking for a judicial rewrite of the Loan Documents so that the default rate applies at a later date and to different amounts.

The Borrowers' contentions that the default rate does not apply to all unpaid principal "until maturity" or until the Lender notifies the Borrowers of its intent to charge default interest are wholly unsupported by the Loan Documents as well as case law. The Note unequivocally states that the default rate applies "***irrespective of any declaration of maturity***" to "***all*** amounts remaining unpaid" and does not condition the lender's right to default interest on notice to the borrower. *Id.*

The decisional authorities relied on by the Borrowers are inapposite and involved markedly distinct facts and loan documents that required the lender to ***accelerate*** the loan's maturity to obtain default interest on the entire

unpaid principal balance and to provide ***notice of acceleration***. Here, the Loan Documents do not contain any such requirements, and the trial court properly refused to rewrite the parties' contract to require acceleration and notice.

II.

The Borrowers argue there were issues of fact regarding the materiality of their Insurance Proceeds Defaults, "forfeiture" of default interest, detrimental reliance, Ocean Bank's knowledge, and the Borrowers' liability for post-maturity interest. However, for the reasons stated in the ensuing Argument, these issues were either not material, not genuine, or not preserved for review.

III.

The Borrowers argue that the trial court could not enter summary judgment while the Borrowers' counterclaims were pending. However, as the Borrowers themselves admitted, all counterclaims that were intertwined with the Lender's claims for relief under the Loan Documents were adjudicated by the trial court in affirming the Lender's right to default interest. Moreover, the Borrowers have since dismissed their FDUTPA, CRCPA, and defamation counterclaims.

Because there is nothing left for the trial court to adjudicate, this case does not implicate the principle upon which judgments have been found premature while a counterclaim is pending.

IV.

The Borrowers argue that the trial court failed to specify its reasons for granting summary judgment. The record refutes the Borrowers' argument. The trial court specified in detail its findings and reasons for granting the Lender's summary judgment motions in its orders and at the hearings thereby complying with Fla. R. Civ. P. 1.510(a).

STANDARD OF REVIEW

Orders granting summary judgment are reviewed *de novo*. *Raffay v. Longwood House Condo. Association, Inc.*, No. 3D22-1911, 2023 WL 6133531 (Fla. 3d DCA Sept. 20, 2023). Similarly, a trial court's interpretation of the terms of notes and mortgages is reviewed *de novo*, as are all decisions interpreting a contract. *Fision Corp. v. Frueh*, No. 2D22-2517, 2023 WL 5418440 (Fla. 2d DCA Aug. 23, 2023).

ARGUMENT

I. THE TRIAL COURT PROPERLY AWARDED DEFAULT INTEREST IN ACCORDANCE WITH THE PLAIN TERMS OF THE NOTE.

A. Applicable Law.

"It is fundamental that where a contract is clear and unambiguous in its terms, the court may not give those terms any meaning beyond the plain meaning of the words contained therein." *1906 Collins LLC v. Romero*, 346 So. 3d 1262, 1265 (Fla. 3d DCA 2022). There are "countless authorities which might be cited in support of the controlling proposition that a party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract . . . ." *Nat'l Health Laboratories, Inc. v. Bailmar*, Inc., 444 So. 2d 1078, 1080 (Fla. 3d DCA 1984). Nor is it the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one contracting party. *Stack v. State Farm Mut. Auto. Ins. Co*., 507 So. 2d 617, 619 (Fla. 3d DCA 1987). "Instead, the plain meaning of the actual language used by the parties controls." *Pol v. Pol*, 705 So. 2d 51, 53 (Fla. 3d DCA 1997).

Where loan documents contain "a clear and unambiguous default rate clause," "the trial court is not at liberty to modify the terms of a note and mortgage that are unambiguous and undisputed." *Ivy Chase Apt. Prop. LLC v. Ivy Chase Apts. Ltd.*, 352 So. 3d 33, 43 (Fla. 2d DCA 2022) (citing *Smiley*

v. Manufactured Housing Assocs. III Ltd. P'ship, 679 So. 2d 1229, 1232 (Fla. 2d DCA 1996) (finding that "the trial court was without authority to modify the terms of the note and mortgage by failing to give effect to the default rate provision")).

1. The Default Rate Applies to "All Amounts Remaining Unpaid", Which Include Unpaid Principal (Response to Borrowers' Argument "I.B.1", Ini. Brf. at 19).

Section 12 of the Note provides that when an Event of Default occurs, the Lender may "exercise any right, power or remedy permitted by law or as set forth herein or in the Mortgage or any other Loan Document". (R. 3711). An Event of Default, in turn, triggers the "Default Rate" provision of the Note, which states:

> 8. **DEFAULT RATE**. From and after the Maturity Date or ***from and after the occurrence of an Event of Default hereunder***, ***irrespective of any declaration of maturity, all amounts remaining unpaid or thereafter accruing hereunder***, shall, at Bank's option, bear interest at 18% per annum). . . . ***Without limiting the generality of the foregoing***, if any payment is not received by Bank on/or before ten (10) days after the due date, then the interest rate ***shall automatically increase to the maximum rate*** permitted by applicable law. . . .

(R. 3707) (emphasis added).

The plain text of § 8 of the Note quoted above unambiguously entitles Lender to default interest from the date of an Event of Default on "***all amounts remaining unpaid*** or thereafter accruing hereunder", "***irrespective of any declaration of maturity***" (*i.e.*, acceleration). *Id.* As such, the trial court, in accordance with the well-settled principles of contract construction cited above, properly found that the phrase "all amounts remaining unpaid" included the Note's "unpaid" principal balance, ***irrespective*** of maturity.

On appeal, the Borrowers argue that the default rate only applies to unpaid principal ***that has matured***. *See* Ini. Brf. at 19-29. The Borrowers base their argument on the general "Interest Rate" provision of § 1(a) of the Note, which states that "[t]he unpaid principal balance of this Note from day to day outstanding, which is not past due, shall bear interest at a rate of interest equal to the Applicable Interest Rate." (R. 3702 at § 1(a)).

The Borrowers' argument is without merit because § 1(a) of the Note merely establishes the general non-default interest rate applicable to the Loan—it does not address the interest rate that applies upon an Event of Default. Rather, § 8 of the Note specifically and exclusively governs the interest rate upon default.

The general "Interest Rate" provision of § 1(a) of the Note, which applies in the absence of an Event of Default, does not conflict with § 8's "Default Rate" provision, which applies after an Event of Default occurs. Even if these provisions conflicted, which they do not, only § 8 specifically addresses the Lender's right to interest where, as here, there is an Event of Default and would therefore govern. *See Idearc Media Corp. v. M.R. Friedman and G.A. Friedman, P.A.*, 985 So. 2d 1159, 1161 (Fla. 3d DCA 2008) ("When certain provisions of a contract conflict, 'it is a general principle of contract interpretation that a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject.'") (quoting *Kel Homes, LLC v. Burris*, 933 So. 2d 699, 703 (Fla. 2d DCA 2006)).

Moreover, "where one or more provisions of a contract conflict, they should be construed so as to be reconciled, if possible." *Bengal Motor Co., Ltd. v. Cuello*, 121 So. 3d 57, 60 (Fla. 3d DCA 2013) (internal quotations and citation omitted). Sections 1 and 8 are easily reconciled by applying the interest rate in § 1 where there is no Event of Default and applying the interest rate in § 8 upon the occurrence of an Event of Default.

