

**IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA**

DCA CASE NO. 5D2023-2222
5D2023-3731 (consolidated)

TROYZ TOWING AND STORAGE, INC.,

Appellant,

v.

TA COLLECTIONS, INC., a Florida Corporation, etc., et al.

Appellees.

On Appeal from the Circuit Court, Fourth Judicial Circuit
in and for Duval County, Florida

Honorable Robert M. Dees, Circuit Judge

Circuit Court Case No. 2010-CA-14005
consolidated with 2015-CA-6581

ANSWER BRIEF OF APPELLEE TA COLLECTIONS, INC.

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INTRODUCTORY STATEMENT

In this Answer Brief, Appellant Troyz Towing and Storage, Inc. will be referred to as “TTS.” Troyz Towing and Recovery, Inc. will be referred to as “TTR.” Those entities and their affiliates may sometimes be collectively referred to as “Troyz Towing” or “Troyz Defendants.” Appellee TA Collections, Inc. will be referred to as “TA.” GT Leasing, Inc. will be referred to as “GT.”

In 2010, GT as Plaintiff in the initial underlying Circuit Court collection litigation sued TTR, Troy Henderson Bostick and Nicole R. Bostick, who are husband and wife and guarantors of TTR’s debt to GT (Case Number 2010-CA-14005).

TA, as assignee of GT, subsequently sued Defendants TTS; TTR; Troyz Towing & Storage Heavy Hauling Inc.; and Troyz Auto, Inc. in Case Number 2015-CA-6581, to determine that these entities were the mere continuation of TTR’s business, or were otherwise liable for judgments previously entered in favor of GT in the predecessor 2010 case.

TA also filed a Notice of Lis Pendens regarding the real property located at 6155 Old Kings Road, Jacksonville, Florida, which was the business location for the Troyz Towing entities (R. 3310). TA also sought relief under Section 56.29, F.S., Florida’s Proceedings Supplementary statute.

In this appeal, Appellant TTS seeks reversal of the trial court's June 2023 Final Judgment, ruling that because of TTS' business activities continuing well after TTR's 2011 bankruptcy, (a) TTS was the alter ego or mere continuation of TTR; (b) TTR and TTS were the same company by *de facto* merger; and (c) GT's Judgments against TTR continued against TTS because of the provisions of Section 56.29, Florida Statutes.

The Record on Appeal will be referred to by the symbol "R." The Record on Appeal was supplemented three times. However, the Circuit Court Clerk prepared those supplemental volumes using sequential page numbers, so there is no need to differentiate between the volumes of the Supplemental Records.

When preparing the Record, and consistent with Rule 9.200(b)(4), Florida Rules of Appellate Procedure, the Clerk did not separately paginate the November 21, 2022 trial transcript, so this Brief cites to the page numbers as assigned by the attending court reporter.

Exhibits introduced at trial may also be referred to by the symbol "PEX" or "DEX," depending upon the introducing party below (Plaintiffs or Defendants). References to Appellant's Initial Brief will be by the symbol "IB." All emphasis in this Brief is that of the scrivener except where otherwise indicated.

STATEMENT OF THE CASE AND THE FACTS

Appellant TTS did not provide this Court with a complete or accurate Statement of the Case and Facts in its Initial Brief, because it omitted or misrepresented key portions of the Record on Appeal which support affirmance. Therefore, Appellee provides this Statement of Case and Facts.

As noted above, Appellee TA Collections, Inc. (“TA”) is the assignee of the monetary claim held by G.T. Leasing, Inc. (“GT”) against TTS. R. 1780-1787.

GT is in the business of leasing vehicles; before 2010, GT leased certain tow trucks and other vehicles (the “Trucks”) to TTR, which was known as and did business under the name “Troyz Towing” (“TTR”). PEX 2.

After TTR failed to pay the required lease payments in 2010, GT sued TTR in various counts; its Amended Complaint sought return of the Trucks and payment for all past due amounts. R. 21-41. GT also sued Nicole Bostick and Troy Bostick, husband and wife. Nicole Bostick owned TTR and both spouses worked in the business and personally guaranteed TTR’s debt to GT. (See R. 34-35).

A January 10, 2011 Circuit Court order required TTR to return the leased Trucks to GT (the “Surrendered Trucks”). R. 128-129; R. 1582-1583; R. 2131-2132.

Although TTR had turned over to GT the Surrendered Trucks, GT still sought recovery of its monetary damages resulting from TTR's failure to pay lease payments.

After TTR returned the Surrendered Trucks to GT in 2011, it acquired new vehicles to continue operating its business, by purchasing or leasing new, different trucks from other lessors (the "Replacement Trucks"). TTR made substantial down payments totaling at least \$50,805.22. R. 2279; 2208-10; 2212-2214; 2215-2216; 2217-2221.

- **The Formation of TTS on the Eve of Trial Against TTR**

The trial on GT's damages claims against TTR was set for December 1, 2011. R. 338-339. However, on November 4, 2011, just weeks before trial, Nicole Bostick formed a new company named TTS (R. 2699). Both TTR and TTS are solely owned by Nicole Bostick, and Troy Bostick actively worked in the management of both entities. Tr. P. 55; R3277.

- **TTR's Asset Conveyance to TTS**

On November 4, 2011, the day TTS was formed (and approximately 23 days before the scheduled trial in the 2010 GT Case), TTR conveyed all its assets to TTS, including (i) real property located at 6155 Old Kings Road, where the towing business was located; (ii) seven (7) motor vehicles; (iii) tools; (iv) paint booth; (v) Snap On Tools; (vi) telephone; (vii) cameras;

(viii) welder and (ix) all other assets, whether tangible or intangible, including good will, and any business name and phone number. R. 1600-1601; DEX 4 at R. 3277-3278, Section 1.1.

Nicole Bostick testified during her June 10, 2021 deposition that she formed TTS “so I could keep working,” even though TTR continued to exist. She identified no reason why TTR could not continue doing business. R. 1844-1845.

- **The Bankruptcy Petitions Are Filed**

On November 7, 2011, three days after TTR transferred the subject assets to TTS, TTR filed a Chapter 7 corporate bankruptcy. R. 364; 2583. However, as discussed *infra*, a corporate Chapter 7 bankruptcy does not provide TTR with a discharge of debt, as described in NLRB v. Better Building Supply Corp., 837 F. 2d 377, 379 (9th Cir. 1988). Better Building held that by adopting Section 727(a)(1) of the Bankruptcy Code, Congress intended that corporate debt would survive Chapter 7 proceedings and be charged against the corporation when it resumed operations. Better Building is discussed in more detail in the Argument section.

Nicole Bostick filed an individual Chapter 13 Petition at the same time TTR filed its Chapter 7 Petition. (See R. 2698; R. 368). And, Troy Bostick filed

an individual Chapter 11 Petition on November 9, 2011. (DEX16; R. 366; R. 2698-2699).

As a result of TTR's transfer of all its tangible and intangible property, Nicole Bostick (through her new, solely owned company TTS) remained in actual possession of the business and its assets, including the non-Surrendered Trucks, and the Old Kings Road property, which was owned or operated by TTR. Ms. Bostick continued to use those assets to conduct business. R. 1601; 1844. The instant Final Judgment ultimately found that the asset transfer to TTS had rendered TTR "insolvent." R. 1602.

As the trial court also ultimately found, Nicole Bostick never obtained an appraisal or opinion of value from any third party in connection with the transfer of TTR's business, land, and assets to TTS. Instead, Ms. Bostick and her husband unilaterally established a "sale" price of \$25,000, which consisted of a \$15,000 cash payment and a \$10,000 unsecured loan. R. 1601; 2366; DEX 5 at R. 3284. No third party gave TTR or Ms. Bostick any opinion that this transfer was a fair, arm's length transaction. R. 1601; 2372.

Furthermore, TTS failed to make any payments on the \$10,000 unsecured "loan" to TTR, and the alleged loan was in default when Nicole Bostick's February 29, 2012 deposition was taken. R. 2371.

All of TTS's real property, vehicles, and equipment came from TTR as a result of the November 4, 2011 transfer. R. 2372. After the TTR asset transfer, TTS conducted the same vehicle towing and storage business and serviced the same customers as TTR, except that TTS did not tow cars for the Jacksonville Sheriff's Office. R. 1601; 2355-2356. This was only because TTR had lost the Sheriff's contract because it had filed bankruptcy. Id. TTS had no new customers, which were different from TTR's customers. (R. 2372).

