IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: 3D12-3076
LOWER COURT CASE NO.: 11-36493-CA-01 (25)

EVERGREEN METAL RECYLING, LLC, and UMAR FAROOQ,

Appellants

v.

ALL FLORIDA LAND CLEANING, INC.

Appellee

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

ANSWER BRIEF OF APPELLEE

THE POWELL LAW FIRM, P.A.
P. Brandon Perkins, Esq.
Brett C. Powell, Esq.
Attorneys for Appellee
18001 Old Cutler Rd. Suite 646
Palmetto Bay, Florida 33157
T. 305-232-0131
F. 305-232-0191
Brett@powellappeals.com

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The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 325 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

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The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 325 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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18001 Old Cutler Rd., Suite 325 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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STATEMENT OF CASE AND FACTS

Appellant, Evergreen Metal Recycling, LLC ("Evergreen") leased a 2007 Kobelco SK235 excavator ("excavator") from Appellee All Florida Land Cleaning, Inc. ("All Florida"). (R. 42). Appellant Umar Farooq personally guaranteed the lease. (R. 42).

The lease provided for a lease down payment of $20,000.00 due at lease inception, along with 31 monthly rental payments of $4,703.52 beginning on February 3, 2011, and ending on August 3, 2013. (R. 42). Evergreen tendered a $20,000.00 post-dated check pursuant to the lease, along with a check in the amount of $4,703.52 (representing the first month's rental payment) and accepted delivery of the excavator. (R. 44-46). Thereafter, Evergreen stopped payment on the $20,000.00 down payment check and tendered only two more regular monthly payments. (R. 46).

On September 22, 2011, All Florida sent Evergreen a NOTICE PURSUANT TO FLORIDA STATUTE § 68.065, advising Evergreen that:

> You are hereby notified that a check numbered 3220, in the face amount of $20,000.00 issued by you on or about August 1, 2011, drawn upon JPMorgan Chase Bank, N.A., and payable to All Florida Land Cleaning, Inc. has been dishonored. Pursuant to Florida law, you have 30 days from receipt of this notice to tender payment in cash for the full amount of the check plus a service charge of $25, if the face value does not exceed $50, $30 if the face value exceeds $50 but does not exceed $300, $40, if the face value exceeds $300, or 5 percent of

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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> the pace amount of the check, whichever is greater, the total amount being due $20,040.00.
>
> Unless this amount is paid in full within the 30-day period, the holder of the check or instrument may file a civil action against you for three times the amount of the check, but in no case less than $50, in addition to the payment of the check, plus any court costs, reasonable attorney fees, and any bank fees incurred by the payee in taking the action.

(R. 48).

Evergreen did not respond to this notice, and ceased making lease payments to All Florida. Consequently, Appellee All Florida filed the underlying lawsuit raising claims of breach of contract (against Evergreen), breach of guarantee (against Farooq), and worthless check (against Evergreen). (R. 6-12). Neither Evergreen nor Farooq bothered to answer the complaint or raise any affirmative defenses. (R. 1-3).

Evergreen and Farooq's attorney died during the pendency of the action. The trial court, on April 12, 2012, issued an order directing Evergreen to obtain new counsel within 45 days and directed Farooq to either obtain counsel within 45 days or file a written notice that he will be representing himself. (R. 13-14). The order also advised that Evergreen and Farooq may be served at 5950 NW 77 Court, Miami, Florida 33166 and that Evergreen and Farooq are responsible for updating their address with the Clerk of Court. (R. 13-14). The order further provided that, if Appellants failed to update their address, such failure would constitute a waiver of

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

any defenses due to lack of notice. (R. 13-14). Finally, the order demonstrates that it was served on "all parties and counsel of record." (Id.).

On July 27, 2012 (after the 45 day period had passed), All Florida served a Motion for Summary Judgment and Notice of Hearing on Evergreen and Farooq. (R. 18-29). The Motion and Notice were sent to: 5950 NW 77 Court, Miami, FL 33166, as directed by the trial court. Copies of the Notice of Hearing were *also* sent to two entities thought to be agents of Evergreen and Farooq.[1]

After the Motion for Summary Judgment and Notice of Hearing were duly served, All Florida received an Affidavit in Opposition to Summary Judgment, demonstrating that Appellants had notice of the hearing. (R. 58-61). However, Appellants failed to follow-up on their naked affidavit by filing an answer raising any defenses, appearing at the hearing, (either personally or thorough counsel) or by presenting any written argument in opposition to summary judgment that would demonstrate a genuine issue of material fact in the record.