The Borrowers' misreading of the Note improperly isolates the general interest rate provision in § 1 from the default interest rate in § 8. As this Court recently reiterated:

> "When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." *. . .* A single term or group of words must not be read in isolation. *. . .* "Rather, 'the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.'" *. . .* "[W]e are constrained by law to construe a contract as a whole so as to give effect, as here, to all provisions of the agreement if it can be reasonably done."

TBC Florida, LLC v. Infinity Biscayne Myrtle Member, LLC, No. 3D22-1317, 2023 WL 6278886, at *2 (Fla. 3d DCA Sept. 27, 2023) (quoting *Perez-Gurri v. McLeod*, 238 So. 3d 347, 350 (Fla. 3d DCA 2017)) (internal citations omitted).

Section 8 of the Note unambiguously allows the Lender to apply the default rate from the occurrence of an Event of Default to "***all*** ***amounts remaining unpaid or thereafter accruing hereunder***". (R. 3707 at § 8) (emphasis added). By its plain terms, this provision includes all unpaid principal.[2]

[2] The Mortgage similarly provides that "Mortgagee may charge and collect interest from the date of default on the ***unpaid*** balance of the ***Liabilities***, at

Because the entire principal balance indisputably remained unpaid on the date of the Insurance Proceeds Defaults (and at all times thereafter), the trial court properly applied the default rate to such amount, irrespective of maturity. The trial court enforced the plain text of the Note and rejected the Borrowers' request to rewrite the parties' agreement by limiting application of the default rate to only "past due" or "matured" amounts.

Finally, the Borrowers' claim that "[t]here is a half century of precedent from this Court overruling interest on an unmatured principal balance" is hyperbolic and misleading. Ini. Brf. at 20. The precedent cited by the Borrowers consists of three cases, *Morton v. Ansin*, 129 So. 2d 177 (Fla. 3d DCA 1961), *Breitbart v. Zaucha*, 185 So. 2d 496 (Fla. 3d DCA 1966), and *Stern v. Kafin*, 676 So.2d 458 (Fla. 3d DCA 1996). However, the loan documents addressed in those cases expressly required the lender to ***accelerate*** the loan's maturity date to obtain default interest on the entire unpaid balance, whereas here, the Note applies the default rate to ***all*** unpaid amounts, ***irrespective of acceleration***. (R. 3707 at § 8).

In *Morton*, this Court found that under the unique provisions of the subject note, the lender was not entitled to default interest on the note's

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the Default Rate set forth in the Note." (R. 3610 § 8.1) (emphasis added). "Liabilities" is broadly defined and includes "principal". (R. 3591-92).

entire unpaid balance absent acceleration after the borrower failed to make a timely installment payment of principal and interest. Unlike the instant Note, the *Morton* note provided for a non-default rate of 5% per annum on principal and interest "***until maturity***", and contained a default provision comprised of the following three sentences:

> **[1]** This Note shall be considered in default when any payment of principal or interest required to be made hereunder shall not be paid on its due date, or . . . any breach in the terms of such mortgage or collateral instrument shall also constitute a default in this Note.
>
> **[2]** While in default the ***whole of said indebtedness,*** including unpaid principal, accrued interest and other charges, shall bear interest at the rate of ten percent (10%) per annum.
>
> **[3]** If this Note shall continue in default for a period of thirty (30) days, then ***the whole of said indebtedness*** shall, at the option of the holder, ***become immediately due and payable [i.e., accelerated]***, without notice, and until fully paid shall bear interest at the rate of ten percent (10%) per annum.

Id. at 179 (emphasis added).

This Court found it "quite significant" that the original lender in *Morton* had only claimed judgment for the unpaid principal installment and interest payment at the 10% default rate. *Id.* at 180. By so limiting its claim for judgment, this Court concluded that "[t]his clearly indicates the

understanding, belief and intention of the holder of the note" that the 10% default rate only applied to the amount of the missed payments, rather than the note's entire balance. *Id.* Here, however, the Lender's claim was ***not*** so limited, which is the first material distinction between this case and *Morton*.

The second material distinction is that the default provision in *Morton* is significantly different from that of the instant Note. This Court observed in *Morton* that sentence [2] of the default provision specifically governed missed payment defaults, and that the phrase "whole of said indebtedness" in such sentence, to which the default rate would apply, "would be the amount of the principal installment not paid, plus the amount of the accrued interest not paid". *Id.* at 181. This Court further determined that the repeated use of the phrase "whole of said indebtedness" in sentence [3] meant "the whole indebtedness represented by the note", and that the default rate would only apply thereto "(1) after the note had been in default for 30 days and then only (2) after the holder had ***accelerated*** the whole indebtedness by declaring the same due and payable." *Id.* (emphasis added). Based on the foregoing, this Court concluded:

> ***If*** a note provides for interest on principal sum at the rate of five percent per annum ***<u>until maturity</u>***, ***a higher rate of interest should not be allowed <u>on sums subject to acceleration clause,</u>*** at the option of the holder of the note, ***until the sums have been declared accelerated and become matured and***

> ***due and payable***, and then the higher rate should commence only from the accelerated date.

Id. (emphasis added) (citations omitted).

Here, however, unlike in *Morton*, the phrase "all amounts remaining unpaid" in the Note's default rate provision is ***not*** "subject to [an] acceleration clause". Nor does the Note expressly cap the interest rate on unpaid principal "until maturity" or provide separate treatment for missed payment defaults. Rather, the Note is clear that the default rate applies to ***all*** amounts remaining unpaid "***irrespective of any declaration of maturity***." (R. 3707) (emphasis added). Indeed, the Borrowers themselves acknowledged below that the Lender's right to default interest is ***not*** conditioned on acceleration. (R. 4452) ("THE COURT: Does our note - - does our note, listen to my question, require the lender to accelerate before default interest begins to run? I don't believe it does. MR. RICHARD [Borrowers' counsel]: It does not, Your Honor . . . .").

The second of the three cases cited by the Borrowers, *Breitbart*, also involved an "acceleration clause" like the one in *Morton* and expressly capped the interest rate "until maturity".[3] This Court held in *Breitbart* that

[3] The *Breitbart* note stated that "upon default in the payment of principal and/or interest when due, the whole sum of principal and interest remaining

under the note at issue, "the 9% Interest ***payable after maturity*** was not to be allowed on the unmatured principal ***inasmuch as there had been no acceleration*** . . .." *Id.* at 498 (emphasis added). Again, the instant Note's terms are materially different and apply the default rate regardless of acceleration.

The third case cited by the Borrowers, *Stern*, is merely an affirmance with three case citations and no discussion of the facts of the case. Consequently, there is no indication whether the loan documents in *Stern* bear any similarities to the instant Note.

In sum, none of the Borrowers' cited cases holds that default interest may ***never*** apply to unmatured principal, or that acceleration is required to obtain default interest on all unpaid principal ***in all circumstances***.