As the trial court found, TTS continued to conduct the same exact business, with the same ownership, same employees, same equipment, many of the same tow trucks (other than the Surrendered Trucks), same telephone number and same location TTR used, with many of these actions continuing up to the 2022 trial. R. 1602; 3278; Tr. p. 133-136. TTS even advertised through 2022 on its website that TTS was the same business as TTR, when it claimed TTS had been doing business for more two decades, even though TTS has only been active for approximately 11 years since it was filed in 2011. R. 3277 (e); PEX 32 at R. 1995, Tr. 165-166.

Moreover, as discussed in detail in the Argument, TA established at trial that the assets transferred from TTR were not conveyed by the TTR Bankruptcy Trustee, as erroneously claimed by Appellant's Initial Brief (IB 4-5). Pursuant to a settlement agreement with various parties (but not GT or

TA), the Bankruptcy Trustee only agreed to transfer the Bankruptcy Estate's interest in TTR's seven vehicles which TTR had financed, and could not unilaterally transfer to TTS. R. 2702.

- **The Details of the Company's Ongoing Towing Operations**

During his October 31, 2022 deposition, Troy Bostick acknowledged he was the namesake for the business name "Troyz Towing" used by TTR and TTS, by adding a "Z" to his first name. 11/21/22 trial transcript at 134-137. Mr. Bostick testified that as of October 31, 2022, he was working for TTS, and TTS was doing the "Same thing they do for, like, 28 years: Tow vehicles." 11/21/22 trial transcript at 133-134. Troy Bostick further admitted that TTS is the same business as TTR. 11/21/22 trial transcript at 134.

TTR claimed it was insolvent before the asset transfer to TTS and was losing money. R. 3277 (c). However, contrary to those insolvency claims, evidence was introduced establishing the historical income generated by the towing business which was relevant to the claims and defenses. In fact, TTR had been generating positive cashflow from 2009 to 2013. In 2009, TTR's tax return showed net income of \$69,964 on gross receipts of \$678,627. R. 1984. TTR's 2010 tax return shows gross income of \$614,869. TTR's 2011 tax return showed \$108,538 in net income from gross receipts of \$633,216. R. 2546.

After the TTR assets were transferred to TTS, the new company declared net income of \$12,900 in 2011 on gross receipts of \$93,340 from its November 5, 2011 formation to December 31, 2011. R. 2560. TTR's total net income from its towing business in 2011 was \$121,438, generated from its total gross income of \$725,556. Id.

Nicole Bostick testified that during 2009-2011, TTR had been grossing between the high \$80,000's to the low \$90,000's each month, which would equate to a gross income of \$1,080,000 or more per year (R 2358-2360). In 2012, TTS declared net income of \$18,082 on gross income of \$672,512. R. 1742. In 2013, TTS declared net income of \$34,721 on gross income of \$550,000. R. 1799

- **The Actions of the TTR Bankruptcy Trustee**

TTR's Chapter 7 bankruptcy Trustee filed a Notice of Intent to Compromise Claims and Sell Property of the Bankruptcy Estate (DEX 16: R. 2695-2711) (the "Notice of Intent"), which set out the Trustee's activities. Those activities were limited to (a) taking a Bankruptcy Rule 2004 examination of Nicole Bostick (see R. 1258-1444); (b) filing a proof of claim in Nicole Bostick's individual bankruptcy; (c) filing a proof of claim in Troy Bostick's individual bankruptcy; and (d) sending out the Notice of Intent, which set out the background facts and the situation the Trustee was in. The Notice of

Intent stated certain assets were transferred from TTR to TTS and “the Trustee asserts that the Transferred Assets are property of the bankruptcy estate pursuant to 11 S.S.C. § 541, because the transfer constituted a fraudulent transfer of property.” R. 2698-2699.

The Notice of Intent also stated that CBC Bank claimed that a mortgage and UCC-1 Financing Statement provided the Bank with a lien on the debtor’s real property, personal property, accounts receivable and the property transferred from TTR to TTS. R. 2700-2702; 2691-2693. Further, TTS argued that TTR had received adequate payment for the transferred assets. R. 2699-2700.

Therefore, TTR’s Trustee was arguing with TTR and CBC Bank over various accounts and property. The TTR Trustee never made an “alter ego” or “mere continuation” claim against TTS, or any other person or entity. R. 2697-2711.

- **The Limited Bankruptcy Settlement**

The Trustee’s Notice of Intent stated that the proposed settlement was limited to (i) the Trustee’s claim for fraudulent transfer, preferential transfer or breach of fiduciary duty against Nicole Bostick in her individual Chapter 13 bankruptcy case which was filed at the same time as the TTR Petition (R. 2698); (ii) the Trustee’s claim against Troy Bostick for fraudulent transfer,

preferential transfer or breach of fiduciary duty in Troy Bostick's individual Chapter 11 bankruptcy Petition which was filed the day after his wife filed her Chapter 13 Petition (DEX 16, p. 2-3; R. 2698-2699); (iii) the Trustee's claim against TTS for fraudulent transfer of the assets received from TTR (DEX16, p. 3; R. 2699); and (iv) the Trustee's claim against CBC Bank, in response to with CBC Bank's claims to the other TTS assets and its claim to a secured interest in a TTR account (R. 2700-2701).

According to the Notice of Intent, the TTR Trustee and CBC Bank had been competing for TTS assets, including its bank accounts and personal property. As noted above, CBC Bank claimed it held a security interest in TTR's Old Kings Road Property and personal property, including accounts receivable and bank accounts transferred to TTS. R. 2699-2700.

The TTR Bankruptcy Trustee settled its fraudulent transfer claims and the other claims identified in the Notice of Intent with TTS, Nicole Bostick, Troy Bostick and CBC Bank. The Notice of Intent did not claim to value the actual amount of the assets transferred by TTR to TTS, nor was there any determination that a fraudulent transfer had occurred (R. 1604).

As noted, TTR's Bankruptcy Trustee never filed any complaint or adversary proceeding against any person or entity for fraudulent transfer, and never mentioned any claim against any person or entity for alter ego or mere

continuation. No adversary proceeding was ever filed in the TTR bankruptcy case. R. 2695-2711.

Instead, TTR's Bankruptcy Trustee reached a compromise with CBC Bank which settled the Bank's claimed lien and its claimed security interest in the Old Kings Road property), Nicole and Troy Bostick, TTR and TTS (including the claims asserted in Mr. and Mrs. Bostick's personal bankruptcy cases). The Notice of Intent stated the reason for the settlement:

Because the costs and time involved in resolving the bankruptcy estate's interest in the [bank] Account, APA, Transfer, Transferred Assets, Transfer Claims, CBC Claims and other claims described herein could yield less than what creditors will receive as a result of this compromise, the Trustee believes that the compromise is reasonable and recommends it to the creditors of the estate. R. 2703.

The Bankruptcy Court's subsequent Consent Order approved the proposed settlement (the "TTR Order Approving Settlement"), but never specifically determined whether a fraudulent transfer had occurred. Nor did the court identify the value of property or amount of money TTR transferred to TTS, or whether any party owed any amount of money to the TTR Bankruptcy Trustee. R. 2714-2715.

- **GT Obtained Relief From the Automatic Stay to Pursue its Claims**

On November 15, 2012, GT obtained relief from the bankruptcy automatic stay to complete its litigation in the 2010 Circuit Court case.

R. 1604; 1763-1764; 2729-2730. In doing so, the Bankruptcy Court did not bar, restrict or limit GT's right to proceed on its judgment, except that GT's judgment against TTR would constitute an unsecured claim in TTR's bankruptcy. R. 1604; 1763-1764; DEX 19.

GT obtained a Final Judgment against TTR in this case (the 2010 Case) on March 6, 2013 in the amount of \$426,521.09 (the "GT First Judgment"). R. 424-426; 1604-1605.

On May 24, 2013, GT obtained a Supplemental Judgment awarding its attorneys' fees and costs against TTR in the amount of \$73,431.46 (the "GT Second Judgment"). R. 438-440; 1605. This award was also authorized by the relevant provision of the Master Lease Agreement between GT and TTR. (R. 438).

After certified copies of the GT First Judgment and GT Second Judgment were recorded in the Official Records of Duval County, Florida, a lien was created on any real property owned by TTR. (R. 1605). In 2015, GT assigned its two Judgments against TTR to TA. R. 457; 459-461; 1605; 1780-1787.

- **The 2015 TTR Bankruptcy is Closed**

The Bankruptcy Court closed the TTR Chapter 7 case on February 9, 2015, discharged the Trustee and abandoned all remaining assets of the

bankruptcy estate. R. 1605; DEX 23; 2746-2756.

On May 31, 2015, Nicole Bostick and Troy Bostick formally agreed to reaffirm the underlying mortgage debt on 6155 Old Kings Road (from which all business operations of TTR and TTS were being conducted), by signing a reaffirmation agreement with CBC Bank, which was also signed by their bankruptcy attorney. R. 1605; 2748-2756. At that time, the market value of the Old Kings Road Property was shown as \$430,000. R. 1605; 2751.

