

**FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

SE PROPERTY HOLDINGS,LLC, as
Successor by merger to VISION BANK,

Appellant,

First DCA No.: 1D23-1304

vs.

Lower Tribunal No.: 09-4378-CA

JF< INVESTMENTS, INC., LARRY
B. THACKER, JESSE G. FLETCHER,
THE ST. JOE COMPANY, BEACH
COMMERCE PARK OWNERS
ASSOCIATION,INC.

Appellees,

On appeal from the Circuit Court of the
Fourteenth Judicial Circuit In and for
Bay County, Florida

The Honorable Dedee Costello Presiding

APPELLEE JESSIE FLETCHER'S ANSWER BRIEF ON THE MERITS

JOSEPH SILVA, JR.
Florida Bar No. 0352860
Silva Law Group
2070 Panama City, Fl
Telephone 559.831.7836

Email Joseph@jsilvalaw.com

Attorney for Appellee Jessie G. Fletcher

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STATEMENT OF THE CASE

I. Introduction

Appellee, Jessie G. Fletcher files this Answer Brief regarding the issues on appeal from the judgment of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida (the “Circuit Court”), entered on April 28th, 2023, establishing Appellant Fletcher’s liability in attorneys fees and costs at \$325,000.00, as contained in the Judgment. (R.7204-7205). The Judgment is premised upon the Courts finding of facts and Conclusions of law contained in the Order After Evidentiary Hearing on the Issue of Attorneys Fees and Costs raised by the Plaintiff, entered in the lower tribunal on December 28th, 2022. (R. 7092-7011).

SEPH’s claims of commercial default arose out of the financial meltdown of 2008, wherein Fed Chairman, Alan Greenspan’s cheap money policies (ultra low interest rates) resuted in investment and asset bubbles, the bursting of which bubbles triggered a myriad of commercial defaults. The fundamental elements of “stable” currency and asset valuations had eroded into mountains of bad debt. The situation was so dire that the U.S. Government authorized over \$750 Billion dollars in bail out funds to stabelize the failed banking industry in that policy prescription denominated TARP, which stands for Toxic Asset Recovery Program.

Background and Proceedings

1. On March 17th, 2010, the Court entered the Partial Summary Judgment (the “PSJ”) against the primary obligor, **JF<, Inc.**, and (secondary obligors) LARRY B. THACKER, and JESSIE G. FLETCHER, as guarantors of the company’s total indebtedness, with total damages of \$1,959,688.81. (R.271-2736).

2. Appellant immediately pursued discovery in aid of execution and collection efforts, mostly against guarantor THACKER. (R. 282-6139). Appellant then pursued Proceedings Supplemental to Judgment against Thacker, resulting in the reversal of multiple conveyances to a revocable trust. (R.). Liability in that proceeding then served as the basis for denial of discharge in bankruptcy as to Thacker’s chapter 7 bankruptcy. (R. 6626-67,6859-63). Those proceedings make up the substantial component of Appellant’s claimed (post-judgment) attorneys fees, with the vast majority of those fees having accrued prior to entry of the Deficiency Judgment. (R. 7351-7451-Trial Exhibit 16).

3. The lower tribunal entered the Final Judgment of Foreclosure on or about May 13th, 2015, and Appellant continued collection and discovery efforts against THACKER and Appelle/Counterappellant, FLETCHER until THACKER’s February 13th, 2017, objection to continued

collection efforts in the absence of a deficiency judgment under the authority of *Hammond v. Kingsly Asset Mgmt., LLC*, 144 So.3d 673,675 (Fla. 2d DCA 2014) (R. 2352-53).

4. After entry of the Final Judgment of Foreclosure on May 13th, 2015 judgment creditor SEPH, armed with broad contract language (loan documents and PSJ, until 2017) to recover attorneys fees for garnishments, unlawfully moved for writs of garnishment approximately 14 times before entry of the Deficiency Judgment. (R. Collection efforts post foreclosure are barred until entry of a deficiency judgment. Hammond Accordingly, this snapshot of collection practice abuse, in violation of law and norms of commercial behavior, provides graphic illustration of the Circuit Court's reasoning and rationale in denying recovery under the terms of the underlying loan documents. (R. 2087-2256).

5. On or about March 9th, 2017, Appellant filed its Motion for Judgment Establishing Deficiency. (R. 2578-2633).

6. On March 16th, 2017, Appellant filed the three (3) count Complaint against JESSIE G. FLETCHER, SYLVIA M. FLETCHER, and BIG DOG, INVESTMENTS, LLC., under the Uniform Fraudulent Transfers Act (UFTA) for alleged wrongful conversion of BIG DOG INVESTMENTS,

LLC under advise of other commercial counsel, and alleged fraudulent transfers of assets. That matter is styled S.E. PROPERTY HOLDINGS, LLC. v. JESSIE G. FLETCHER, SYLVIA M. FLETCHER, AND BIG DOG INVESTMENTS, LLC. bearing case No. 03-2017-CA., filed in the Circuit Court, Fourteenth Judicial Circuit in and for Bay County, Florida. (The “Companion Matter”). (R. 6775-77).

7. After comprehensive evidentiary hearing over a few days, on September 13th, 2017, the Lower Tribunal entered the Order on Plaintiff’s Motion for Judgment Establishing Deficiency. After additional credit for mortgaged property FMV, and additional recoveries, the total sum due had been whittled down to \$841.337.15. (R. 4750-4752).

8. On March 31st, 2022, The court in the Companion Matter set that case for trial on January 17th, 2023. (R. 6157)

9. The existence of an insolvency rendering debt, such as the original judgment of liabilities in this matter, is the essential element of a claim under the UFTA. §726.105, Fla. Stats.