In contrast to the three cases relied on by the Borrowers, Florida courts addressing default rate provisions like § 8 of the instant Note have awarded lenders default interest from the occurrence of a default regardless of acceleration. For example, in *THFN Realty Co. v. Kirkman/Conroy Ltd.*, 546 So. 2d 1158 (Fla. 5th DCA 1989), the Fifth District affirmed the trial court's

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shall, at the option of holder, ***become immediately due and payable***"—i.e., accelerated. *Id.* at 497 (emphasis added).

award of maximum default interest from the date of the default, where the loan document "clearly provides that the higher default rate of interest is to be calculated '***from and after the date of any such default***' and is ***not keyed to the date of the mortgagee's exercise of the option to accelerate***." *Id.* at 1158-59 (emphasis added); *see also Patch of Land Lending, LLC v. Realty Capital Ventures, LLC*, No. 17-80450, 2018 WL 3899388, at *8 n.9 (S.D. Fla. July 11, 2018) ("Defendants claim that the interest was improperly calculated, but the Promissory Note allows default interest from the date of default, not the date of acceleration. Defendants' default interest calculations from the date of acceleration are in error."); *COF Investment LLC v. Columbus Apartment LLC et al.*, No. 2021-027467-CA-01 (Fla. 11th Cir. Aug. 3, 2022) (Hanzman, J.) (Order on Summary Judgment) ("COF Order" at 5-11) (rejecting argument that "[p]laintiff must exercise its option to accelerate before it can exercise its option to impose the default interest rate"). The COF Order can be found in the record at R. 4013-25.[4]

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[4] The Note in COF, which coincidentally was also issued by Ocean Bank, similarly provided that following a default, "irrespective of any declaration of maturity, all amounts shall, at Bank's option, bear interest at the highest permissible rate." (R. 4014). The trial court granted rehearing on one issue ("COF Rehearing Order") but reaffirmed its prior finding that Ocean Bank's assignee "had the right to accrue default interest from the initial date of default". (R. 4071-72).

Courts in other states have also reached similar results. *See, e.g., LaGrange Ventures, LLC v. Wells Fargo Bank, N.A.*, No. 15 C 7922, 2016 WL 8711597, at *3 (N.D. Ill. July 22, 2016) (finding that successor lender inured to original lender's right to default interest from the date of borrower's pre-assignment default, where lender's option to collect default interest was automatic upon default and not contingent on acceleration); *In re S. Side House, LLC*, 451 B.R. 248, 264, 266 (Bankr. E.D.N.Y. 2011), *aff'd sub nom. U.S. Bank Nat. Ass'n v. S. Side H., LLC*, No. 11-CV-4135, 2012 WL 273119 (E.D.N.Y. Jan. 30, 2012) (finding that where loan documents provided that default interest was payable and calculated "***from the occurrence of the Event of Default***," "default interest was due ***whether or not the Lender accelerated the Loan***") (emphasis added); *1077 Madison St., LLC v. March*, No. 14-CV-4253, 2017 WL 6383839, at *4 (E.D.N.Y. Mar. 31, 2017) ("Loan documents, however, may permit a lender to charge interest at an increased rate upon the occurrence of any default. . . . If the loan documents so provide, the default interest rate may apply even before a lender exercises its option to accelerate.").

Under the Borrowers' misguided interpretation of the Note (that default interest only applies to past-due payment amounts), the lender would never be entitled to default interest for any non-payment-related defaults absent

acceleration, which is not what the parties intended or bargained for. Rather, § 8 of the Note is clear that regardless of the type of Event of Default, the lender is entitled to default interest from the occurrence of such default on ***all*** amounts remaining unpaid irrespective of maturity.

2. No Notice Is Required for Default Interest to Accrue (Response to Borrowers' Argument "I.B.2", Ini. Brf. at 30).

Citing the provision in § 8 of the Note that the default rate shall apply at the "option" of the lender, the Borrowers argue that "the lender must exercise the option and inform the borrower before default interest accrues". Ini. Brf. at 30. The trial court properly rejected the Borrowers' argument, which is unsupported by the Note's plain text and case law.

Section 8 of the Note, the Default Rate provision, states that the default rate applies "from and after the occurrence of an Event of Default. . . at Bank's option . . . ." (R. 3707). Although § 8 gives the lender the "option" (*i.e.*, right) to apply the default rate, nothing in § 8 requires the lender either to notify the borrower that it is exercising such right or calculate default interest from the date of such notice. Section 8 does not even mention "notice" to the borrower, much less condition the lender's right to default interest on such notice.

Additionally, the Borrowers expressly waived any right to notice or demand in § 13.6 of the Note. (R. 3549) ("**Waiver**. Borrower, jointly and

severally, waives demand, notice, presentment, protest, demand for payment, notice of dishonor, notice of protest and diligence of collection of this Note."); *see also In re Pinebrook, Ltd.*, 92 B.R. 948, 949 (Bankr. M.D. Fla. 1988) (applying Florida law and finding that lender "clearly reserved unto itself the right to charge interest at the rate of 24 percent per annum ***upon default and without notice. That right vested upon default in payment and no election or notice to claim such interest was necessary***.") (emphasis added); COF Order (R. 4020) (analyzing substantially similar default rate and waiver provisions of Ocean Bank-issued loan documents and concluding that "[b]ased on the plain language of the Note and Mortgage, the Court finds there was no requirement for the Lender to 'notify' the Borrower that default interest began accruing. To the contrary, the Borrower expressly waived any right to notice in both the Note and Mortgage. . . .").

The Borrowers' argument would have required the trial court to rewrite the default rate provision to impose a notice requirement where none exists which is prohibited. *See Nat'l Health Laboratories, Inc., supra; see also* COF Rehearing Order (finding that Ocean Bank's assignee had the right to accrue default interest from the date of default, and was under no obligation to declare or communicate its intention to do so as a condition to exercising this

contract right where "nothing in the contract conditions the exercise of that right [to default interest] on 'notice' to the borrower.") (R. 4072, 4074).

The Borrowers' insistence that the default rate could not apply until the Lender notified the Borrowers of its intent to charge default interest is particularly preposterous where ***the Borrowers actively concealed their Insurance Proceeds Defaults for years***. (R. 3346-3359). But even if Ocean Bank knew about the Insurance Proceeds Defaults (which Ocean Bank did not) and declined to declare them, such knowledge would not affect the Lender's right to later seek default interest for those defaults.

The Loan Documents' "anti-waiver" provisions permit the lender to forgo or delay exercising any rights without waiving same, and require any waiver to be in writing, signed by the lender and limited "to the extent specifically set forth therein." (R. 3612 at §§ 9.2, 9.3; R. 3712 at § 13.5). In opposing summary judgment, the Borrowers presented no evidence that Ocean Bank or the Lender waived their right to default interest on account of the Insurance Proceeds Defaults in accordance with the requirements of the Loan Documents for such a waiver. Thus, the Lender was entitled to seek default interest from the date of the Insurance Proceeds Defaults upon discovery of the defaults years later. *See LaGrange*, 2016 WL 8711597, at *2-3 (finding that successor lender inured to original lender's right to default

interest from the date of pre-assignment default that occurred years earlier due to anti-waiver provisions and lack of written, signed waiver by lender); *GECMC 2006-C1 Complex 400, LLC v. RP 400 Urb. Renewal, LLC*, No. A-3460-16T3, 2018 WL 6055672, at *7 (N.J. Super. App. Div. Nov. 20, 2018) (affirming trial court's award of default interest to successor lender, who exercised its right to default interest nearly two years after the pre-assignment default, where there was no evidence of waiver by predecessor lender in writing, as required by loan agreement); COF Order (awarding successor lender, who acquired a loan from Ocean Bank in late 2021, default interest from the date of a pre-assignment default that occurred in 2019) (citing *THFN Realty Co*. and *LaGrange*) (R. 4015-16, 4021-22).