- **The 2015 TA Circuit Court Litigation Against the Troyz Defendants.**

On October 15, 2015, TA , as GT's assignee (DEX 20 at R. 1780), sued TTR, TTS, Troyz Auto, Inc. and other corporations owned by Nicole and Troy Bostick in Circuit Court, Duval County, Florida, Case No. 2015-CA-6581 (the "2015 Case") (R. 3313). and recorded a Notice of Lis Pendens against the real property owned by TTR which was transferred to TTS. (R. 3310). TA sought a judicial determination that TTS was nothing more than the mere continuation of TTR, or its alter ego. R 3319-3320.

The 2015 Case was consolidated with GT's underlying 2010 litigation case. R. 570.

- **TA's Proceedings Supplementary**

On October 30, 2015, TA filed a Motion for Proceedings Supplementary under Section 56.29, Florida Statutes, on the original Judgments in favor of

GT, and sought an order impleading TTS, Troyz Auto and the other Troyz entities. R. 462-494.

TA sought a ruling that TTS was (and is) the mere continuation of TTR, as well as a determination that TTS was holding property which was subject to execution by TA, including the Old Kings Road property. R. 466-467. The Court granted the Proceedings Supplementary, finding GT and TA had established the requisite prima facia showing, in accordance with Sanchez v. Renda Broadcasting, 127 So. 3d 627, 628-29 (Fla. 5th DCA 2013). R. 563-566.

The case then proceeded to trial on TA's 2015 Complaint and its Proceedings Supplementary. R. 1586. In the Pretrial Stipulation, the parties agreed that the Court would consider the alter ego or mere continuation claims and proceedings supplementary against TTS. Id.

As the Final Judgment found, in August 2019, TTR, TTS, and/or Mr. and Mrs. Bostick allowed the CBC Bank loan on the Old Kings Road property (which it had reaffirmed in 2015 in connection with the bankruptcy proceedings) to go into default by failing to pay monthly payments, real estate taxes, and hazard insurance premiums (R. 1605). CBC Bank's successor filed suit to foreclose and obtained a \$475,000 judgment (see R. 2791-2796); a foreclosure sale was scheduled for January 11, 2022. R. 1605-1606. Nicole

Bostick testified that prior to that foreclosure sale, she successfully applied online for an SBA loan and received a \$500,000 wire transfer to TTS's bank account. R. 1606. Ms. Bostick testified that she did not know when or to whom payments had to be made to repay the loan (R. 1606).

The Bosticks' counsel thereafter settled the CBC Bank foreclosure claim for \$437,000 (see R. 2799), purportedly using funds Ms. Bostick obtained from the \$500,000 SBA loan to pay the Judgment in favor of CBC's successor. By paying off the CBC mortgage, significant equity existed in the Old Kings Road property. TA resumed its collection efforts, which led to the underlying November 21, 2022 non-jury trial. R. 1606.

- **The Findings and Rulings in the Final Judgment**

The Final Judgment acknowledged that GT's original 2010 collection case had been consolidated with the TA's 2015 case, which was being considered along with the Order granting TA's Motion for Proceedings Supplementary and impleading Troyz Auto, Inc. and TTS (R. 1599).

The court identified three main issues. First, whether TTR had validly conveyed the Old Kings Road real property to TTS by various deeds signed by Nicole Bostick as President of TTS, instead of TTR. The second issue was whether TTR's November 4, 2011 asset sale to TTS was a fraudulent transfer. The court ruled that TA would not prevail on those two issues.

However, the third issue was whether TTS was a mere continuation or alter ego of TTR, thereby allowing TA's money judgments against TTR to continue as collectable judgments against the other Defendants, pursuant to Section 56.29, Fla. Stat.

The court concluded that the technical irregularity in how Ms. Bostick executed the deed was insufficient to invalidate the title transfer to the Old Kings Road property from TTR to TTS (R. 1608). However, while making that finding, the court directly acknowledged that "the corporate names Troyz Towing and Recovery, Inc., and Troyz Towing and Storage, Inc., are confusingly similar and it takes an effort to remember which is which" (R. 1607).

The court also concluded that TTR's transfer of the Old Kings Road property, equipment and assets to TTS did not constitute a fraudulent transfer under the Florida Uniform Fraudulent Transfer Act (FUFTA), Section 726.105(1)(a), Fla. Stat. The court found TA had established certain "badges of fraud" (a) the transfer obligation was to an insider; (b) the debtor retained possession or control of the property transferred after the transfer; (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (e) the transfer was of substantially all of the debtors assets; (i) the debtor was insolvent or became insolvent shortly after the

transfer was made or the obligation was incurred; and (j) the transfer occurred shortly before or shortly after a substantial debt was incurred.

However, the court found that despite the rebuttable presumption that the transaction should be void, TA did not meet its burden to establish that the consideration TTR received was inadequate. R. 1608-1609.

However, the trial court did find TTS was the alter ego and mere continuation of TTR, or a *de facto* merger had occurred between TTR and TTS. As a result, the money judgments against TTR owned by TA continued in effect against TTS and TTS was liable for the Judgments against TTR as a matter of fact and law under Section 56.29, Florida Statutes. R. 1610-1622.

The Judgment found “TTS obviously trades on the "Troyz Towing" name and represents to the consuming public that TTS is the same company as TTR. Further, TTS is solely owned by TTR's sole owner, does business from the same location in the same manner and TTR and (at least in 2011 and 2012) did business with the same employees and same tow trucks as TTR.” R. 1611.

The Court further found that since 2011, the tow trucks had been replaced, but that was a normal part of the business. “Notably, the same level of income has been declared by TTS as TTR during the period 2009 to 2014.” R. 1611.

Since “TA has brought a proceedings supplementary claim pursuant to § 56.29, Fla. Stat., in addition to its request for declaratory judgment that TTS is a mere continuation of TTR, Proceedings supplementary under § 56.29, Fla. Stat., are not limited to fraudulent transfer claims.” (R. 1611).

The Court directly found: “TTR and Nicole Bostick orchestrated a transfer of TTR's assets for TTR to reconstitute itself as TTS to avoid debt. They then filed a Chapter 7 case and engaged in a settlement of various claims to attempt to argue that there was a discharge when no corporate discharge was available.” R. 1613.

The Judgment recognized some of the key facts from the Southern District’s opinion in Murphy & King Professional Corporation v. BlackJet, Inc., 2016 U.S. Dist. LEXIS 69206 (S.D. Fla. 2016) and the opinion in Amjad Munim, M.D., P.A. v. Azar, 648 So. 2d 145 (Fla. 4th DCA 1994) (discussed in detail in the Argument), were present in the instant case. Based on those principles, the Court held TTS was a “mere continuation and alter ego of TTR and therefore TTS and its assets should be liable for TA Collections’ “judgments”. The Court concluded that “Under these facts TTS is the resulting corporation of a *de facto* merger with TTR and TTS is additionally liable for TTR’s debts.” (R. 1613-1614).

The Court granted TA's Motion for Proceedings Supplementary, finding TTS was the mere continuation or alter ego of TTR (R. 1614). Since both TA Judgments against TTR were assessed against TTS, consistent with Murphy and Munim, TA was also entitled to an award of its attorneys' fees and costs pursuant to the proceedings supplementary, pursuant to Section 56.29(8), F.S. (R. 1614; 1623). The Judgment found TA was the prevailing party in the Proceedings Supplementary, and while acknowledging that "The judgment for fees and cost is not directly taxable against TTS, the implead defendant, but as in Murphy & King ... (citation omitted), because TTS has been found to be the mere continuation of TTR, TTS is indirectly liable for the fees in the same manner as TA Collections, Inc.'s Judgments are effective against TTS." (R. 1623). Therefore, the award of fees and costs to TA was entirely consistent with applicable law, contrary to Appellant's arguments.

The Court's additional legal analysis supporting these rulings will be addressed in the Argument section.

The Court found that GT's Judgments against TTR from the 2010 Case would apply to TTS, and entered judgment in favor of TA, and against TTS for \$426,521.09, plus interest from March 4, 2013 (R. 1622-23). The Court entered a separate money Judgment for TA's attorney's fees and costs from 2010 to 2013 of \$73,431.26 against TTS.

As the prevailing party in the Proceedings Supplementary, and pursuant to Sec. 56.29, F.S., the court also ruled that TA was entitled to recover its attorneys' fees and costs for the litigation from 2013 through the 2022 trial (R. 1623).