10. On November 1st, 2017, the lower tribunal entered the CHARGING ORDER, charging FLETCHER’s membership interest in BIG

DOG, LLC, with the then outstanding sum of the DEFICIENCY JUDGMENT of \$841,337.15. (R. 4885-4886).

11. On February 15th, 2018, the lower tribunal entered the Final Judgment of Continuing Garnishment against Big Dog, LLC, for \$1,500.00 of FLETCHER'S disposable earnings. (R. 5626-5630).

12. On April 8th, 2021, Appellant provided Verified Answers to Interrogatories propounded by FLETCHER to Appellant SEPH, verified by SEPH VP and Custodian of Records, Jennifer Corbitt, in the Companion Matter (R. 6400-6438).

13. The Interrogatory response provided by VP Corbitt misrepresented the total amount of Judgment principal, and interest only (excluding attorneys fees) due, at \$1,225,527.52 as of 3/10/21, and purposely failed to disclose liquidated sums for attorneys fees and costs. (R. 6400-6438). Recall, the DEFICIENCY JUDGMENT of September 13th, 2017, 4 years prior, had already adjusted and reestablished the principal and interest components of the Judgment at \$841.337.15 (R. 6400-6438).

14. On July 23rd, 2021 Appellant's counsel, Mr. Reeves, provided to FLETCHER, via counsel, Corbitt's revised "Calculation of Amounts Owed," reflecting a corrected principal balance of \$463,372.21, as of June

15th, 2021, and not \$1,225,527.52. (R. 6352-6375). This response also excluded amounts for attorneys fees and costs.

15. On May 9th, 2022, Appellee, Fletcher forwarded to Appellant, SEPH's counsel certified funds in satisfaction of the judgment in the amount of \$478,596.37. (R.6147-6167).

16. On May 10th, 2022, via overnite express, the certified funds or "tender package" was delivered to SEPH counsel Richard Gaal in the amount of \$478,596.37, which represented principal and interest satisfaction calculated from Corbitt's revised Calculations of Amounts Due. (R. 6147-6167).

17. Appellant counsel, Mr. Gall ignored the package and did not respond until ten (10) days later on May 20th, 2022. The May 20th, 2022 answer occurred only in response to Appellee's counsel's phone call soliciting the status of the tender (i.e. "accepted" "rejected", etc.). (R.6344-6351).

18. On July 25th, 2021, Appellee FLETCHER served Requests for Admission, and Requests for Production of documents, seeking, *inter alia*, hard copy attorneys fees invoices, in preparation of a defense for the customary evidentiary hearing on fees and costs. (R. 6283).

19. On August 23rd, 2022, Appellee FLETCHER filed the Motion for Order to Show Cause Why Attorneys Fees and Costs Claimed should not be dismissed or Adjudicated as Waived. (R. 6297-6312).

20. On August 24th, 2022 Appellant served its response to the RFA, and RFP served on July 25th, 2022. Instead of producing the invoices (evidence) necessary for the perfection of its claim for fees, Appellant produced a **spread sheet** referencing invoices and total fees, and simply refused to produce the invoices necessary for proper disposition of the outstanding claim for fees at \$1,015,000.00 (R.6362-7375; 6400-6438).

21. On September 7th, 2022, Appellee filed FLETCHER's MOTION TO COMPEL, directed at Appellant's production of the self-serving spread sheet depicting invoices and associated amounts due, but NO ACTUAL "invoices," necessary to the perfection, (and defense) of the outstanding liability of attorneys fees and costs. (R. 6352-6375).

22. On September 1st, 2022, the lower tribunal heard Appellee FLETCHER's, Motion for an Order to show Cause, and 1.) after confirming the sum of FLETCHER's tender as sufficient to cover the principal and interest components of the (then operative) Deficiency Judgment, and finding no defense to acceptance, the court directed Appellant to accept

and negotiate the Draft of Certified funds in the amount of \$478,596.37;
2.) ordered Appellant to produce to APPELLEE FLETCHER, ALL attorney fee invoices and documents as required proof within 15 days; and set the evidentiary hearing on attorneys fees and costs for November 4th, 2022. (R. 6397-6399).

23. Appellant SEPH did not disclose the sums (to be) claimed as attorneys fees and costs, until September 16th, 2022, and then, only under compulsion by the Circuit Court, all as set forth in that (late entered) Order of October 17, 2022. (R. 6397-6399).

24. On September 16th, 2022, four months or 120 days after APPELLANT FLETCHER's tender of satisfaction of the principal and interest components of the Deficiency Judgment of SEPTEMBER 13th, 2017, Appellant uploaded roughly one thousand (1,000) pages in attorney fees invoices to a file sharing protocol, and certified its compliance with the Order in its filing of September 16th, 2022. (R. 6376-6377).

25. On October 31st, 2022, 4 days prior to the hearing, and five (5) years after entry of the DEFICIENCY JUDGMENT, APPELLANT, for the first time since entry of the Deficiency Judgment, submitted a filing seeking a finding of entitlement to Post Judgment attorneys fees. (R. 6497-6501).

26. On November 2nd, 2022, APPELLEE filed his Hearing Brief, denying APPELLANT's entitlement to attorneys fees, and setting forth the affirmative defenses/Counterclaims, sounding in breach of the explicit duty of disclosure of sums due, as a specific breach of the duty of good faith and fair dealing; knowing waiver of the right to recover attorneys fees and cost; and a claim to recoup the sum tendered for refusal of acceptance, stated as a common law contract action, relying on the rationale of §673.6031, Florida Statutes. (R. 6515-6532). The Circuit Court denied the affirmative defenses.