After discovering the Insurance Proceeds Defaults, the Lender promptly notified the Borrowers, in estoppel letters and this proceeding, that it was seeking default interest from the date of the Insurance Proceeds Defaults. (R. 3819-3827; R. 2376-2380 at ¶¶ 40-45, 50, 62).[5] The Borrowers

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[5] *Balvanz v. Coast Bank of Florida*, 968 So. 2d 614 (Fla. 2d DCA 2007), cited by the Borrowers, is distinguishable. In *Balvanz*, the court reversed the trial court's award of default interest to the lender because there was "no evidence ***in the record*** that Coast Bank was exercising its option" to default interest. *Id.* at 615 (emphasis added). Here, however, the record evidence establishes that the Lender sought default interest in all estoppel letters and throughout this proceeding. (R. 3819, 3825).

cannot act surprised by the Lender's exercise of its contractual right to default interest upon discovery of the Insurance Proceeds Defaults. As recognized by the court in *LaGrange*:

> The right to collect default interest has at all times been allowed under the contract. Based on [the original lender]'s forbearance of that right, [borrower] expected a lesser amount to be due and owing on the note than [successor lender] now claims. The late invocation of the always-present default right by [successor lender] was apparently inconsistent with [borrowers]'s expectations. It should not have been, since the note expressly permits the holder to "delay or forgo enforcing any of its rights or remedies" without consequence.

LaGrange, 2016 WL 8711597, at *2; *see also* COF Order (R. 4023) (finding that defendant "should not be surprised that Plaintiff – as assignee of Ocean Bank – insists on enforcing its contractual rights and remedies") (citing *Lawyers Title Ins. Co. v. Novastar Mortg., Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2003)).

In purported support of their argument that where the lender has the option to assert default interest, the lender must give notice to the borrower before default interest begins to accrue, the Borrowers cite *Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 541 (Fla. 3d DCA 2015), *Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999), *Eckert Realty v. Eckert*, 941 So. 2d 426, 429-30 (Fla. 4th DCA 2006), *Haddock v. Marlin*, 458 So. 2d

848, 849 (Fla. 5th DCA 1984), *Bratcher v. Wronkowski*, 417 So. 2d 1132, 1133 (Fla. 5th DCA 1982), *Baader v. Walker*, 153 So. 2d 51, 54 (Fla. 2d DCA 1963), and *Rones v. Charlisa, Inc.*, 948 So. 2d 878, 879 (Fla. 4th DCA 2007). Ini. Brf. at 30-31.

But in those cases, the courts merely address the lender's option to ***accelerate***, and whether ***notice of acceleration*** to the borrower is required. Such "optional acceleration" cases are inapposite, which was not lost on the trial court.[6] In *COF*, Judge Hanzman addressed the material distinction between a lender's acceleration option and its option to collect default interest while rejecting the very argument Borrowers raise here:

> Put simply, Lake Worth says that because an "optional" acceleration clause is not triggered until the lender notifies the borrower that the option has been exercised, default interest should not accrue until the lender "notifies" the borrower that the "option" to accrue it has been exercised. ***But acceleration and default clauses are apples and oranges.***

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[6] (R. 4250) ("MR. RICHARD [counsel for Borrowers]: Because there are several Florida cases, including one out of the third DCA, that holds that the default interest does not begin to accrue until the option is exercised. One of the -- THE COURT: Wait one moment. What cases are you referring to? MR. RICHARD: We're referring to, and we can -- it's Snow versus Wells, which is 3rd DCA 156. THE COURT: And Greeny [phonetic] versus Bursy? MR. RICHARD: Yes. ***THE COURT: But those have to do with acceleration***.") (emphasis added); *see also THFN Realty Co*., 546 So. 2d at 1158–59 (distinguishing *Haddock* and *Bratcher* as tying default interest to the date of acceleration due to the specific language of the notes in those cases).

> . . .
> ***[U]nlike acceleration, accrual of interest requires no action whatsoever on the part of a lender. The default interest begins to accrue upon a "default" – plain and simple.***
> . . .
> ***Regardless of whether the Note/Mortgage says default interest will accrue 'at Bank's option,' . . . the lender's right is the same: it has a contractual right to accrue interest at the default rate upon a default – end of story***.

COF Rehearing Order (R. 4083-85) (emphasis added) (referencing *In re Pinebrook Ltd*, 92 B.R. at 949; *La Grange*, 2016 U.S. Dist. Lexis 9632, at *4; *THFN Realty Co.*, 546 So. 2d 1158). Here, as in *COF*, "[a] default triggers the right to accrue interest at the default rate, regardless of whether the lender's intent to do so is communicated to the Borrower or not." COF Order (R. 4022) (citing *LaGrange*, 2016 WL 8711597, at *5).

II. THE BORROWERS FAILED TO RAISE ANY GENUINE ISSUE OF MATERIAL FACT IN OPPOSITION TO SUMMARY JUDGMENT.

A trial court "shall grant summary judgment if the movant shows that there is no ***genuine*** dispute as to any ***material*** fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a) (emphasis added). "The Florida Supreme Court has emphasized that one 'of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.'" *Ibarra v. Ross Dress for Less, Inc.*, 350 So. 3d 465, 467 (Fla. 3d DCA 2022) (quoting *In re Amendments of Fla. R. of*

Civ. P. 1.510, 309 So. 3d 192, 194 (Fla. 2020)). "As such, when contesting a motion for summary judgment, an opposing party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* at 468 (quoting *In re Amendments of Fla. R. of Civ. P. 1.510*, 309 So. 3d at 193).

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *In re Amendments to Fla. R. of Civ. Proc. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Indeed, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Nembhard v. Universal Prop. and Cas. Ins. Co.*, 326 So. 3d 760, 764 (Fla. 3d DCA 2021) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). If the evidence presented by a party asserting that a fact is genuinely disputed "is merely colorable, or is not significantly probative, summary judgment may be granted." *Gervas v. Gazul Producciones SL Unipersonal*, 358 So. 3d 1257, 1260 n.3 (Fla. 3d DCA 2023) (quoting *In re Amendments to Fla. R. of Civ. P. 1.510*, 309 So. 3d at 193).

The Borrowers' alleged factual disputes were either not genuine, not material, or not preserved for appellate review.

A. There Was No Genuine Issue of Material Fact as to the Materiality of the Borrowers' Insurance Proceeds Defaults and the Borrowers Failed to Preserve this Argument for Review (Response to Borrowers' Argument "II.B.1.", Ini. Brf. at 33).

The Borrowers erroneously argue that the materiality of their Insurance Proceeds Defaults presented a genuine issue of fact precluding summary judgment. The Borrowers failed to preserve this argument for appellate review. Regardless, all the Borrowers' numerous breaches of the Loan Documents were material.