TTS moved for rehearing (R. 1635), and TA Collections responded in opposition (R. 1674). While the Motion for Rehearing was pending, TTS filed its Notice of Appeal, which was held in abeyance pursuant to Rule 9.110(l), Florida Rules of Appellate Procedure, while its Motion for Rehearing was still pending. (See R. 1672). The court denied rehearing (R. 1699).

On September 5, 2023, after TTS' appeal was no longer abated, the trial court granted its pending Motion for Stay Pending Appeal (R. 1671). The court found the Old Kings Road Property then had a fair market value of \$1,430,000, and concluded there was sufficient equity in that property to adequately secure TA's Judgments, especially since the Lis Pendens on the subject property was still in place (R. 1726-1725) (R. 3310).

- **The Subsequent Award of Attorney's Fees and Costs to TA**

The parties stipulated to an amount of reasonable attorneys' fees and costs to be awarded to TA against TTR and TTS for the 2013-2022 period, while TTS reserved the ability to challenge TA's entitlement to fees and costs on the merits.

A Consent Supplemental Final Judgment was entered awarding TA \$81,012.25, in attorneys' fees and costs against TTR and TTS, which would generate interest from November 2023 (R. 2329-3230). Appellant then filed its second Notice of Appeal (R. 3235), and the two appeals were then consolidated by this Court.

SUMMARY OF THE ARGUMENT

The trial court's factual findings and legal rulings are fully supported by the Record evidence and applicable law. The Court correctly applied the law of mere continuation/alter ego/*de facto* merger and Section 56.29, Fla. Stat., to these facts.

The court correctly followed the holdings in numerous cases that a judgment creditor may pursue claims against the alter ego or mere continuation of a corporate Chapter 7 debtor, because there is no discharge of debt in a corporate Chapter 7 case. Such claims are not limited to those based on an underlying unfair labor standards claim, as Appellant incorrectly argues.

Numerous cases hold that a judgment creditor may pursue claims against the alter ego or mere continuation of a corporate Chapter 7 debtor, even if the debt is not based on an unfair labor standards claim. See, for example, Izzo Golf v. King Par Corp., No. 10-CV-6507 CJS, 2019 U.S. Dist.

LEXIS 233337, at *18-19 (W.D.N.Y. Aug. 13, 2019), where a patent infringement claim was allowed against an individual who was the alter ego or mere continuation of a corporate Chapter 7 bankruptcy debtor.

In re Custom Builders of Steamboat, Inc., 349 B.R. 39, 44 (Bankr. D. Idaho 2005) involved a homeowner's warranty claim against a building contractor debtor who had filed a corporate Chapter 7 bankruptcy. The court held that an alter ego claim survives a corporate Chapter 7 bankruptcy.

In Seminole Boatyard v. Christoph, 715 So. 2d 987, 990 (Fla. 4th DCA 1998) the Fourth District allowed a post-bankruptcy alter ego claim for unpaid rent against the individual corporate owner, after the tenant company filed Chapter 7 bankruptcy.

In Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd), 898 F.2d 1544 (11th Cir. 1990) the Eleventh Circuit held that a bankruptcy court approval of a settlement can never constitute a final decision on the merits, and therefore could not have res judicata effect which would preclude a subsequent cause of action, because approval of a settlement only considers whether the settlement is in the best interest of the bankruptcy estate. The principles described in Justice Oaks fully apply in this case.

The fact that the opinion in In re Goodman, 873 F.2d 598 (2nd Cir. 1989), involved unfair labor practice claims brought before the NLRB is not dispositive here.

Consistent with Justice Oaks, here the Court correctly found there was no res judicata effect to the TTR Order Approving Settlement, because the Bankruptcy Court only found the settlement was in the best interest of the TTR creditors. The Bankruptcy Court made no factual findings nor drew any legal conclusions, or otherwise adjudicate any claims or defenses existing in the underlying litigation. Nor did res judicata principles bar TA's alter ego claim.

Even if the TTR Order Approving Settlement had constituted a judgment subject to res judicata, it would not preclude TA's mere continuation/alter ego claims against TTS because (a) the TTR Bankruptcy Trustee made no alter ego or mere continuation claim against TTS, so TA was not precluded from bringing a subsequent (and distinct) alter ego, mere continuation or Sec. 56.29 claim; (b) the TTR Bankruptcy Trustee had no jurisdiction or standing to even make a claim of mere continuation or alter ego on behalf of a creditor; and (c) the elements of alter ego/mere continuation are different than the elements of a fraudulent transfer claim, as a matter of law. This was also explained in Munim; mere continuation/alter ego claims do not require the element of fraudulent intent.

Significantly, in this case the trial court did not base its judgment on a fraudulent transfer theory, but on the actions of TTS which supported the finding that TTS was the mere continuation of TTR, or was the product of a *de facto* merger, which continued well beyond TTR's 2011 bankruptcy. TTS, and its principals brazenly admitted there was no difference between TTS and TTR. TTS was advertising in 2022 that it was the same towing business (i.e. TTR) which had been operating for over two decades, and since TTS was incorporated in 2011, eleven years before the Final Judgment, the other nine years must have been when the business was operating as TTR. R. 1614.

Troy Bostick candidly acknowledged TTS was the same company as TTR, and the ongoing use of the "Troyz Towing" tradename was itself conclusive proof of mere continuation. R. 1611, R. 1995. Tr. p. 133-137.

Finally, as a matter of law, TA is entitled to an award of fees and costs, both under Sec. 56.26, the principles discussed in Murphy & King, and the underlying Master Lease Agreement between GT and TTR. Competent substantial evidence supports the resulting Consent Fees and Costs Judgment. Appellant had already stipulated to the reasonableness of the amount of trial level attorney's fees and costs awarded to Appellee and only disputed TA's entitlement. Affirmance of the underlying money judgments

likewise require affirmance of the separate judgment awarding attorney's fees and costs.

STANDARD OF REVIEW AS TO ALL ISSUES

Every Florida judgment is presumed correct, and Appellant bears the substantial burden of demonstrating reversible error. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979); Figueroa v. Kossiver, 336 So. 3d 1260, 1262 (Fla. 5th DCA 2022).

When reviewing a final judgment entered after a non-jury trial, an appellate court must disregard any conflicting evidence and accept the facts in evidence in the light most favorable to the prevailing party. Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976); Amjad Munim, M.D., P.A. v. Azar, *supra*, 648 So. 2d at 148-149; Williams v. River Bend of Cocoa Beach, Inc., 281 So. 3d 546, 549-550 (Fla. 5th DCA 2019); Blue Lakes Apartments, Ltd. v. George Gowing, Inc., 464 So. 2d 705, 708 (Fla. 4th DCA 1985). Moreover, the appellate court must not reweigh the evidence or substitute its judgment for that of the trial court. See Shaw, *supra*, 334 So. 2d at 16.

In this case, Appellant bears the burden of establishing that TTS was not a mere continuation of TTR's established business or its alter ego, and had not acted in an attempt to delay, hinder or defraud creditors. See RREF

SNV-FL SSL, LLC. v. Shamrock Storage, LLC, 178 So. 3d 90, 92 (Fla. 1st DCA 2015) (applying Sec. 56.29). Appellant did not meet its burden.

A final judgment must be upheld if there is *any* competent substantial evidence to support it. Shaw, *supra*, 334 So. 2d at 16; Zerquera v. Centennial Homeowners' Ass'n, Inc., 721 So. 2d 751, 752 (Fla. 3rd DCA 1998); Abreu v. Amaro, 534 So. 2d 771, 772 (Fla. 3rd DCA 1988); Citibank, N.A. v. Olsak, 208 So. 3d 227, 229 (Fla. 3rd DCA 2016).

When sitting as the trier of both law and facts, the trial court's factual findings are entitled to the same weight as a jury verdict and must not be disturbed on appeal unless "clearly unsupported by the evidence." Walker v. Connolly, 299 So. 2d 67 (Fla. 1st DCA 1974); see also Atl. Int'l Inv. Corp. v. Turner, 383 So. 2d 919 (Fla. 5th DCA 1980).

Appellant contends that *de novo* review is required because the trial court allegedly made "multiple legal errors," and its purported "misapplication of controlling legal principles" should be "corrected" on appeal (IB 34). Appellee disagrees that any such legal errors were made. The case relied upon by Appellant, Sargeant v. Al-Saleh, 137 So. 3d 432 (Fla. 4th DCA 2014), stated that trial courts have discretion in conducting proceedings supplementary under Sec. 56.29, but only resulting issues of law are subject

to *de novo* review under Sanchez v. Renda Broadcasting, *supra*, 137 So. 3d at 434.