27. This Article 3 provision of the Florida U.C.C., although not expressly applicable to judgments as non-negotiable instruments, provides for the recoupment of the amount of the tender that was refused. So, the statute appears to simply state the negotiable instrument version of the common law contract doctrine of material breach excusing counter-performance of the counterparty. The evidence, resident in the Record on appeal clearly shows Appellant's overt rejection and refusal of tender of the proper sum to satisfy the P&I component of the Judgment. (R. 6320).

SUMMARY OF THE ARGUMENT

28. With exception of those expenses and costs awarded under §57.115 Fla. Stats., SEPH's claims are barred for failure of perfection in accordance with Rule 1.525, Fla. R. Civ. P., which requires a filing seeking an award of fees within 30 days of entry of the Deficiency Judgment of 2017, where the judgment does not contain an express grant of attorneys fees, such as the Deficiency Judgment here.

29. SEPH's claims for pre Deficiency Judgment costs of enforcement lapsed under the doctrine of merger of cause of action into judgment. Prior to entry of the deficiency decree, the PSJ was the cause of action upon which SEPH sought remedies. However, that cause of action merged into the Deficiency Judgment, without the fees claim having been heard, on September 13th 2017. Accordingly such claim lapsed as a matter of law under the doctrine of merger.

30. SEPH's collection doctrines and practices appear to abuse the lawful rights of recovery under expansive cost recoupment provisions, by racking up innumerable garnishment actions coupled with aggressive discovery practices. The record herein is clear, and when taken in the aggregate of 14 years of discovery abuse and a final ***Heisman (trophy)***

stiff-arm push away, the Order supporting the judgment on appeal is a comprehensive rebuke of SEPH's collection and enforcement actions.

31. Fletcher directed counsel's pursuit of all reasonable discovery mechanisms and motion practice to obtain a SEPH calculated payoff, and the approximately 1000 pages in attorneys fees invoices.

32. SEPH thwarted those efforts by concealing the invoices and going so far as to object to their production on the basis of privilege. Yes, the sword and shield doctrine immediately comes to mind, but there were bigger fish to fry at that time. Such commercial conduct appears actionable under the definition of "bad faith" set forth in *Moakley v. Smallwood*, 826 S.2d 221, 224 (Fla. 2002). "Bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Moakley, id* (citing *Dogherra v. Safeway Stores, Inc.* 679 F.2d 1293, 1298).

Unfortunately, vetting such a claim while simultaneously preparing to defend a claim with over 1000 pages of evidence on an abbreviated schedule, again, worked and resulted in procedural prejudice to Fletcher.

33. At the November 4th, hearing, SEPH improperly sought recovery of attorneys fees costs of collection under the Partial Summary Judgment of 2010. Other than the amorphous principal of "law of the

case,” appellant offered no supported argument for the proposition that the PSJ of 2010 was vital and effective on November 4th, 2022.

34. Fletcher satisfied the principal and interest components of the Deficiency Judgment on May 10th, 2022, AND paid into the registry of the Court the sum of \$330,256.31, on May 4th, 2023, in satisfaction of the Judgment, presently on appeal.

35. This Court should affirm the Judgment on Appeal, preclude any claim for fees on the part of SEPH, and remand for further proceedings on Fletcher’s claim for attorneys fees and costs.

II. ARGUMENT

36. SEPH appeals the findings of fact and conclusions of law contained in the Order supporting the Judgment for \$325,000.00, on Appellant, SEPH’s claim for, over \$1,015,00.00, in attorneys fees and costs in this fourteen (14) year old commercial foreclosure matter. After the November 4th, 2022 hearing, the Circuit Court received Post-Hearing submissions on November 11th, 2022. But, evidently, in part, due to the over 925 docket entries, at the time of the Court’s review, the Court did not enter its comprehensive, and thorough, twenty (20) page, Order After Evidentiary Hearing . . . , until December 28th, 2022. (R.8444-8463). The Judgment on

appeal arrives with a presumption of correctness, and the Circuit Court's comprehensive review of the Record on appeal, findings of facts, and conclusions of law should be Affirmed. In a counter-factual example, had SEPH sought a determination of entitlement in accordance with rule and law, the judicial labor of a determination of "reasonableness" would have been much more efficient and economic. Fletcher would not have been procedurally prejudiced in defense of the fees claim.

37. Appellant SEPH improperly, and contrary to applicable law, sought recovery of post-judgment attorneys fees based on the recovery provisions of both the PSJ of 2010, and the Deficiency Judgment of 2017. It hardly requires mentioning, but there is no way on God's green earth that two (2) separate judgments on the same set of facts, arising out of a single aggregate liability, can be operative simultaneously. Such effort defies the fundamental tenets of due process. (R. 6497-6501).

38. The Circuit Court ruled that SEPH's claim for post-judgment attorneys fees was barred by SEPH's failure to perfect the claim to post-judgment fees by filing a request for such fees within thirty (30) days of entry of the Deficiency Judgment. Rule 1.525, Fla. R. Civ. P. (R. 7092-7111). The filing was required in this particular instance because the language of the Deficiency Judgment does not contain an express grant or

award of attorneys fees to ‘any party,’ but retained jurisdiction to entertain proper requests for attorneys fees in accordance with applicable law.

Amerus v. Lait 2, So.3d 203. Consequently, failing an award or grant of attorneys fees in the Deficiency Judgment, SEPH was required to file the request for fees under Rule 1.525, Fla. R. Civ. P., within thirty days of entry, but failed to do so, thereby extinguishing its claim to the recovery of any attorneys fees, with the exception of those post Deficiency-judgment fees available under Section §57.115, Florida Statutes.

39. The Circuit Court further ruled that all claims for attorneys fees and costs accruing between entry of the PSJ in 2010 and entry of the Deficiency Judgment in September 2017 are also barred by the preclusive effect of the merger doctrine for failing to bring those claims during the life of the PSJ, which PSJ ceased to exist upon entry of the Deficiency Judgment on September 13th, 2017. (R. 7092-7111).