1. The Claimed Error Was Not Preserved for Review.

In their responses to the Lender's summary judgment motions, the Borrowers failed to argue that their defaults were not material. Therefore, the Borrowers did not preserve the claimed error for review and cannot raise the issue for the first time on appeal. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the trial court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

The Borrowers first presented their materiality argument to the trial court in their motion for reconsideration, ***after*** the trial court granted the Lenders' summary judgment motions. (R. 4693-94). The Borrowers were too late. *See Frehling v. Garcia*, No. 3D22-0949, 2023 WL 6450464 at *5 (Fla. 3d DCA Oct. 4, 2023) ("It was not until after the trial court granted the Property Appraiser's motion for summary judgment that the Frehlings argued, in opposition to entry of final judgment, that the documents for the 2021 tax year were never produced. Therefore, this argument has not been properly preserved for appellate review."); *Prime Property v. Casualty Ins., Inc. v. Allied Trucking of Florida*, No. 3D22-1616, 2023 WL 6278829 (Fla. Sept. 27, 2023) (citing numerous Florida cases finding no abuse of discretion where trial courts decline to consider new issues presented for the first time on rehearing).

2. The Lender's Contractual Right to Default Interest Arises Upon an Event of Default.

Even if preserved for review, the "materiality" of the Insurance Proceeds Defaults does not affect the Lender's contractual entitlement to default interest upon the occurrence of such defaults.

According to the Borrowers, their Insurance Proceeds Defaults do not trigger default interest unless the defaults are found to be material. However, the Borrowers confuse the elements of a breach of contract claim, which

include a material breach, with a lender's contractual right to default interest, which is governed by the terms of the Note which simply require an Event of Default. *See, e.g.,* COF Order (R. 4084) ("The default interest begins to accrue upon a 'default' – plain and simple. And a borrower, or 'reader', knows that upon a default the lender has the right to charge interest at the default rate . . . .").

An "Event of Default" is a contractually defined event, and neither the Mortgage nor the Note conditions default interest on an additional finding of materiality.[7] The Insurance Proceeds Defaults were indisputably Events of Default that triggered the Lender's right to default interest under the unambiguous, bargained-for terms of the Note, which the trial court had no authority to modify. *See, e.g.*, *Smiley*, 679 So. 2d at 1232 (explaining that "trial court was without authority to modify the terms of the note and mortgage by failing to give effect to the default rate provision"); *In re Heritage Hotel Assocs., LLC*, No. 8:19-bk-09946, 2021 WL 2646533, at *7 (Bankr. M.D. Fla. June 28, 2021) ("Florida courts are not at liberty to modify unambiguous

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[7] (R. 3609 at §§ 7.2, 7.3) (defining "Event of Default" to include "[a] breach of any covenant contained in Section 2.3, 2.4, 2.6, or 2.7 hereof" and "[a] breach by Mortgagor of any other term, covenant, condition, obligation or agreement under this Mortgage. . . ."); (R. 3710 § 11) (defining "Event of Default" to include, *inter alia*, the failure to pay and "the occurrence of any Event of Default under the Mortgage or any other Loan Document.").

terms in a note and mortgage, including provisions for a default rate of interest.”).

The trial court properly found that the Borrowers committed numerous breaches of the Loan Documents, including the Insurance Proceeds Defaults, the Insurance Coverage Default, and the Maturity Default. (R. 4183 at ¶¶ 13-16). Each of these breaches supported the Lender’s breach of Note claim. In all instances, the calculation of default interest under the Note is the same and runs from the date of an Event of Default.

3. The Insurance Proceeds Defaults Were Material.

In any event, the Borrowers’ Insurance Proceeds Defaults were material. “A material breach occurs where the covenant not performed is of such importance that the contract would not have been made without it.” *Seawatch at Marathon Condo. Assoc., Inc. v. Guarantee Co. of N. Am.*, 286 So. 3d 823, 829 (Fla. 3d DCA 2019) (citations omitted). “To constitute a ... material breach, a party’s nonperformance must ‘go to the essence of the contract.’” *Id*.

The Borrowers admittedly acquired and transferred millions of dollars of Insurance Proceeds without Ocean Bank’s contractually required prior written consent or endorsement in breach of §§ 2.6 and 2.12 of the Mortgage. (R. 3486, 3829-30; SR. 5). Such misconduct by the Borrowers violated the

lender's rights under essential, bargained-for terms at the heart of the parties' agreements, amounted to millions of dollars, and substantially injured the lender by depriving it of its contractual rights and protections under the Loan Documents. Thus, the Borrowers' actions materially breached the Loan Documents.

The Borrowers offer no decisional authority finding such breaches immaterial. In fact, a similar misappropriation of insurance proceeds was held to rise to the level of felony grand theft in *Russ v. State*, 830 So. 2d 268 (Fla. 1st DCA 2002).

The Borrowers argue on appeal that evidence of the Tides Hotel's value and remediation after Hurricane Irma created a genuine issue as to whether the Borrowers' defaults were material. *See* Ini. Brf. at 34-35. Again, the Borrowers cite no authority in support of their argument, which is meritless for several reasons.

First, the determination whether the Borrowers' defaults were material cannot turn upon subsequent market conditions. Adoption of the Borrowers' unprecedented theory would undermine the right to contract, and create uncertainty and unpredictability in mortgage loan transactions which are vital for economic stability and growth.

Second, whether the Borrowers applied the Insurance Proceeds to repair the Tides Hotel was both immaterial and never established. The Mortgage obligated the Borrowers to repair any damage ***regardless of the availability of insurance proceeds***. (R. 3599 at § 2.10(a)(iii))). Moreover, as previously noted, the extent of the damage and time required for repairs were substantial, and Ocean Bank was therefore not required to apply its Insurance Proceeds to the repairs. (R. 3600-02 at § 2.12(b)) (granting lender the sole, reasonable discretion to apply insurance proceeds to "(i) reduction of the Liabilities, (ii) restoration, replacement or repair of the Property . . .; or (iii) Mortgagor" where damage is extensive)). The Borrowers had no right to use the Insurance Proceeds as they pleased or to transfer such funds to themselves or third parties without Ocean Bank's prior written consent. But the Borrowers ignored their contractual obligations, and ***unilaterally*** and ***permanently*** deprived Ocean Bank of its agreed-upon rights and interests in the Insurance Proceeds.

Additionally, the Borrowers presented no evidence that they used the Insurance Proceeds or their principal's personal funds to repair the Tides Hotel. To the contrary, the undisputed record evidence established that more than half the Insurance Proceeds were transferred to the Chetrits' personal accounts. (R. 3486). The report purportedly evidencing their

principals' payment of remediation and enhancement costs simply identifies repair costs, but not the source of the funds used to pay them. (R. 4903-04). The Borrowers further ignored their receipt of millions of dollars in loan disbursements made by Ocean Bank during the same period repairs were made and offered no evidence how such funds were used. (R. 4160-64).

Even if the Borrowers had meticulous evidence that they spent millions of dollars repairing damage to the Tides Hotel (which they were contractually required to do), such a showing would not have entitled them to retain, transfer, or reimburse to themselves the lender's Insurance Proceeds. The Mortgage provides that the Borrowers "***shall have no claim against the insurance proceeds***" and strictly governs the treatment of insurance proceeds (R. 3600 at § 2.12(b)) by which the Borrowers were bound.

B. The Borrowers' Forfeiture Claim Was Not Preserved for Review; Nor Does the Borrowers' Obligation to Pay Default Interest Constitute a Prohibited Forfeiture (Response to Borrowers' Argument "II.B.2", Ini. Brf. at 36).