In this case, the trial court correctly applied existing law. Those legal principles permitted Appellee to pursue its mere continuation/alter ego claims and its proceedings supplementary claims. Moreover, competent substantial Record evidence fully supports the trial court's determination that TTS is liable for TTR's debts under mere continuation/alter ego principles. Application of all these tests and standards require affirmance in this case.

TA's entitlement to an award of attorney's fees and costs has been established by statute, as well as the underlying vehicle lease between GT and TTR, and Appellant has shown no legal basis to disturb it. Even upon application of the *de novo* standard of review, no error exists. Since Appellant agreed the amount of TA's attorney's fees and costs were reasonable, that award should likewise be affirmed.

ARGUMENT ON ISSUE I

THE TRIAL COURT CORRECTLY RULED THAT TROYZ TOWING AND STORAGE, INC. WAS THE ALTER EGO OR MERE CONTINUATION OF ITS PREDECESSOR, TROYZ TOWING & RECOVERY, INC., AND WAS THEREFORE LIABLE FOR THE PREDECESSOR'S DEBT TO APPELLEE TA COLLECTIONS, INC.

- **Competent substantial evidence supports the Trial Court's ruling that TTS is a mere continuation or alter ego of TTR, or a *de facto* merger had occurred.**

Overwhelming Record evidence supports the trial court's ruling that TTS was the mere continuation or the alter ego of TTR. The towing business is owned by the same shareholder, using most of the same employees and same trucks. It operates from the same business location and uses the same telephone number.

TTS did not even try to hide its alter ego/more continuation status. TTS openly held itself out as being the same as TTR. The towing business advertised itself as "Troyz Towing" at all times. In 2022, TTS advertised it had been doing business for 20 years, even though TTS was not formed until late 2011. Troy Bostick admitted TTS was the same business as TTR and had been conducting the same business for 28 years. Tr. p. 134, lines 21-24; R. 1611. The other nine years of business operations therefore had to be while it was known at TTR, as the trial court observed. R. 1614.

Under Florida law, if a separate company is found to be an alter ego of the judgment debtor, or if the debtor engaged in improper conduct in an attempt to avoid debts (including purposeful avoidance of creditors while continuing to do its same business under a new name), a creditor's judgment will be enforceable against the alter ego or new entity, and further allows for collection of attorneys' fees and costs pursuant to Section 56.29, F.S. Munim, *supra*, 648 So. 2d. at 148-149.

In addition to relying on Munim, the trial court cited at length from Murphy & King, Professional Corporation v. BlackJet, Inc., *supra*, where the Southern District of Florida stated the elements establishing mere continuation:

The concept of continuation of business arises where a successor corporation is merely a continuation or reincarnation of the predecessor corporation under a different name. . . . The “purchasing corporation is merely a ‘new hat’ for the seller, with the same or similar entity or ownership.” *Id.* The key element of a continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporation, that is, a continuation of the corporate entity of the seller corporation. . . . The change is in form, but not in substance. Put another way, “[t]he bottom line question is whether each entity has run its own race, or, whether there has been a relay-style passing of the baton from one to the other.” (citing Munim at 154) . . . Id. at *13-14.

In Munim, the Fourth District found mere continuation, based on similar facts, where the successor entity “provided the same services in the same office with the same files, patients, nurses, clerical help, office manager and the same major player, Dr. Munim — the sole stockholder in and president of each P.A.” 648 So. 2d at 154-55.

Appellant erroneously argues that Munim “is inopposite” here, (IB 35), but fails to present any persuasive reasoning supporting that position. Instead, Appellant focuses on the so-called “badges of fraud” tests (which deal with fraudulent transfers) (IB 36-37), while relying on the existence of the

bankruptcy settlement, which does not bar on a mere continuation/alter ego claim. The basis of the trial court's ruling was not based on the "badges of fraud" which were present, or not present. Appellant's contention that TA's claims "were adjudicated" in the bankruptcy litigation (see IB 37-40), is incorrect, because no such adjudication occurred.

The court correctly found TTR and its owner, Nicole Bostick, had intentionally orchestrated the timing of the transfer of TTR's assets, and the bankruptcy filings, so TTR could attempt to reconstitute itself as "TTS" in an obvious attempt to avoid TTR's substantial debt to Appellee, and so Nicole Bostick could continue to freely do business. Appellant openly acknowledges that was Ms. Bostick's intent while denying any responsibility for the debt. TTR then filed a Chapter 7 bankruptcy case and settled various claims (but not any debts owed to GT or TA) in an attempt to create an argument that TTR had been discharged, even though no corporate discharge was available to TTR.

TTS continued to do business under TTR's trade name of "Troyz Towing" from the same location, and with the same ownership and employees. TTS advertised that TTS was the same business as TTR, and TTS' ongoing income was approximately the same income each year as TTR's income had been.

Applying NLRB, Munim and Murphy & King, the trial court correctly found TTS is the alter ego or mere continuation of TTR as a matter of fact and law, and that TTS was liable for TTR's debt under Sec. 56.29.

- **A successful alter ego or mere continuation claim after a corporate bankruptcy is permitted, even if some fraudulent transfer claims had been settled in the bankruptcy case.**

Appellant argues that because some other creditors reached a settlement with TTR's corporate Chapter 7 Trustee, all creditors are prohibited from bringing any further action against an alter ego or mere continuation of Debtor TTR. Appellant further argues that the only exception exists in unfair labor practice cases arising from the National Labor Relations Board. Understandably, Appellant cites no case law supporting its novel, but erroneous legal theory.

Appellant's argument is directly refuted by Izzo Golf v. King Par Corp., *supra*, No. 10-CV-6507 CJS, 2019 U.S. Dist. LEXIS at *18-19; In re Custom Builders of Steamboat, Inc., 349 B.R. at 44; and Seminole Boatyard v. Christoph, *supra*, 715 So. 2d at 990, which all held that judgment creditors in numerous types of cases are permitted to pursue alter ego/mere continuation claims against corporate entities which had filed a Chapter 7 bankruptcy proceeding and had continued to operate.

Izzo Golf involved a claim for patent infringement. Seminole Boatyard involved a damages claim based on a breach of lease, and In re Custom Builders involved a claim for breach of warranty on a construction project. These opinions directly refute Appellant's argument (IB 46-47) that "successor liability applies in bankruptcy cases with the sole exception for cases in which there are claims of an unfair labor practice." No such "sole exception" exists, and for good reason.

Izzo Golf allowed a mere continuation claim by a judgment creditor against an individual who was the alter ego of a corporate Chapter 7 bankruptcy debtor. The judgment creditor's debt was based on patent infringement, and not unfair labor practice. Id. at p. 18. This ruling was made even after (a) the corporate debtor filed a Chapter 7 bankruptcy; (b) the judgment creditor participated in the Chapter 7 bankruptcy; and (c) the bankruptcy Trustee filed and settled a fraudulent transfer claim in the Chapter 7 corporate bankruptcy. As the Western District of New York succinctly explained:

. . . since a corporate Chapter 7 does not result in a discharge, a creditor may later pursue a legal claim for payment against the debtor corporation (if it resumes doing business) or its alter ego. See In re Goodman, 873 F.2d 598, 602 (2d Cir. 1989) (Observing that because corporations do not receive discharges in Chapter 7, "any successor or alter ego of these corporations will become liable for those obligations."); . . . If the underlying claim against the debtor

corporation is not extinguished, there is no logical reason why a creditor should not be able to pursue an alter ego claim against an owner of the corporation.") . . .

The Court has already determined that Baird is King Par's alter ego, and that he is personally liable to Izzo to the same extent as King Par. Accordingly, having established King Par's liability to Izzo in the companion case, the Court now fixes Baird's personal liability to Izzo in the same amount . . .

Id. at *18-19

As the trial court correctly ruled, a corporation cannot file a Chapter 7 case and then have its principals continue to do the same business as a mere continuation or alter ego of the old company, citing NLRB v. Better Building Supply Corp., *supra*, (affirming judgment against successor corporation where predecessor corporation transferred assets and filed Chapter 7 bankruptcy, because a corporate Chapter 7 debtor does not receive a discharge).

NLRB v. Better Building Supply Corp. also stands for the proposition that liquidation of a defendant's assets via bankruptcy does not extinguish all pre-existing claims, because Congress intended that corporate debt would survive Chapter 7 proceedings under such facts, and that debt would be charged against the corporate entity upon its resumption of operations. (Final Judgment at R. 1615-1616).

In Better Building, the alleged successor corporation was the alter ego of the bankrupt predecessor "based on common control and management and

the similarity of the work performed”. (R. 1615). As the trial court correctly concluded (R. 1616), Better Building is closely on point with the current case. The Bosticks had debts but transferred assets and continued operating their towing business in the same location with the same ownership and same equipment, but using a corporation named TTS instead of TTR. See also Kramer v. Cash Link Sys., 652 F.3d 840, 841 (8th Cir. 2011) (citing Better Building with approval).