40. SEPH’s trial Exhibit 16 contains all the attorneys fees invoices submitted by SEPH. (R. 7348-7350). The collection of attorneys fees invoices are bates stamped 0008 through 1066. Invoice numbers 0008 (October 30th, 2009) through 0729 (August 14th, 2017) account for approximately \$700,000.00, in fees having accrued prior to September 2017.

SEPH either failed to file, or elected to omit, the claim for attorneys fees from the Deficiency Judgment proceeding. (R. 2578-2633). Accordingly, that claim has lapsed as a matter of law.

41. Additionally, after having expressed its astonishment at the number of garnishment actions initiated by SEPH, during the pendency of the collection efforts, the Circuit Court further restricted recovery under §57.115, Florida Statutes, to eliminate sums accrued in violation of the January 9th, 2018 discovery stay, as unreasonable. (R. 7092-7111).

42. And finally, the Circuit Court denied the claim for recovery of attorneys fees related to co-guarantor THACKER's chapter 7 (non-discharge) bankruptcy proceedings. While the expansive provisions of attorneys fees and cost recovery, contained in the loan documents (personal guaranties) had been properly merged into the PSJ of 2010 at Para 3, the Deficiency Judgment expressly omits any such language or reference to expansive rights of recovery. (R. 4750-4752). And, pursuant to the doctrine of merger of cause of action into judgment, those provisions contained at paragraph 3 of the PSJ, do NOT appear in the Deficiency Judgment. (R. 271-273). Accordingly, absent an affirmative mandate of recovery for such fees, the Circuit Court employed the its discretionary authority under §57.115, Florida Statutes, considered the voluminous Record of discovery in

aid of execution, and the “astonishing” number of garnishment actions and disallowed the claim for recovery of fees accrued in the bankruptcy proceedings. (R. 7092-7111).

1.The Standard of Review

43. Awards for attorneys fees and costs are reviewed under a mixed standard. *Webber v. D’Agostino*, 251 So.3d 177,180 (Fla. 4th DCA 2018). “[F]actual findings must be supported by competent, substantial evidence, while legal findings are reviewed *de novo*. *Id.* Determinations as to the amount of post-judgment attorneys fees and costs are reviewed for an abuse of discretion. *Id.*

44. Appellant’s arguments in support of the points on appeal presume the survival of expansive rights of enforcement, collection recovery, after entry of the Deficiency Judgment in 2017. This presumption is untrue as a matter of law, as SEPH’s arguments put the cart before the horse by presuming a right that does not exist. And, SEPH’s claim to recover post 2017 bankruptcy fees under § 57.115, Florida statutes, under the authority of *Webber* is severely misplaced because, unlike *Webber*, in the instant case, it is the creditor (SEPH) who denied the validity of the debt when it

refused and rejected the Tender of \$478,596.37 on May 20th, 2022. (R. 6320).

2. Rule 1.525 and the Rule in *Amerus v. Lait*

45. SEPH's recovery of post-judgment fees is barred by failure to file a request for attorneys fees within 30 days of entry of the Deficiency Judgment, as required by Rule 1.525. Fla. R. Civ. P., which provides in pertinent part:

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.

(Rule 1.525, Fla. R. Civ. P.)

46. The rule and its exceptions had been the subject of significant confusion until the Florida Supreme Court decided, *Amerus Life Insurance Company v. Lait*, 2 So.3d 203, 204 (Fla. 2009). In *Lait*, the Florida Supreme Court established the following bright line rule. "we ... hold that the thirty-day time requirement under rule 1.525 does not apply when the trial court has already determined entitlement to attorneys' fees and costs, and only reserves jurisdiction to determine the amount." *Amerus Life Insurance Company, v. Lait*, 2 So.3 203, 204 (Fla. 2009).

47. The Deficiency Judgment of 2017 was the only operative adjudication upon which Plaintiff could seek relief. This Deficiency Judgment did not award Plaintiff 'entitlement' to attorneys fees, and therefore plaintiffs claim falls under the strictures of Rule 1.525.

Paragraph 4 of the Deficiency Judgment provides:

"4. The Court retains jurisdiction over this matter and the parties to award Attorneys' fees, costs and expenses, if appropriate, and to provide the parties with such other relief as may be just and proper. (R. 4750-4752).

48. The Court's retention of jurisdiction "to award attorneys' fees, costs and expenses, if appropriate,..." illustrates, and confirms, that the Court had yet to determine entitlement to attorneys fees. The Court was well apprised of the magnitude of the case and the efforts to collect. The plain language of the ruling clearly illustrates the Court's treatment of the dispute, under the Deficiency Judgment as a final adjudication of the rights and remedies of the parties. Plaintiff may have set forth its intention to recover post-judgment fees arising out of the PSJ, but the Deficiency Judgment does not grant those fees, and in fact, expressly reserves the grant until a subsequent submission, in accordance with applicable rule

and law. Plaintiff did not make the submission within 30 days of entry of the Deficiency Judgment.

49. Consequently, Plaintiff was required, but failed, to perfect its claim, to any attorneys fees by filing the request within 30 days of September 13th, 2017. The object of the Rule is to avoid the surprise and resulting prejudice to the defendant, such as that arising in the instant case.

3. Merger Res Judicata and Issue Preclusion

50. It is black letter law that a cause of action merges into the judgment obtained. *Brinker v. Ludlow*, 379 So.2d 999, 1002 (Fla. 3d DCA 1980). Noted practice and procedure authority, Henry Trawick explains:

A cause of action that is sued on merges in any final judgment entered. The preexisting obligation ceases to exist. The only thing that remains is the judgment. A Judgment for money then becomes the debt. The judgment for other than money becomes the obligation.