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[1] After service of the original Notice of Hearing, All Florida learned that the King Law Firm was now the registered agent of Appellant, and a second Notice of Hearing was sent to include that entity as well. These Notices were not served on attorney Kimberly Gilmour, however, because Gilmour never filed her Notice of Appearance as required by the trial court's order, and her filing of the Farooq affidavit on August 6, 2012 was not received prior to the second notice of hearing being served on August 7, 2012. Although Appellants imply a deficiency of notice in the "Facts" section of their brief, they do not raise this contention on appeal, and the facts of the case demonstrate that both defendants received notice.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

At the hearing on the Motion for Summary Judgment (which the Appellants did not attend despite being duly noticed), the trial court considered the Affidavit in Opposition to Summary Judgment, and entered judgment against Evergreen and Farooq. (R. 170-171).

After rendition of the final judgment, Appellants Evergreen and Farooq moved to vacate the final judgment for lack of notice. An evidentiary hearing was held and Appellants motion was denied. Appellants failed to timely appeal from this order. (R. 160).[2]

Appellants Evergreen then belatedly moved for a "new trial" but quickly abandoned that motion by filing the first notice of appeal directed to the original final judgment. (R. 153-159). Then, Appellant Farooq moved for relief of the final judgment pursuant to Rule 1.540, of the Florida Rules of Civil Procedure, and requested a corrected final judgment. (R. 84-87).

Thereafter, pursuant to the Appellant Farooq's request and "upon agreement of Counsel for Farooq and Plaintiff," the trial court entered the corrected final judgment from which both Appellants now appeal. (R. 232-33).

[2] Appellants do not raise lack of notice as an issue in this appeal.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

SUMMARY OF ARGUMENT

The trial court's judgment should be affirmed because there were no genuine issues of material fact in dispute, and All Florida was entitled to judgment as a matter of law, pursuant to an agreed upon final judgment. Specifically, All Florida plead that Evergreen had the intent to defraud it of its $20,000.00 lease down payment. Evergreen did not file an answer denying this allegation, nor did it specifically deny this allegation in its affidavit in opposition. Instead, Evergreen asserted that it intentionally stopped payment on the $20,000.00 check after the excavator stopped working—*after* it had been in Evergreen possession for a period of time.

Even when the facts are viewed in the light most favorable to Evergreen, there are still no genuine issues of material fact that preclude summary judgment. To be sure, the undisputed facts are: (1) Evergreen issued a $20,000.00 check as a lease down payment; (2) it accepted delivery of the excavator in working condition; and (3) it stopped payment on the lease down payment check when the excavator stopped working and ceased making its monthly payments on the excavator. Evergreen never alleged any defense based on a breach of warranty theory.

Further, *Evergreen acknowledges* that there is no record evidence that All Florida is a "merchant" or that a warranty of merchantability applies to this lease.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

Admittedly, pursuant to section 680.212, of the Florida Statutes, an implied warranty of merchantability would apply to a lease if the lessor is a "merchant" dealing in goods of the kind leased. But here, All Florida is not a "merchant" and the Appellees concede that there is no record evidence to suggest otherwise. Accordingly, that the excavator stopped working (or why it stopped working) is not a *material* fact and, therefore, is not a legal justification or excuse to stop payment on the down payment check.

Therefore, the record evidence is clear, Evergreen intended to defraud All Florida out the benefit of its bargain, *i.e.*, the benefit of having a $20,000.00 down payment check prior to releasing possession of the excavator.

Further, the damages awarded were appropriate because Evergreen's act of stopping payment on the $20,000.00 check (along with its failure to continue payments) operated as a complete breach of the entire lease agreement. Therefore, All Florida had the right to declare the entire contract in default and sue for past and future damages.

In any case, each of the above issues have been waived by Appellants, due to their failure to raise these issues in the trial court.

Likewise, the attorney fees were reasonable and the reasonableness was not contested by Evergreen or Farooq. As such, they cannot raise this issue for the first time on appeal.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, AND ALL FLORIDA DEMONSTRATED THAT IT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Appellee All Florida carried its burden by demonstrating the absence of any genuine issues of material fact and its entitlement to judgment as a matter of law. Summary judgment is proper "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). After the moving party meets its burden of showing that it is entitled to judgment as a matter of law, the burden shifts to the non-moving party to come forward with opposing evidence to demonstrate that a genuine issue of material fact exists. *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 788 (Fla. 4th DCA 1995).