In Seminole Boatyard, the court ruled that an alter ego/mere continuation claim could be successfully brought against an individual who subsequently operated the same business as the entity which had filed a corporate Chapter 7 case, because the trustee never owned the alter ego claim and could not release it. 715 So. 2d at 990:

- **The TTR Bankruptcy Court’s Order Approving the proposed Settlement Agreement did not constitute a res judicata bar preventing TA’s mere continuation or alter ego claim, or TA’s Sec. 56.29 claim, because (a) that Settlement Agreement was not a final judgment on the merits and had no res judicata effect; (b) the elements of alter ego and mere continuation are different than the elements required to establish a fraudulent transfer; (c) TTR’s bankruptcy trustee never had legal authority to bring an alter ego or mere continuation claim under Florida law and did not do so; and (d) Appellee’s predecessor GT was not a party to the TTR Settlement Agreement. TTR’s Trustee did not convey assets to TTS, only the bankruptcy estate’s interest in certain vehicles.**

The Final Judgment recognized, but rejected the argument made below by the Troyz Defendants, and now on appeal, that TA could not pursue its judgments against TTR or TTS because of the Bankruptcy Court's Order approving the Trustee's proposed settlement referred to in the Notice of Intent. The Settlement Order approved certain sale of potential assets of the Estate and approved a settlement among the Trustee, CBC Bank (which claimed a lien on TTR's real property, personal property and accounts receivable) and Nicole Bostick and Troy Bostick personally. However, the Settlement Order did not mention, much less approve any settlement between GT and any other party, and did not determine whether a fraudulent transfer had or had not taken place.

The Settlement Order did not resolve any state court action determining debts or seizing assets. The Settlement Order did not determine that any property was or was not fraudulently transferred. The Settlement Order simply approved the settlement set out in the Notice of Intent.

The Eleventh Circuit's opinion in Wallis v. Justice Oaks II, Ltd., *supra*, 898 F.2d at 1549 (11th Cir. 1990) illustrates that this Settlement Order could not prevent TA from collecting its judgments against TTR and TTS.

In Justice Oaks, the Eleventh Circuit explained why a Bankruptcy Court order approving a trustee's proposed settlement does not carry res judicata effect which the Final Judgment:

We need not tarry over the bankruptcy court's order authorizing settlement since that order does not constitute a final decision on the merits. A court's order or judgment can never have any preclusive effect on future litigation unless that order or judgment constitutes a final decision on the merits.

When a bankruptcy court decides whether to approve or disapprove a proposed settlement, it must consider:

(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

When the bankruptcy court below approved the settlement agreement between Justice Oaks, Justice, South Florida, and Allegheny, the court was required to determine only the probability of success should South Florida's and Allegheny's claims be litigated, the difficulty of collecting on those claims, the expense of litigation, and the other creditors' interests. In making these determinations, the court had to consider many factors other than the merits of South Florida's and Allegheny's claims. The court, moreover, never had to decide the merits of those claims -- only the probability of succeeding on those claims. Such a determination is much like that required of a court before it may grant a preliminary injunction. (emphasis added) (R. 1617-1618).

In Martin v. Pahiakos, 490 F.3d 1272, 1276-77 (11th Cir. 2007), the Eleventh Circuit identified a narrow exception to the general rule embodied in the Justice Oaks holding; a debtor could not continue to litigate an affirmative

defense to a creditor action (a) where the creditor's action was filed before the bankruptcy; (b) the debtor filed an individual Chapter 7 bankruptcy; (c) the bankruptcy trustee then settled the creditor action and specifically waived defenses; and (d) the settlement of the creditor action was approved. That narrow exception is inapplicable here.

The limits of Martin's narrow exception to the general rule that an order approving settlement is not res judicata was further explained by the Southern District of Florida in In re Larkin, 468 B.R. 431 (Bankr. S.D. Fla. 2012):

Importantly, the Martin Cases are premised on the fact that the bankruptcy court approved the settlement agreement, which stipulated that the debtor's defenses were property of the estate, after notice to the debtor and the debtor failed to object [citation omitted]. Thus, the Martin Cases stand for the narrow proposition that a debtor, properly noticed, who fails to object to a settlement agreement entered into by the trustee that waives his pre-petition defenses, which settlement agreement is then approved by the court, is precluded from later re-litigating those defenses.

468 B.R. at 435.

Appellant's reliance on the narrow exception discussed in Martin (see IB 40-42), is misplaced, and was directly rejected by the trial court (R. 1618). The Final Judgment correctly rejected the Troyz Defendants' claim that Martin, in essence, reversed Justice Oaks and established that settlement orders in Chapter 7 cases automatically constitute res adjudicata in any subsequent litigation. (R. 1618).

The Martin exception does not apply in the case at bar, because (a) no legal action was brought against TTR in the bankruptcy case by any entity alleging fraudulent transfer or any other claim which was settled by the bankruptcy trustee; (b) as a result, the bankruptcy court did not consider the merits of any claims brought by the Trustee against any other party; (c) the subject TTR settlement was similar to the Justice Oaks settlement, which simply found a proposed payment in lieu of litigation was acceptable to the estate but did not bar other creditor claims; (d) TTR did not receive a discharge of debt; and (e) there was no stipulation that any pending defenses or claims are the property of the bankruptcy estate.

As the trial court correctly found, the facts present in Martin did not exist in the instant case. The Final Judgment holds:

There was no settlement of a state court action or a bankruptcy adversary proceeding determining the amount or existence of a fraudulent transfer. The settlement was to avoid litigation and to compromise claims among the Trustee, CBC Bank and TTR. TCF Finance was also involved in the instant settlement. Most importantly, there was no discharge of debt in the instant case. TTR's debt continues to exist, and as defendants admitted at the trial, TA's judgments continue to be enforceable. (R. 1620).

In re W.B. Care Ctr., LLC, 419 B.R. 62 (Bankr. S.D. Fla. 2009), further explained why Justice Oaks applies. In that case, the debtor nursing home operator agreed with certain creditors to settle a corporate Chapter 11 case, and then agreed to an order dismissing the bankruptcy without entry of a

confirmed plan, which would have allowed the debtor to continue operations with its debts discharged. The Bankruptcy Court for the Southern District of Florida held that the bankruptcy order simply constituted the approval of a contract and did not have res judicata effect. (See R. 1620).

That settlement agreement was similar to the Justice Oaks settlement agreement and was unlike the Martin agreement, which had only resolved specific defenses in an already filed litigation.

W.B. Care Center expressly and correctly held that a confirmed Chapter 11 plan, which included a discharge of debts and a final order binding all creditors, is a condition precedent to finding that a settlement order had preclusive effect:

Similarly to the situation in Justice Oaks II, this case required [the court] to balance immediate, universal settlement against protracted state court litigation and a drawn-out Chapter 11 . . .

This absence of a confirmed plan or a prejudice period is critical in this case because, as discussed below, the Eleventh Circuit has narrowed its holding that bankruptcy court-approved settlements "cannot constitute . . . final judgment[s] on the merits for purposes of former adjudication." Justice Oaks II, 898 F.2d at 1549; see Martin v. Pahiakos (In re Martin), 490 F.3d 1272 (11th Cir. 2007).

. . .

The settlement agreement before me is unlike the one in Martin and similar to the one in Justice Oaks II because it is a comprehensive Chapter 11 settlement absent a confirmed Chapter 11 plan.

. . . Therefore, . . . it appears that a confirmed plan is a condition precedent for a settlement agreement to have res judicata effect in a subsequent bankruptcy when the settlement agreement does not involve waiver of a particular bankruptcy protection.

Id. 419 B.R. at 68-70 (emphasis added).

The instant Final Judgment applied the same legal reasoning: TTR's bankruptcy involved a corporate Chapter 7 debtor without a discharge, therefore no confirmed Chapter 11 plan was in effect in this case, and a condition precedent to finding preclusive effect is missing. A discharge would allow the Chapter 7 debtor a "fresh start" and to resume operations. The absence of a discharge in a corporate Chapter 7 case is intended so that the company cannot continue to do business. R. 1621.

Since GT was not a party to the TTR Settlement Agreement, neither it nor its assignee TA can be bound by that settlement. TTR admitted below that TA's judgments continue in effect, and there was no reason for the trial court, or this Court, to ignore the effect of those judgments. R. 1620.