Trawick, *Florida Practice and Procedure*, § 25-13 (footnotes ommitted)

51. Under the merger doctrine, the obligations contained in the loan documents merged into the PSJ of 2010. Consequently

application of the expansive provisions for post-judgment collection fees required express reference in the PSJ. Paragraph 3. of the Partial Summary Judgment (PSJ) makes explicit reference to liability for costs of collection under the terms of the personal guaranties of the underlying transaction, which guaranties are the source of the authority for any purported expansive recovery of post-judgment fees and costs. (R. 271-273).

52. Upon entry, the Partial Summary Judgment (PSJ) of 2010 effected the merger of the underlying loan documents and facts of the claim into the judgment itself, such that the PSJ of 2010 then became the cause of action itself, enforceable in accordance with its terms and conditions. *Corzo Trucking Corp. v. Bob West*, 61 So.3d 1285 (Fla.4th DCA 2011)(holding judgments are cause of action.). Upon Appellant/ SEPH's application for deficiency decree, SEPH's rights and remedies resided in, and arose out of, the PSJ of 2010. The adjudication of deficiency merged all the rights of the PSJ into the DEFICIENCY JUDGMENT, such that those facts and causes of action no longer maintained independent existence. *Aluia v. Dyck-0'Neal, Inc.*, 205 So. 3d 768,774. (Fla. 2d DCA 2016); *Diamond R. Fertilizer Co., Inc. v. Lake Pakcing partnership*, 743 So.2d 547,549

(Fla. 5th DCA 1997); *Weston Orlando Park, Inc. v. Fairwinds Credit Union*, 86 So. 3d 1186 (Fla 5th DCA 2012).

4. Res Judicata

53. "Under the doctrine of res judicata, a subsequent action is barred if there is (1) identity of the thing sued for, (2) identity in the cause of action, (3) identity of persons and parties to the actions, and (4) identity of the quality or capacity of the person for or against whom the claim is made. *Res judicata* bars relitigation in a subsequent cause of action not only of claims raised, ***but also of claims that could have been raised.***" *Seminole Tribe of Florida v. State, Dept. of Revenue*, 202 So.3d 971, 973 (Fla. 1st DCA 2016)(emphasis added); *Miller v. Florida Dept. of Corrections*, 153 So.3d 392, 393 (Fla. 1st DCA 2014).

54. SEPH's claim for roughly \$700,00.00 in attorneys fees accrued through August 2017, was liquidated and ripe for claim under the PSJ as a cause of action by August 2017. At the hearing on the deficiency amount in 2017 SEPH elected to not bring the claim for fees that had accrued by August 2017. SEPH simply failed to plead for attorneys fees. Therefore that claim is collaterally estopped from relitigation in a subsequent proceedings, that being the hearing on Deficiency. But that

did not stop SEPH, from asserting the lapsed claim at the November 4th, 2023, hearing on Attorneys fees and costs. (R. 6497-6501).

55. In the ordinary case the issue of merger does not present with such difficulty. That is generally because in the ordinary case there is rarely such an extended period (7 years) between entry of first judgment (PSJ) and the deficiency decree (judgment). Accordingly, the preclusive effect of the deficiency decree rarely amounts to loss of claims, because the judgment rendering the deficiency provides for the recovery of pre judgment fees, while the right to post-judgment fees picks up from that point moving forward. In other words, 7 years between initial adjudication and the final adjudication of a deficiency decree is not the norm. This issue or imbroglio only arises as a result of Plaintiff's election to delay entry of a deficiency decree for 7 years, and, its ultimate failure to bring the claim within the life of the PSJ, before it merged into the Deficiency Judgment of 2017. Accordingly, Appellant's litigation and collection strategy appears to be the signal culprit of its loss of pre-Deficiency Judgment claims for attorneys fees.

III. The Language of the Two Judgments at law

1. Language of PSJ of 2010

56. With the dust of the 2008 financial crises still in the air, on March 19th, 2010, the lower tribunal entered the Partial Summary Judgment (“PSJ”) against (primary obligor) JF< Investments, Inc., and THACKER and FLETCHER (secondary obligors) as co-guarantors, in the aggregate amount of \$1,959,688.81. Paragraph 3. of the PSJ provides in pertinent part:

3. Defendants, Larry B. Thacker and Jesse G. Fletcher, as Guarantors to JF< Investments, Inc.s indebtedness by virtue of their execution of personal guaranties, attached to the Complaint as Exhibits C, D, F, G, I, and J, are jointly and severally, liable for the full amount of JF< Investments, Inc.s default and indebtedness to Vision Bank. (PSJ of 2010, R. 271-273).

The enforcement provisions of the underlying loan documents provide the (contractual-judgment) authority for SEPH’s recovery of collection costs and attorneys fees for ‘garnishment actions’ and ‘bankruptcy proceedings,’ which is consistent with Florida commercial law. (R. 77-135, (103-106)). However, absent an affirmative mandate for recovery of such attorneys fees and costs in the Deficiency Judgment, SEPH’s

claims are subject to the Circuit Court's discretionary authority, as set forth in § 57.115, Florida Statutes.

2. Language of Deficiency Judgment of 2017

57. The language of the Deficiency Judgment at para. 3 provides in pertinent part:

"... the remaining amount owed under the Partial Summary Judgment as principal, interest, property taxes paid and insurance paid (not including attorneys fees, expenses and costs) is \$841,437.15, for which sum let execution issue forthwith, ... "

(Deficiency Judgment 09/13/2017) R. 4750-4752).