The Borrowers argue on appeal that their obligation to pay default interest is a prohibited forfeiture. Ini. Brf. at 36-38. The Borrowers did not present this contention to the trial court and are therefore precluded from raising their forfeiture claim in this appeal. *See Sunset Harbour Condo. Ass'n, supra.*

Even if the Borrowers had argued forfeiture below, there is no legal or logical support for the claim that their contractual obligation to pay default interest is a prohibited forfeiture. The forfeiture cases cited by the Borrowers, *Rader v. Prather*, 100 Fla. 591, 130 So. 15 (1930) and *Smith v. Winn Dixie Stores, Inc.*, 448 So. 2d 62 (Fla. 3d DCA 1984), are distinguishable as involving the immediate loss of a leasehold interest, not an obligation to pay default interest.

Additionally, courts of equity can only mitigate forfeitures "when it can be done ***without doing violence to the contract of the parties***." *Rader*, 100 Fla. at 595, 130 So. at 17 (emphasis supplied). Here, the Borrowers improperly ask this Court to rewrite the parties' agreement to relieve them of the consequences of their defaults. However, "equitable considerations cannot justify rewriting the terms of the parties' agreements upon which the right to foreclose is based." *Ivy Chase*, 352 So. 3d at 43.

The acceleration cases cited by the Borrowers, *Overholser v. Theroux*, 149 So. 2d 582 (Fla. 3d DCA 1963) and *Consolidated Capital, II, Ltd. v. National Bank of N.A.*, 420 So. 2d 618 (Fla. 5th DCA 1982), are also distinguishable because the Lender's right to default interest is not tied to acceleration which, as noted, the Borrowers admitted, *see* p. 24, *supra*. While a court of equity may have the power to relieve a mortgagor from an

acceleration, “a trial court may not alter that contractual right [of a lender to charge ***default interest***] based on equitable considerations even though mortgage foreclosures in Florida are equitable proceedings.” *In re Sundale, Ltd.,* 410 B.R. 101, 105 (Bankr. S.D. Fla. 2009) (collecting Florida cases).

C. The Lender Was Entitled to Summary Judgment on the Borrowers’ Estoppel Defenses (Response to Borrowers’ Argument “II.B.3”, Ini. Brf. at 38).

A party invoking the doctrine of equitable estoppel must prove: (1) the party against whom estoppel is sought made a representation about a material fact that is contrary to a later asserted position; (2) the party claiming estoppel relied on that representation; and (3) the party seeking estoppel changed its position to its detriment based on the representation and his reliance on it. *Nationstar Mortg. LLC v. LHF Hudson, LLC*, 271 So. 3d 1073, 1077 (Fla. 3d DCA 2019). The doctrine “should be applied with great caution and only where to refuse its application would be virtually to sanction a fraud.” *Sacred Family Investments, Inc. v. Doral Supermarket, Inc*., 20 So. 3d 412, 416 (Fla. 3d DCA 2009) (citation omitted).

The Borrowers failed to provide evidence demonstrating that they could carry the burden of proving the elements of their waiver or estoppel defenses at trial. The trial court thus correctly found that the Borrowers’ affirmative defenses, including waiver and estoppel, were unsupported by

record evidence and failed as a matter of law. *See* R. 4184 at ¶ 19-20; *In re Amendments to Fla. R. Civ. P. 1.510*, 309 So. 3d at 193 ("[S]ummary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial") (quotation omitted).

On appeal, the Borrowers claim that they detrimentally relied on two emails from Ocean Bank. *See* Ini. Brf. at 38-39. The first email discussed the waiver of default interest arising from defaults ***wholly unrelated to the Insurance Proceeds Defaults***. (R. 4936) (referring to default interest from the extended maturity date of February 20, 2020 to March 6, 2020). In the second email, Ocean Bank discussed approximate amounts of non-default interest and principal due through maturity. (R. 4930). Each of these discussions resulted in subsequent modification letter agreements (R. 4931, 4947) in which Ocean Bank unequivocally stated that it "***is not aware of any existing defaults***" and is not "waiv[ing] any other rights or remedies that it may have under the Loan Documents or at law or equity, which [Ocean Bank] specifically reserves." (R. 4932, 4948-49) (emphasis added).

Ocean Bank's emails, which are unsigned and make no reference to the Insurance Proceeds Defaults or default interest relating thereto, did not

modify or waive any rights relating to such defaults. *See* R. 3712 at § 13.5 (requiring all modifications and waivers to be in a signed writing and limited "***only to the extent specifically set forth therein***") (emphasis added); R. 3612 at § 9.3 (same); R. 3612 at § 9.2 (stating that mortgagee's failure to exercise rights will not affect such rights). Nor could Ocean Bank have waived any rights relating to defaults of which it was wholly unaware.[8] *Peninsula Fed. Sav. & Loan Ass'n v. DKJI Props., Ltd.*, 616 So. 2d 1070, 1076 n.12 (Fla. 3d DCA 1993 (Waiver is "the ***intentional*** relinquishment of a ***known*** right") (citation omitted) (emphasis added).

Ocean Bank's emails, which contain no reference to the Insurance Proceeds Defaults or related default interest, similarly fail to support the Borrowers' estoppel defenses. Like the Borrowers, the debtors in *Ivy Chase* argued that the lender was estopped from seeking default interest based on documents provided by the lender's predecessor reflecting a lower rate of interest. *See* 352 So. 3d at 38. The *Ivy Chase* court found that the successor lender was not estopped from recovering default interest because the

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[8] *See* R. 4011 (declaration of Ocean Bank's Vice President stating that "Ocean Bank did not waive any defaults under the Loan documents relating to the insurance proceeds . . . nor could it have done so, as it was not aware of such defaults until after the Loan was assigned.").

predecessor's documents, like Ocean Bank's emails, did not refer to such default interest being sought by the successor lender. *Id.* at 44.

"Florida courts routinely enforce anti-waiver provisions to preclude the affirmative defenses of waiver and estoppel." *Banco Pop. N.A. v. M/V Triple Play*, 12-20188-CIV, 2012 WL 12885237, at *2 (S.D. Fla. Apr. 11, 2012) (citing *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519 (Fla. 4th DCA 1991) (finding affirmative defenses of estoppel and waiver defeated as a matter of law by contractual anti-waiver clause)). Thus, the trial court properly found that the Borrowers' waiver and estoppel defenses were unsupported by evidence and failed as a matter of law. *See Rybovich*, 587 So. 2d at 521-22 (involving materially identical anti-waiver provisions); *National Home Comms., L.L.C. v. Friends of Sunshine Key, Inc.*, 874 So. 2d 631, 634 (Fla. 3d DCA 2004) (same); *see also LaGrange*, 2016 WL 8711597, at *1, 3 (finding that original lender's affirmative election not to pursue default interest was "not dispositive of its future rights under the agreement or the right of its successors and assigns" absent effective waiver).