In HDR Architecture, P.C. v. Maguire Grp. Holdings, 523 B.R. 879 (S.D. Fla. 2014), the Southern District of Florida held that non-parties to a bankruptcy settlement agreement are not bound by the proposed agreement:

Settlement agreements compromising claims in bankruptcy, including where approved by a bankruptcy court, are treated as contracts in accordance with normal contract-interpretation principles.

It is axiomatic that a contract cannot bind a nonparty.

HDR was not a party to the Connecticut Settlement Agreement. Admittedly, HDR did not object to the Connecticut Settlement Order or the Confirmation Order. Nor did it participate in the Confirmation Hearing. It had no reason and was not required to. The Connecticut Settlement did not seek to restrict HDR's indemnification rights. Nor could it have. It sought only to settle the State's claims against the Debtors and to preclude the State from asserting and being able to recover on any claims against the Debtors, or from the Debtors insurers in their capacity as insurers of the Debtors on account of the claims submitted by the State against the Debtors.

523 B.R. at 890-891.

- **Res Judicata Does Not Bar TA's Claim for Alter Ego or Sec. 56.29**

Res judicata (sometimes referred to as claim preclusion) only bars re-litigation of a claim if the following four elements are satisfied: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the actions; and (4) identity of the quality or capacity of the persons for or against whom the claim is made." Thakkar v. Good Gateway, LLC., 351 So. 3d 192, 195 (Fla. 5th DCA 2022); Wurtzebach v. Flooring Depot FTL, Inc., 384 So. 3d 251, 256 (Fla. 4th DCA 2024). A judicial determination that no alter ego liability exists does not preclude a later claim for fraudulent transfer, because the elements of the two claims are distinct.

In the instant case, the trial court properly found from the Record evidence that the four prongs of res judicata did not exist. First, the Bankruptcy Court Order approving the TTR settlement did not bar all future claims, and therefore does not provide due process notice that all future claims against TTR and its alter egos were barred by the Order.

Second, the Order is like the settlement in Justice Oaks, where the trustee's proposed agreement was only approved because the Bankruptcy Court concluded the benefit to the bankruptcy estate outweighed the risks of ongoing litigation. The TTR bankruptcy settlement was also an executory contract requiring performance on both sides; it made no factual determinations and did not constitute any type of waiver. There was no ruling on the merits of any defense or any unasserted claim of fraudulent transfer, and there was no discharge or final order prohibiting future litigation among the parties. Consequently, the instant Bankruptcy Order Approving Settlement is not a final order, just as was found in In re W.B. Care Ctr.

Third, GT (TA's predecessor) was not a party to the TTR settlement agreement and could not be bound by it. The GT Judgment debts for unpaid principal, interest, attorney's fees and costs continue undischarged after TTR's bankruptcy.

Fourth, TA's mere continuation/alter ego and Sec. 56.29 causes of action are not the same as the claim resolved in TTR's bankruptcy case, which was whether payments to the Trustee to settle claims by CBC Bank and others (but not TA or GT) against certain TTR funds were appropriate for the benefit of the bankruptcy estate, when considering the risks and costs of litigation.

The TTR settlement made no finding that a fraudulent transfer had occurred, so it obviously could not have determined the amount of any such transfer, and the Settlement Order did not calculate the amount improperly taken from debtor TTR.

The instant Final Judgment did not find that a fraudulent transfer was the basis for its ruling in favor of TA. Therefore, no finding was made which could negate the mere continuation cause of action. Compare Wurtzebach, *supra*, 384 So. 3d at 255-256 (final judgment based on common law fraud/alter ego principles does not preclude an action for fraudulent transfer, because the claims are separate and distinct.) Izzo Golf, *supra*, at *18 (settlement of fraudulent transfer case in corporate Chapter 7 case does not prohibit subsequent alter ego claim); National Union Fire Ins. Co. v. Grusky, 763 So. 2d 1206, 1207-1208 (Fla. 3rd DCA 2000) (there was no res judicata effect to a

bankruptcy discharge where fraudulent transfer issue was not litigated by the creditor or bankruptcy trustee).

The elements of an action under Section 56.29 are different than those in a fraudulent transfer case. Munim, *supra*, 648 So. 2d at 150. Pursuant to Section 56.29(5) a court may fashion an appropriate equitable remedy to provide a judgment creditor with as complete relief as possible, including finding a new corporation liable for a judgment entered against its predecessor corporation, when the new corporation is merely the alter ego of the predecessor corporation. The trial court correctly ruled that because TTS was the alter ego and mere continuation of TTR, the judgments against TTR could be imposed against TTS under Section 56.29. R. 1614.

- **Even if the TTR Order Approving Settlement had been able to be given res judicata effect, it would not preclude TA's mere continuation/alter ego claim/*de facto* merger claim, because (a) the TTR Bankruptcy Trustee made no alter ego or mere continuation claim against TTS; (b) the TTR Bankruptcy Trustee lacked jurisdiction to assert a mere continuation or alter ego claim; and (c) since the elements of alter ego/mere continuation are different than the elements of fraudulent transfer, a judgment for fraudulent transfer would not preclude a claim for alter ego/mere continuation.**

The TTR bankruptcy Trustee's Notice of Intent to Settle merely stated that the Trustee had potential fraudulent transfer claims against TTS, along with other disputed secured claims of creditors against TTS assets. (R. 2699-

2700). However, it is undisputed that the TTR bankruptcy Trustee never asserted any mere continuation or alter ego claims, and those were the claims which formed the basis for finding in favor of TA in the instant Final Judgment. R. 2697-2704.

As clearly explained in Munim and applied by the trial court, while the theories of fraudulent transfer and mere continuation (i.e., alter ego) are sometimes referred to interchangeably, they are different because mere continuation and alter ego claims do not require the element of fraudulent intent, while fraudulent transfer claims require proof of intent. 648 So. 2d at 153.

Also, as in Munim, alter ego claims also involve consideration of conduct occurring after the bankruptcy case ended. See In re Goodman, *supra*, 873 F.2d at 602, overruled on other grounds; Germain v. Connecticut Nat'l Bank, 926 F.2d 191 (2nd Cir. 1991) (affirmed the liability of debtor and alter ego corporation for pre-bankruptcy debt in separate action, where the alter ego claim was based on actions occurring after bankruptcy).

In this case, just as in Goodman, the trial court properly considered the events and corporate actions occurring after the 2011 TTR bankruptcy proceeding, when determining the alter ego/mere continuation or *de facto* merger doctrine applied to TTS' activities. Those facts included the

continuation of the same business by the same owner in the same location using the same assets; the steady level of ongoing income generated from the ongoing towing business between 2009 and 2013 (R 1611); and the use of the confusing business name “Troyz Towing” for many years up to 2022 (before and after the TTR bankruptcy) and the statements on the TTS website, which asserted that TTS had been in business for two decades. R. 1611.

In Goodman, the Second Circuit ruled that (a) despite a corporate bankruptcy, liability for unfair labor practices continued because the subject corporations did not obtain a discharge, so any successor or alter ego of the debtor corporations remained liable; (b) even an individual obtaining a bankruptcy discharge may continue to be liable for a corporate debt if the individual engaged in post-petition conduct as the alter ego of the debtor corporation; and (c) the bankruptcy court did not have exclusive jurisdiction to consider the alter ego claims and the NLRB could pursue alter ego claims elsewhere. Id. at 602-603. Although Goodman involved an NLRB case, its principles are not limited to such cases.

A bankruptcy trustee does not have authority to pursue an alter ego claim, as established by Seminole Boatyard, which held that the bankruptcy trustee lacked standing to assert an alter ego claim on behalf of a creditor.

715 So. 2d at 990. Seminole Boatyard had entered into a long-term commercial lease with Christoph, as president of Florida Atlantic Marine (FAM). FAM stopped paying rent and sued Seminole for rescission of the lease agreement. Seminole then filed a separate action against FAM and Christoph, individually, to recover unpaid rent, alleging Christoph had diverted funds from FAM, and FAM was the mere alter ego of Christoph. Thereafter, FAM filed for bankruptcy protection. Christoph obtained a general release from the bankruptcy trustee as to all FAM's claims against Christoph.

When Seminole Boatyard continued its alter ego litigation, Christoph asserted the bankruptcy release was a complete defense. The trial court ruled the release barred Seminole's claims, but the Fourth District reversed because Florida law did not allow the bankruptcy trustee to assert alter ego claims:

In this case, Seminole Boatyard, and not the estate, is clearly the real party in interest in the alter ego action. Therefore, the trustee would be attempting to collect money not owed to the estate, an outcome not contemplated in the bankruptcy statutes. Second, as in Williams, FAM has no claim of its own to assert against Christoph. Lastly, there exists a possibility of inconsistencies between the positions taken between Seminole and the trustee as to any causes of action each may pursue.