The Court expressly excluded the claim for attorneys fees, which means it withheld such adjudication, (as it was not a form of requested relief) as more fully confirmed by the language of Para. 4,

"the Court retains jurisdiction over this matter and the parties to "award" attorneys' fees, costs and expenses, if appropriate, and to provide the parties with such other relief as may be just and proper"

(Deficiency Judgment Para. 4.,) R. 4750-4752).

58. "[a]s a general rule, judgments are to be construed like other written instruments and contracts." *46 Am. Jur. 2d Judgments §66; Littlepage v. Littlepage*, 2016 WL 4417125 (ala. Civ. App. 2016);

Deeen-Bacchus, 71 N.E. 3d 882 (Ind. Ct. App. 2017). All courts of competent jurisdiction are imbued with the inherent authority to enforce their rulings and judgments. *12A Fla. Jur 2d Courts and Judges* § 35, citing *Brand v. Old Republic Nat. Title Ins. Co.*, 797 So.2d 643 (Fla. 3d DCA 2001); *Jimenez v. Bondi*, 259 So.3d 722 (Fla. 2018). Construction is a question of law for the Court. *11 Fla. Jur 2d Contracts* § 140. General rules of construction apply to the Court's construal of the entire judgment. *46 Am. Jur. 2d Judgments* § 66 (see *McCann v. Walker*, 852 So.2d 366 (Fla. 5th DCA 2003) ("citing *Boynton v. Canal Authority*, 311 So.2d 412,415 (Fla. 1st DCA 1975), (h[olding] that '[i]f the language employed in a judgment is plain and unambiguous, there is no room for construction or interpretation and the language must be given its literal meaning.'..."). "In construing a judgment ... the adjudication should not extend beyond that which the language used fairly warrants, since the purpose and function of construction is to give effect to that which is already latent in the judgment, and the Court may not by construction add new provisions to a judgment which were omitted or withheld in the first instance." *Id.* "[T]he legal operation and effect of a judgment

must be ascertained by construction and interpretation of its terms, and this presents a question of law." *Id.*

59. Consequently, absent, either patent or latent, ambiguity, the plain language governs without resort to extrinsic, or parol evidence. *Id.* Rights and responsibilities of parties to a judgment, as applied and construed under the judgment and applicable doctrines of law, within the sound discretion of the Court, are not extrinsic evidence. The language of the Deficiency Judgment is neither ambiguous nor vague. It is clear from the language that the Court treated the motion for deficiency as a final adjudication of the dispute between the parties. Hence, the reservation of jurisdiction to ascertain *if* additional fees would be appropriate. At Paragraph 3. of the Deficiency Judgment, the Court expressly references the liability and the rate of accrual as "set forth in the Partial Summary Judgment through June 30th, 2016, and thereafter at the legal rate for judgments published by the Chief Financial Officer," (R. 4750-4752). That adjudication presents as a final adjudication and does not contain language of entitlement to expansive rights of recovery for post-judgment attorneys fees and costs of post-judgment enforcement or collection efforts.

3. Production, Posturing, and Prejudice

60. At first blush, this appeal appears to involve a traditional commercial foreclosure matter. However, the entirety of the Record on Appeal illustrates Appellant's approximately 14 year practice of over zealous, and over the top, employment of the judicial system as an arm of Appellant SEPH's judgment collection efforts. While Appellant glibly tossed out the total sum of \$1,011,379.00, ostensibly due as attorneys fees on June 29th, 2022 (R. -, SEPH, via counsel, refused to produce the evidence necessary for the claim ("invoices") and instead hunkered down into the *Heisman* (trophy) *stiff arm push-away*, and refused, and failed to produce attorneys fees invoices at least thrice, until compelled by the Circuit Court on September 1st, 2022, in response to Appellant, Fletcher's Motion to Show Cause Why Attorneys fees and Costs Claimed Should not be Dismissed or Adjudicated as Waived. (R. 6297-6301, 6344-6351). All of this while being in receipt of FLETCHER's draft of certified funds in the amount of \$478,596.37 in satisfaction of the Principal and interest since May 10, 2022. (R. 6344-6351). Also recall that SEPH had effectively rejected the tender until the Circuit Court ordered, from the bench, SEPH to accept and negotiate the instrument on September 1st, 2022.

61. Appellant cites *Webber*, a fourth DCA case that suggests that § 57.115, Florida Statutes, provides for the recovery of attorneys fees for collection efforts in bankruptcy proceedings. *Webber v. D'Agostino*, 251 So.3d 188 (Fla. 4th DCA 2018). *Webber* is distinguishable from the instant case on its facts.

62. *Webber* involved a lender enjoying expansive rights of recovery for garnishment, and bankruptcy proceedings, where the lender's rights of enforcement remained vital and enforceable under the terms of the judgment, which is not the case here. The actions, efforts, and motion practice of SEPH in opposition to THACKER's conveyances (reversed), and defenses in both state court and bankruptcy courts, occurred in the early phases of the litigation, and had been completely adjudicated by September 17th, 2017. Therefore those sums are not recoverable as those claims have lapsed, and the operative judgment, or cause of action, does not permit recovery of costs of collection in bankruptcy. Therein lies the crucial distinction between *Webber* and the instant case. ANY claim for fees accrued prior to September 2017 has lapsed as a matter of law, and the provisions of the Deficiency Judgment are bereft of entitlement to recovery of fees expended in bankruptcy.