In the present case, Evergreen and Farooq failed to attend the hearing on All Florida's Motion for Summary Judgment, despite being noticed of the hearing. Moreover, Appellants did not present any written argument to the trial court in opposition to Appellee's motion. Instead, Appellants filed only the Farooq affidavit in opposition to summary judgment which did not, as will be seen below, directly refute the claims made in All Florida's complaint. Thus, after the burden shifted to the Appellants to establish the existence of any material fact in this case,

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

Appellants failed to do so. As explained in *McColman v. Deutsche Bank Nat. Trust Co.*, 2013 WL 1810583 (Fla. 4th DCA, May 1, 2013):

> [W]e recognize[] that the rules allow a party to defend at any time before a default is entered and allow the court to consider affidavits when determining whether an issue of material fact exists. . . . We have never held, however, nor should we, that where an answer has not been filed and no default entered, a defendant who has had ample time and opportunity to inject their version of the facts into the record but refuses to do so may, simply by raising the possibility of defenses in a motion for rehearing, avoid the consequences of the failure to act. The McColmans did not comply with the court's order to file an answer, and have never sought leave to file an untimely answer.

Thus, Appellants failed to present any evidence showing the existence of material fact, and have waived any argument they may have had in opposition to summary judgment.

A. ALL FLORIDA ESTABLISHED EVERGREEN'S INTENT TO DEFRAUD.

All Florida established Evergreen's intent to defraud it of the benefit of the $20,000.00 lease down payment check. Under section 68.065, Florida's "worthless check" statute, the intent to defraud is measured at the time the owner notifies the bank to stop payment. *Madness L.P. v. DiTocco Konstruction, Inc.*, 873 So. 2d 427 (Fla. 4th DCA 2004). In *Madness*, the Fourth District provided the following hypothetical to explain intent to defraud:

> If A, on Friday, gives a painter a check for $1000 to paint his house, and over the weekend the painter does the work, A's stopping payment on Monday could subject A to triple damages under the statute, because the painter did the work in exchange for the payment.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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> If, however, A stops payment on Monday, before any work is done, A has received nothing, and stopping payment could not amount to intent to defraud.

Thus, under *Madness*, the intent to defraud is established where the issuer of the check induces his counterpart to perform, and then stops payment of the check after performance. Here, Evergreen gave All Florida a lease down payment check in the amount of $20,000.00. In reliance on the negotiability of that check, All Florida was induced into transferring possession of the excavator to Evergreen pursuant to the lease. When Evergreen stopped payment on the check it did more than merely breach the contract; its action defrauded All Florida out of the benefit of the $20,000.00 down payment. Just as in the hypothetical set forth in *Madness*, Evergreen is liable for triple damages because All Florida was induced into performing its obligations under the contract in reliance on the negotiability of the $20,000.00 lease down payment check. Accordingly, the trial court's judgment awarding triple damages pursuant to the "worthless check" count of the complaint should be affirmed.

Further, it must be remembered that Farooq's affidavit did not contradict the assertions in All Florida's complaint or in its Motion for Summary Judgment, but instead offered only a legally deficient justification for his actions of stopping payment on the deposit check. In fact, the Farooq affidavit confirms that 1) Evergreen uttered the check in return for the excavator's delivery; 2) that the

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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excavator was in good working condition when it was delivered; and that 3) after the machine was broken, Farooq stopped payment on the check.

Appellants submitted no further justification for Appellants' actions, and offered no case law to the trial court to support its affidavit. Although Appellants now contend that the Farooq affidavit sufficiently raises a material fact as to whether Appellants *felt justified* in stopping payment for the excavator, the affidavit does nothing to dispel the reality that Farooq and Evergreen did indeed utter the deposit check, receive the excavator and then intentionally stop payment on the check after the excavator was broken.[3]

B. THE LEASE CONTRACT DID NOT CONTAIN AN IMPLIED WARRANTY OF MERCHANTABILITY.

The lease contract did not contain an implied warranty of merchantability.[4] Arguably, an implied warranty of merchantability would potentially apply to a lessor *who was a "merchant" with respect to goods of that kind. See* Sect. 680.212 (1), Fla. Stat. (2012)("Except in a finance lease, a warranty that the goods will be