Moreover, the Borrowers' purported reliance on Ocean Bank's emails was ***unreasonable*** given that they materialized into subsequent letter agreements in which Ocean Bank made clear that it was not aware of existing defaults and preserved all rights and remedies. *See, e.g.*, *Spagnoli*

v. Medtronic Minimed, Inc., No. 07-22871-CIV, 2008 WL 11333238, at *2 (S.D. Fla. June 30, 2008) ("Under Florida law, the reliance by the party asserting estoppel must be reasonable.") (citing *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001)); *Enegren v. Marathon Country Club Condo. W. Assoc., Inc.*, 525 So. 2d 488, 490 (Fla. 3d DCA 1988)). Nor could the Borrowers have reasonably relied on Ocean Bank's statements regarding amounts due under the Note after successfully concealing the Insurance Proceeds Defaults from Ocean Bank.

Finally, the Borrowers cannot invoke an equitable estoppel defense because "he who seeks equity must do equity." *Davis v. Verandah at Lake Grady Homeowners Assoc., Inc.*, 354 So. 3d 1140, 1144 (Fla. 2d DCA 2023) (quotation omitted). The doctrine of equitable estoppel bars *a* ***wrongdoer*** "from profiting from his or her own misconduct" and, as such, "operates against the wrongdoer, ***not the victim***." *United Auto. Ins. Co. v. Chiro. Clinics of S. Fla., PL*, 322 So. 3d 740, 743 (Fla. 3d DCA 2021) (emphasis added); *see also Nationstar*, 271 So. 3d at 1077-78 (reversing judgment for mortgagor on estoppel defense where mortgagee took no "steps to mislead" mortgagor).

The only "wrongdoers" here are the Borrowers, who knowingly violated Ocean Bank's rights and interests in the Insurance Proceeds and prevented

Ocean Bank from discovering these defaults by the Borrowers. Conversely, the Lender's enforcement of its contractual right to default interest under the terms of the Note to which the Borrowers agreed does not result in any inequity. *See LaGrange*, 2016 WL 8711597, at *2 ("The late invocation of the always-present default right by [successor lender] was apparently inconsistent with [borrowers]'s expectations. It should not have been, since the note expressly permits the holder to 'delay or forgo enforcing any of its rights or remedies' without consequence.").

D. The Trial Court Did Not Make Credibility Determinations (Response to Borrowers' Argument "II.B.4", Ini. Brf. at 39).

As previously explained, the Loan Documents required the Borrowers to obtain Ocean Bank's ***prior written consent*** before transferring any of its "Property", including insurance proceeds. The Borrowers did not argue or present evidence that they obtained Ocean Bank's prior written consent to their transfers of the Insurance Proceeds to themselves and third parties. Thus, in finding the Borrowers in default, the trial court did not make, and did not need to make, any credibility determination. The trial court simply and correctly applied the plain language of the Loan Documents to the undisputed fact that the Borrowers transferred the Insurance Proceeds without Ocean Bank's prior written consent.

On appeal, the Borrowers contend that whether Ocean Bank knew that the Borrowers received the Insurance Proceeds was a factual dispute that the trial court improperly resolved against the Borrowers by making credibility determinations. This contention is meritless for several reasons.

First, Ocean Bank's purported knowledge is not relevant or ***material*** to the Lender's right to default interest under the Loan Documents. It is undisputed that the Borrowers failed to obtain Ocean Bank's prior written consent to the transfers of the Insurance Proceeds to themselves and third parties, which were Events of Default under the Loan Documents. Even if Ocean Bank knew of the Insurance Proceeds Defaults when they occurred (which Ocean Bank did not know), the Lender could still seek default interest on account of such defaults due to the Loan Documents' anti-waiver provisions. *See LaGrange*, 2016 WL 8711597, at *1, 3 (finding that original lender's election not to pursue default interest prior to or in its foreclosure pleadings was "not dispositive of its future rights under the agreement or the right of its successors and assigns" due to anti-waiver provisions); *GECMC*, 2018 WL 6055672, at *2 (affirming award of default interest to successor borrower, even though its predecessor "did not take any action in response to defendant's default").

Second, even if relevant, the Borrowers' contention that Ocean Bank knew about their receipt of the Insurance Proceeds is blatantly contradicted by the record evidence and thus insufficient to give rise to a ***genuine*** issue of material fact. *See Gervas*, 358 So. 3d at 1260 n.3 (recognizing that if the evidence presented by a party asserting that a fact is genuinely disputed "is merely colorable, or is not significantly probative, summary judgment may be granted.") (quoting *In re Amendments to Fla. R. of Civ. P. 1.510*, 309 So. 3d at 193); *In re Amendments to Fla. R. of Civ. P. 1.510*, 309 So. 3d at 193 (recognizing that when a party tells a story that "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment").

The Lender presented ample evidence that Ocean Bank had no knowledge of and did not consent to the Borrowers' receipt or transfers of the Insurance Proceeds while it was the lender. *See* pp. 5-7, *supra*. The Borrowers' story, however, is that they "had Ocean Bank's consent, documented in the bank's loan file, allowing Borrower to reimburse itself up to $13.4 million of the 'original equity and acquisition of the Tides Hotel and the assemblage,' which the $1.2 million [of Insurance Proceeds] fell within." Ini. Brf. at 42. However, that "loan file" refers to disbursements authorized

as an “up-front reimbursement” of acquisition costs when the Loan was originated, ***three years before*** Hurricane Irma. (R. 4920). The loan file is not Ocean Bank’s “prior written consent” to the Borrowers’ transfers of $1.2 million of the Insurance Proceeds to the Chetrits—of which Ocean Bank had no knowledge. Nor would these supposed up-front reimbursement rights override the Mortgage’s clear restrictions governing insurance proceeds. (R. 3600 at § 2.12(b)). The Mortgage did not permit the Borrowers to receive or use insurance proceeds to reimburse themselves in any manner.

The Borrowers also point to a tax return allegedly disclosing the Insurance Proceeds. Ini. Brf. at 9. The alleged disclosure is merely a vague reference to “insurance proceeds” buried in the middle of a 50-page document and listed under “Other Liabilities”. (R. 523). The Borrowers provided this tax return in response to Ocean Bank’s request for the Borrowers’ compliance with § 10.2.1(e) of the Note, which required the Borrowers to provide their tax returns no later than thirty days after filing. (R. 551; 3545). The tax return, which was provided thirteen months after the Borrowers’ receipt and transfers of the Insurance Proceeds, was not evidence of Ocean Bank’s prior written consent and therefore immaterial to the trial court’s default findings.

The Borrowers further argue that an officer of Ocean Bank, Ralph Gonzalez-Jacobo, ***orally*** authorized their receipt of the Insurance Proceeds. Ini. Brf. at 10. But the Mortgage required insurance proceeds to be paid to Ocean Bank and Ocean Bank's ***prior written consent*** to any transfer of such proceeds. Any modification of these requirements had to be in ***writing*** and ***signed*** by Ocean Bank. *See* R. 3712 at § 13.5; R. 3612 at § 9.3; *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014) ("when a contract plainly provides that any modification must be in writing, all claims—however labeled—founded upon an alleged oral modification should generally be disposed as a matter of law").

Moreover, there was no evidence corroborating Mr. Gonzalez-Jacobo's alleged oral authorization who died in October 2019 and therefore could not provide testimony in this case. Notably, in the voluminous written communications between Ocean Bank and the Borrowers, neither the Borrowers' receipt of the Insurance Proceeds nor Gonzalez-Jacobo's purported oral authorization was ever mentioned. (R. 3793-3806).