63. *Webber* involved the loan of \$1.4 million secured by a security interest (or pledge) of the borrower's stock in FJK IV. Upon default of the obligation, the lender sought to foreclose the security interest, but the borrower had alienated and transferred the stock to an out of state friend. *Id.* The borrower filed a suggestion of bankruptcy which was dismissed and the parties appear to have engaged in various bankruptcy proceedings. The trial court reversed the out of state transfer finding it was made to delay, hinder and/or defraud" and marked the borrower with badges of fraud. *Id.* Accordingly, the *Webber* Court engaged in the customary analysis of fraudulent transfer and found the borrower liable for attorneys fees and costs of collection in the bankruptcy court. *Id.*

64. The facts of *Webber* and the facts of the instant case are strikingly similar, and strikingly dissimilar. *Webber* involved award of attorneys fees and costs for bankruptcy proceedings where the borrower (bankrupt) fraudulently alienated the collateral, was marked with badges of fraud, filed bankruptcy, and continued to dispute the enforceability of the underlying debt, even after having paid the debt. *Id.*

65. Excepting the formal dispute of the amount of the Judgment debt, the above stated facts are consistent with the Record regarding co-guarantor THACKER's considerations. However, where *Webber* involved the recovery of sums for bankruptcy proceedings under an enforceable contract (judgment) provision for recovery of costs of collection, those rights do not exist in the instant case. The lion's share of those attorneys fees to enforce the judgment in bankruptcy in the instant case, accrued early on, with the majority of contentious litigation having ceased by December 17th, 2017. Consequently, SEPH's attorneys fees incurred in opposition to THACKER's claims and defenses in bankruptcy, prior to September 2017, have already lapsed as a matter of law. Moreover, in *Webber* the lender continued to enjoy expansive contract rights to recover in bankruptcy under the original loan documents. Here, SEPH's pre-2017 claims for garnishment and bankruptcy lapsed, while the Deficiency Judgment contains no provision for the recovery of the costs of collection in bankruptcy.

66. An award of attorneys fees for bankruptcy related matters, well after the lapse of such expressly bargained for rights, rewards

SEPH for less than reasonable efforts, to extract ever increasing sums in onerous debt collection practices.

67. Appellant SEPH obstructed Fletcher's ability to satisfy the debt by withholding and concealing attorneys fees invoices, to support the claim, for at least six (6) months, while overtly rejecting and refusing the proper Tender of the P&I component (\$478,596.37) of the Deficiency Judgment on May 20, 2022. (R. 6337). SEPH engaged in this obstructionist conduct to prevent Fletcher's satisfaction of the debt of the Deficiency. SEPH was determined to stave off satisfaction of the debt, for the purpose of preserving the debt as an essential element of the claims in the Companion Matter for fraudulent transfers under the UFTA, with a trial date set for January 17th, 2023. The Trial date was ultimately stayed due to the evidentiary hearing on SEPH's claim for attorney fees.

68. Largely due to the prejudice caused by SEPH's precisely, ***imprecise***, Submission In Support of Proposed Fee Award, filed 4 days prior to the November 4th Evidentiary Hearing, FLETCHER was hard pressed, and fixated on a potential [additional liability] of \$1,015,000.00, after having already satisfied the Principal and interest portion of the Deficiency Judgment in the amount of \$478,596.37, on

May 10th, 2022. Consequently his ability to defend against complex claims was unfairly compromised. Here, it is important to recall that SEPH continued to dun the debtors with discovery in aid of execution, some 12 years after the original PSJ of 2010, as set forth throughout significant portions of the Record on Appeal. And most egregiously, SEPH sought to compel production in aid of execution from Thacker on June 21st, 2022, a whole month after receiving the tender package with the draft of certified funds for \$478,596.37, but prior to the Circuit Courts Order from the bench to accept and negotiate the instrument on September 1st, 2022. (R. 6095-6139) (R. 6397-6399) (entered October 17th, 2022).

69. And most importantly, at this point, it should be remembered that FLETCHER expended significant sums in counsel fees for discovery requests for a final accounting of fees due. (R. 6283,6352,6375). However, as set forth herein above, SEPH engaged in calculated efforts to conceal the additional sums due, in order to prevent FLETCHER's satisfaction of the debt. Why does a special purpose entity with the business purpose of collecting bad debt reject or refuse \$478,596.37 under the specious premise that it lacked payment for attorneys fees sums THAT HAD YET TO BE

DISCLOSED? (R. 6337). At the time of SEPH's putative rejection of the tender, SEPH's Companion Matter under the UFTA had been set for jury trial on January 17th, 2023. (R. 6157)

70. SEPH interposed frivolous objections to the production of attorneys fees invoices on at least three separate occasions, each of which is memorialized in discovery responses (of record), as set forth above. Since the existence of an insolvency rendering debt is 'the' essential element of a claim under the UFTA, SEPH was determined to forestall FLETCHER's satisfaction of the entirety of the debt (by refusing disclosure of invoices) to maintain the unpaid Deficiency Judgment as the essential element of the Companion Matter. Once the Deficiency judgment is satisfied in its entirety, the Companion Matter under the UFTA evaporates as a matter of law for failure of the essential element of an insolvency rendering debt. §726.105, Fla. Stats.

71. The remedies of the UFTA provide the putatively, defrauded creditor the ability to recover "make whole" damages. §726.105, Fla. Stats. Interestingly, FLETCHER voluntarily tendered the \$478,596.37 on May 10th, 2022; and on May 4th, 2023, he satisfied the subject

Judgment on appeal with payment of **\$330,256.31** into the registry of the Circuit Court. (R. 7207-7208)(Lower Tribunal Docket entry #924).

72. On May 20th, 2022, Appellant via counsel, rejected and refused the tendered sum of \$478,596.37 in that correspondence between respective counsel. (R. 6337). FLETCHER vigorously and aggressively sought the accounting (invoices) for attorneys fees so that he could bring this veritable, debtor's prison to an end with the payment of U. S. dollars In accordance with the terms of the Judgment. SEPH was not having it, and continued to refuse to "accept" the tender of \$478,596.37, on May 10, 2022, and interposed frivolous objections to the subject RFPs for fees invoices.