In addition, the Florida Supreme Court has imposed a strict standard upon those wishing to pierce a corporate veil. Under this standard, it must be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them. . . .

Based upon Caplin and its progeny, the trustee in this case clearly would have no standing to assert an alter ego claim on behalf of Seminole. 715 So. 2d at 990.

Even if the Trustee had brought and tried an adversary proceeding for fraudulent transfer against TTS, and conclusively determined that certain TTR assets had been fraudulently transferred to TTS, and then settled that claim, any such hypothetical settlement would not preclude TA from pursuing its distinct mere continuation/alter ego claims.

Those claims are markedly distinct from fraudulent transfer claims, because they involve conduct occurring after the bankruptcy proceeding was closed and involve claims which could never have been pursued by the TTR bankruptcy trustee in the first place. Wurtzebach, *supra*, 384 So. 3d at 256 (judgment for defendant on alter ego claim does not prevent a subsequent fraudulent transfer claim being asserted by the same parties, based on either res judicata or claim preclusion, because fraudulent transfer claims are different from common law fraud/alter ego claims); National Union Fire Ins. Co. v. Grusky, *supra*, 763 So. 2d at 1208 (bankruptcy discharge had no res judicata effect where fraudulent transfer issue was not litigated by creditor or trustee in bankruptcy trustee); Seminole Boatyard, *supra*, 715 So. 2d at 990 (alter ego claim allowed against corporate owner after bankruptcy based on underlying lease obligation).

- **This case was tried long after the TTR bankruptcy estate closed and the automatic stay was lifted for GT, so the trial court had jurisdiction to consider and rule on TA's alter ego and mere continuation claims.**

In In re Goodman, *supra*, the Second Circuit ruled that the NLRB could determine alter ego liability in an administrative action, and the bankruptcy court had lacked jurisdiction to consider this claim. 873 F.2d at 602. But, as shown above, this principle applies beyond the NLRB unfair labor practices line of cases. For instance, Seminole Boatyard held that a Florida court could consider an alter ego claim after a corporate bankruptcy, because the bankruptcy trustee had lacked standing to assert an alter ego claim. 715 So. 2d at 990.

Jackson v. CorporateGear, LLC, 2005 U.S. Dist. LEXIS 35579, (S.D.N.Y. Dec. 21, 2005) stated that other courts have jurisdiction to consider alter ego and other claims after the bankruptcy estate is closed, as it was in this case:

The Bankruptcy Court's June 30, 2004, "Order of Final Decree" declared the estate "fully administered," and it discharged the trustee and closed the case. Hence, there no longer was an estate and there no longer was a trustee to pursue any further claims against CorporateGear or its shareholders. Jackson's claims against CorporateGear were not "administered," and CorporateGear was not "discharged." Once the automatic stay was lifted, Jackson was free to pursue his claims against CorporateGear in Jackson I, and he did so, obtaining a judgment. There was nothing to preclude him from then

pursuing an alter ego claim against the Vercheres to recover on that judgment.

Hence, if a claim against a debtor corporation was not administered in the Chapter 7 proceeding, it survives and can be pursued after the Chapter 7 case is closed. If the underlying claim against the debtor corporation is not extinguished, there is no logical reason why a creditor should not be able to pursue an alter ego claim against an owner of the corporation.

Jackson v. CorporateGear, LLC at *16. (emphasis added).

Consequently, there was no jurisdictional bar to the trial court's consideration of TA mere continuation/alter ego claims.

ARGUMENT ON ISSUE II

THE TRIAL COURT CORRECTLY RULED THAT TA COLLECTIONS, INC. WAS LEGALLY ENTITLED TO AN AWARD OF ITS UNDERLYING ATTORNEYS FEES AND COSTS.

The Supplemental Final Judgment correctly awarded attorneys' fees and costs to TA against both TTR and TTS, as the mere continuation of TTR, and based on the court's authority when administering proceedings supplementary. R. 1623; R. 3232-3234. This ruling is entirely consistent with Florida case law interpreting Section 56.29(8), Fla. Stat., which allows reasonable attorney's fees to be taxed against the judgment debtor.

The cases relied upon in Appellant's Initial Brief (IB 49) did not involve an alter ego or mere continuation claim. For example, in Destination Boat Clubs, Inc. v. Island Breeze Boat Club, 226 So. 3d 301,302 (Fla. 2nd DCA

2017), the trial court found certain fraudulent transfers were made and ordered the transfers undone, but did not enter an attorney's fees award against any party. Notably, Destination Boat Clubs did not involve a determination that one company was the mere continuation of alter ego of the other.

The Second District reversed in part, stating that pursuant to Sec. 56.29, attorneys' fees and costs should have been assessed against the transferor company, but not the transferee. However, Destination Boat Clubs still allowed additional attorneys' fees to be awarded under Sec. 56.29, which would be collected from the transferred assets:

However, once a judgment for fees is entered against the judgment debtor, the trial court may apply assets previously determined to have been fraudulently transferred toward the new judgment debt.

226 So. 3d at, 303.

The trial court recognized and correctly applied the law, as stated in Destination Boat Clubs, when awarding fees. Therefore, there is no legal or procedural bar to TA's recovery of attorney's fees. Gaedeke Holdings, Ltd. v. Mortg. Consultants, Inc., 877 So. 2d 824, 825 (Fla. 4th DCA 2004), also involved a fraudulent transfer action, instead of a mere continuation/alter ego action. Gaedeke held the court could satisfy the attorneys' fees from the fraudulent transferred assets.

Spector v. Spector, 226 So. 3d 256 (Fla. 4th DCA 2017) is not on point, contrary to Appellant's argument (see IB 47). Spector reversed a circuit court judgment denying proceedings supplementary involving homestead property and rights to the proceeds of an insurance policy which had possibly been fraudulently transferred to the detriment of the former wife of the transferor former husband to his new wife. 226 So. 3d at 260. Spector does not directly involve an award of fees and costs after an alter ego finding.

Murphy & King, *supra*, was cited in the Final Judgment, and specifically involves a determination that one company is the mere continuation of another. In Murphy & King, a company (BlackJet Technology) with a similar name was found to be the mere continuation and successor by *de facto* merger to the judgment debtor (BlackJet). Murphy & King stands for the proposition that where the facts support a finding of mere continuation, the successor corporation is liable for the judgment debtor's attorneys' fees:

However, because BlackJet Technology has been found to be the mere continuation of and successor by *de facto* merger to BlackJet, BlackJet Technology is indirectly liable for BlackJet's attorney fee and cost liability under successor liability precepts in the same manner as the underlying Judgment is enforceable against it. Compare Gaedeke Holdings, Ltd. v. Mortgage Consultants, Inc., 877 So.2d 824, 826-27 (Fla. 4th DCA 2004) (plaintiff was not entitled to a direct award of attorneys' fees against implied defendants, but trial court should have applied fraudulently transferred assets toward satisfaction of the attorney fee award).

Murphy & King, *supra*, 2016 U.S. Dist. LEXIS 69206, at *23.

In the instant case, just as in Murphy & King, TA properly requested an award of fees and costs from TTR. Since the Circuit Court correctly determined TTS was the same entity as TTR, and TTR/TTS stipulated to the reasonableness of the amount of TA's fees and costs, both entities are liable for the Judgment for TA's trial level attorney's fees and costs.

There is a separate, sufficient basis for awarding attorney's fees to TA, which is the underlying Master Lease Agreement between GT and TTR, which had enabled TTR to lease the Trucks. Paragraph XV provides in pertinent part "In any action related to this lease, the prevailing party shall be entitled to an award of its reasonable attorney's fees and court cost including fees and costs incurred because of or rising out of appellate actin (sic) related to this lease or any bankruptcy proceeding" (R. 46). Obviously, the instant appellate proceedings are directly "related" to the underlying Lease Agreement, which forms a separate basis for an award of TA's attorney's fees and costs.

CONCLUSION

For the foregoing reasons, this Court should affirm both the Final Judgment and the Consent Supplemental Final Judgment awarding Attorney's Fees and Costs against TTR and TTS.

Respectfully submitted this 15th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that in accordance with Rule 2.516(b) (1), Florida Rules of General Practice and Judicial Administration, a true and correct copy of the foregoing has been furnished by **email only** this 15th day of August, 2024 to:

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CERTIFICATE OF FONT, FONT SIZE AND WORD COUNT

I hereby certify, pursuant to Rule 9.045(e), Florida Rules of Appellate Procedure, that the foregoing complies with the font (Arial), type size (14-point), and applicable word count as provided for in the Florida Rules of Appellate Procedure for computer-generated documents.

/s/ Michael J. Korn
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