E. The Lender Was Entitled to a Summary Judgment for Post-Maturity Default Interest (Response to Borrowers' Argument "II.B.5", Ini. Brf. at 44).

The Borrowers contend that there was a triable question of fact as to the Lender's entitlement to default interest from the date of the Maturity

Default based on the Lender's purported failure to provide an accurate estoppel letter under § 701.04, Fla. Stat. The Borrowers' argument is not supported by any authority. Even if the Lender's estoppel letter was inaccurate (and it was not), the Lender's right to charge default interest is independent of its obligation to provide an accurate estoppel letter.

"Florida recognizes a lender's right to charge default interest if the underlying loan document so provides, despite a failure to satisfy a statutory or contractual obligation." *In re Kraz, LLC*, 626 B.R. 432, 439 (M.D. Fla. 2020) (citing *Eckert*, 941 So. 2d 426). "And in Florida, ***a lender's failure to provide an accurate estoppel letter does not excuse the promisor's contractual obligation to pay interest due under the note***." *Id.* (emphasis added).

The Lender did not prevent the Borrowers from tendering payment on or after the Final Maturity Date. The Lender initially provided the Borrowers with an estoppel letter stating that it was investigating a potential default by the Borrowers relating to insurance proceeds and offering two payoff amounts to the Borrower — one if such default had occurred, and another if no such default occurred (as the Borrowers claimed). (R. 3819). ***The Borrowers failed to tender either amount.*** In fact, the Borrowers failed to tender ***any*** payment in response to the Lender's subsequent estoppel letter

(R. 3825), which the Lender issued after confirming that the Insurance Proceeds Defaults had occurred.

Like the borrower in *In re Kraz*, the Borrowers argue that they could not refinance the debt due to the purportedly inflated estoppel letter. However, the Borrowers' obligation to pay default interest (and all other amounts due under the Note) was not conditioned on the Lender providing an "accurate" estoppel letter. The Borrowers had an unequivocal obligation on the Final Maturity Date to repay all amounts owed under the Note—not the right to borrow money from a third party to satisfy the debt. Therefore, the trial court's award of post-maturity default interest was proper.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT NOTWITHSTANDING THE BORROWERS' PENDING COUNTERCLAIM (Response to Borrowers' Argument "III.B.", Ini. Brf. at 46).

"Florida adheres to the principal that piecemeal appeals should not be permitted where claims are legally interrelated and in substance involve the same transaction." *Dieuvil v. Falcon Trace Homeowners Assoc., Inc.*, 367 So. 3d 543, 544 (Fla. 4th DCA 2023) (quotation omitted). Based on this principle, error has been found where a final judgment is entered on a claim while "***legally interrelated***" or "***intertwined***" counterclaims remain pending. *See id.*; *see also Stone v. Privatbanken A/S*, 580 So. 2d 882, 883-84 (Fla.

4th DCA 1991) (finding "intertwined" counterclaims had to be determined before finalizing foreclosure).

The Borrowers argue that the trial court prematurely entered a foreclosure judgment before disposing of their pending Counterclaim. However, all counts of the Counterclaim were either adjudicated by the trial court or subsequently dismissed by the Borrowers.

As the Borrowers themselves argued in opposing Lender's motion to dismiss this appeal, the trial court's judgment "determines ***all*** issues in [the Lender's] complaint and the Borrower's compulsory counterclaims." Appellants' Response in Opposition to Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction at 2 (emphasis in original); *id.* at 9-11. By awarding the Lender default interest from the date of the Insurance Proceeds Defaults, the trial court necessarily rejected the Borrowers' counterclaims for breach of contract, breach of the implied covenant of good faith, promissory estoppel, abuse of process, and violations of FDUTPA and CRCPA, which were all premised on the Borrowers' contention that Lender was not entitled to default interest from the occurrence of the Insurance Proceeds Defaults. The Borrowers thereafter: dismissed their FDUTPA and CRCPA claims; and dismissed their counterclaim for defamation which was the only claim not legally interrelated or intertwined with the Lender's claims under the Loan

Documents. *See* Lender's Unopposed Motion for Court to Take Judicial Notice of Stipulation and Voluntary Dismissal (filed in this appeal on Oct. 20, 2023) and Order of this Court (dated Oct. 23, 2023) carrying the motion with the case.

Thus, the Borrowers' argument is moot because there are no pending counterclaims or further judicial labor required in the trial court to justify reversal of trial court's rulings.

IV. THE SUMMARY JUDGMENT ORDER COMPLIES WITH RULE 1.510 (Response to Borrowers' Argument "IV.B.", Ini. Brf. at 48).

The Borrowers argue that the trial court's summary judgment orders violate Fla. R. Civ. P. 1.510 for lack of specific findings and reasoning. This is incorrect. Rule 1.510(a) requires that "[t]he court shall state on the record the reasons for granting or denying the [summary judgment] motion." *See* rule 1.510(a). The trial court amply described its reasons for granting summary judgment in its orders and on the record at various hearings.

Prior to entering the Partial Summary Judgment Order, the trial court conducted two lengthy hearings on the Lender's partial summary judgment motion. (R. 4219-4296; 4297-4375). After hearing extensive argument on the Lender's claims and the Borrowers' affirmative defenses, the Court made the express finding that "that the date of default was November 9, 2017, and I'm granting a partial summary judgment on the breach of the note count and

on the foreclosure count." (R. 4356). The Court further stated that "…so the record is clear, I find -- I agree with Plaintiff's position on all these points and I find that a reasonable jury would not rule in favor of defendant." (R. 4357).

The trial court then entered the twenty-one paragraph Partial Summary Judgment Order specifying in detail how the Borrowers breached and defaulted under the Note and Mortgage, noting the lack of any genuine issue of material fact, and finding the Borrowers failed to produce any evidence to support their affirmative defenses. (R. 4181-86).

On December 8, 2022, the trial court held an additional hearing on the Lender's final summary judgment motion. At the conclusion of that hearing, the trial court stated on the record that it agreed with the Lender "that the default rate was to apply to all amounts remaining unpaid." (R. 4466). The trial court thereafter entered the Final Summary Judgment Order (R. 4401-4404) which expressly incorporated the prior Partial Summary Judgment Order findings. Both summary judgment orders incorporate the reasons stated on the record at the hearings. (R. 4184; 4403).

The two cases cited by the Borrowers are inapposite. In *Jones v. Ervolino*, 339 So. 3d 473 (Fla. 3d DCA 2022), the trial court made ***no findings*** and simply granted the motion for summary judgment and this Court held that "[a] mere pronouncement the court has granted or denied

such a motion fails to comply with the rule as it does not contain reasons for granting or denying the motion." *Id*. at 475. In *De Cardenas Cardenas v. White Pine Ins. Co.*, 347 So. 3d 459, 461 (Fla. 3d DCA 2022), the trial court granted summary judgment based on the insufficiency of an affidavit, without any explanation as to its reasoning. Here, however, the trial court specified its reasons for granting summary judgment with enough specificity to allow for appellate review.

CONCLUSION

For the reasons herein, the Lender respectfully requests that the Court affirm the summary final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing answer brief was emailed to those in the service list on October 30, 2023.

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CERTIFICATE OF COMPLIANCE

This initial brief complies with the font (Arial 14 point) and word count requirements of Fla. R. App. P. 9.210.

s/ *Paul Morris*