73. Consequently, FLETCHER was compelled to employ the coercive authority of the Court to compel acceptance of the tender of, \$478,596.37 and to produce ALL attorneys fees invoices to FLETCHER within 15 days, and to set the final evidentiary hearing on the remaining attorneys fees liability for November 4th, 2022.

74. But for FLETCHER's, Motion for an Order to Show Cause why attorneys fees and Costs Claimed Should Not Be Dismissed or Adjudicated as Waived, filed on August 23rd, 2022, and heard on

September 1st, 2022, the FLETCHER's would have been on the hook for additional, significant costs of defense of the Companion Matter. In SEPH's letter to Thacker of June 29th, 2022, SEPH represents a formal number in excess of \$1,000,000.00 in post judgment collection fees but refused to produce the evidence until compelled by the Circuit Court. (R. 6326). The pattern of discovery abuse and misconduct depicted in the Record on Appeal speaks for itself and illustrates SEPH's bad faith manipulation of both, commercial information necessary for productive endeavors, and calculated abuse of the judicial system as a scheme of enrichment.

75. FLETCHER recognized the abusive ploy as SEPH's go to practice of preventing payment of the debt, by rejecting payment, and refusing to disclose attorney fees (invoices), and buffalooing the debtor into any multitude of additional collection proceedings. Apparently, SEPH's collection doctrines are designed to generate a slew of post-judgment attorneys fees. (R. 6662-67, 6859-63). Then, with the large unknown, BUT GROWING, bill (liability) for post-judgment attorneys fees, SEPH creates the 'palpable' impression that satisfaction of the large, and growing debt, is unsupportable and unsustainable. (Gaal

letter to Thacker, of June 29th, 2022, R. 6326)(SEPH also provided the letter to Fletcher).

76. And therefore, the debtor is strategically coerced into seeking relief in Chapter 7 of the Bankruptcy Code. As illustrated by the THACKER Chapter 7 bankruptcy estate proceedings, multiple asset collection proceedings appear to generate significant sums in creditor attorneys fees.

77. Appellant suggests that the Circuit Court's post-hearing comments regarding impugned integrity taint the validity of the comprehensive and thorough Order After Evidentiary Hearing (Tr. Pp.162-163). Clearly, at that point in the proceedings the Circuit Court had yet to review the extensive Record (largely self created by SEPH) of litigation and collection enforcement actions.

78. Accordingly, the Circuit Court's analysis arrives with greater force and validity because the Circuit Court was compelled to *disabuse* itself of the (apparently) perceived, extreme nature of Fletcher's allegations and averments regarding SEPH's commercial conduct. In other words, the Circuit Court ruled as it did *in spite* of the Court's comments at the close of the evidence. Such results confirm a

comprehensive analysis, with particular regard to the questions of law that would (or would not) support any claim to the recovery of post-judgment collection fees.

79. Recall, in the October 31st, 2022, Submission in support of an Award of Attorneys fees, SEPH's arguments presume the existence of entitlement to such fees under the loan documents and judgments. Consequently, as a result of the prejudice of SEPH's late filing of a putative request for attorneys fees, Fletcher was compelled to oppose the question of entitlement at the evidentiary hearing on reasonableness of fees. Fletcher enjoyed the dubious honor of disputing entitlement during a process and procedure designed to determine the "reasonableness" of such fees. This is the very definition of procedural prejudice that the holding in *Lait* is designed to prevent. *Lait*, 2 So.3d 203. This case is the poster child of commercial creditor unreasonableness in the pursuit of post-judgment collection costs.

80. Appellant Southeast Property Holdings is a sophisticated business entity and is therefore governed by the expectations of reasonableness and good faith set forth in Florida law, and codified at

various provisions of Florida's version of the Uniform Commercial Code.

CONCLUSION

SEPH is barred and prohibited from the recovery of attorneys fees and costs, except those awarded under §57.115, Fla. Stats, as costs of collection. And SEPH fails to offer *bona fide* arguments for the reversal, extension, or modification of existing law to alter or amend the time honored doctrines of *Res Judicata*, Merger, and the issue preclusion concepts of defensive collateral estoppel.

Accordingly, Fletcher prays this Court affirm the Judgment on appeal and find that SEPH is not entitled to recovery of any further attorneys fees and costs under the Judgment on appeal and that Fletcher shall be entitled to the costs of defense associated with SEPH's apparent refusal to accept the proper tender, as more fully explicated in the Record on appeal.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to the following:

- (1) Richard M. GAAL (counsel for Appellant SEPH.).
rgaal@mcdowellknight.com
- (2) Elizabeth J. Walters (counsel for Appellee the St Joe Cpmpany and Beach Commerce Park Owners Association, Inc.).
lisa.walters@joe.com
- (3) Larry B. Thacker (co-Appellant).
Carla.thackerconstruction@yahoo.com ; ltr23@yahoo.com

Copies of the foregoing were furnished by email to the email addresses listed above on February 25th, 2024.

/S/ Joseph Silva, Jr.

JOSEPH SILVA

**CERTIFICATE OF COMPLIANCE WITH
FONT REQUIREMENTS AND WORD COUNT LIMITS**

I hereby certify that this Answer Brief on the Merits was prepared using Arial 14-point font; that the word count, excluding the words in the caption, cover page, table of contents, table of citations, signature block, certificate of service, and certificate of compliance, is 7499; and this brief complies with the font and word count requirements of Fla.R. App. P. 9.045 and 9.210(a). I relied upon the word count of the word processing system used to prepare this document.

/S/Joseph Silva, Jr.

JOSEPH SILVA, JR.