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[3] Further, as noted by the trial court, All Florida objected to the Farooq Affidavit on the grounds that it contains inadmissible hearsay within hearsay. *See* Fla. R. Civ. P. 1.510(e); §§ 90.801, 90.802, and 90.805, Fla. Stat.; *Fla. Dep't of Fin. Servs. v. Associated Indus. Ins. Co.*, 868 So. 2d 600 (Fla. 1st DCA 2004) (an affidavit was not based on personal knowledge and it contained hearsay, therefore, the trial court erred in failing to strike the affidavit). The Farooq Affidavit should not be considered by this Court

[4] The contract does not contain, and Appellants have not contended that it contains, an express warranty.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.").

Here, Evergreen and Farooq *concede* that there is no record evidence that All Florida is a "merchant" with respect to excavators or goods of that kind. (Initial Brief at 16). In addition, Evergreen and Farooq concede that there is no record evidence that the contract contains and an implied warranty of merchantability. (Id.).[5] Thus, Appellants' arguments that All Florida supposedly breached its contractual implied warranty of merchantability are to no avail, because the law does not impose such an implied warranty on a seller of All Florida's type.

Further, neither Farooq nor Evergreen filed an affirmative defense alleging breach of implied warranty, nor did they otherwise "inject their version of the facts into the record" through Farooq's affidavit, and have therefore waived their right to raise this issue for the first time on appeal. *See McColman, supra* ("We have never held, however, nor should we, that. . . a defendant who has had ample time and opportunity to inject their version of the facts into the record but refuses to do so may, simply by raising the possibility of defenses in a motion for rehearing, avoid the consequences of the failure to act."); *Johnston v. Hudlett*, 32 So. 3d 700, 703 (Fla. 4th DCA 2010)("[I]t is axiomatic that it is the function of the appellate

[5] Nor has Appellant demonstrated that there is any question of fact as to whether the excavator was unmerchantable at all, as the Farooq affidavit explicitly states

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court."), *quoting Abrams v. Paul,* 453 So.2d 826, 827 (Fla. 1st DCA 1984).

Because All Florida met its burden in demonstrating no genuine issues of material fact existed in this regard, and because Evergreen and Farooq concede that they did not come forth with evidence indicating that All Florida is a "merchant" or that the lease contains an implied warranty of merchantability, the judgment of the trial court should be affirmed.

C. ALL FLORIDA WAS ENTITLED TO RECOVER THE CONTRACT'S FULL CONTRACT VALUE.

Because Evergreen stopped payment on the $20,000.00 lease deposit check and ceased making regular lease payments, All Florida was "authorized to consider [these actions] as entirely putting an end to the contract." *Pallardy-Watrous Ins. Agency, Inc. v. M. Tucker, Inc.*, 163 So. 284, 287-88 (Fla. 1935) (the test to use when deciding whether a party is authorized to bring suit for past and future contract damages is "whether there has been such a breach of contract as plaintiff is authorized to consider as entirely putting an end to the contract.").

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that the equipment ceased functioning only after Evergreen had used it for a period of time.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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In *National Educ. Centers, Inc. v. Kirkland,* 635 So. 2d 33 (Fla. 4th DCA 1993), the Fourth District held that a plaintiff may recover both past and future contract damages notwithstanding the absence of an acceleration clause in the contract. In *Kirkland,* a purchaser stopped making installment payments on an energy system. The jury awarded the seller its full contract damages, which included both past and future payments. On appeal, the Fourth District held that because the contract did not contain an acceleration clause, the trial court erred in failing to limit the seller's damages to the amount of payments due under the contract as of the date of the verdict. On rehearing, the Fourth District vacated its previous opinion and held:

> A non-breaching party is entitled to recover the benefit of its bargain under the contract. Under the facts of this case, such a benefit would include all damages, past and future.

Id. at 34. In reaching this holding, the Court noted that the applicable principle of law governing the measure of a non-breaching party to a contract's recovery appears in 17 Fla. Jur. 2d., *Damages* § 16 (1980):

> Whether, in an action on a contract, the plaintiff can recover damages for nonperformance of the whole contract, and thus recover damages not sustained at the time the action is brought, depends, as a general rule, on whether there has been such a breach of the contract as the plaintiff is authorized to consider as entirely putting an end to the contract. If the damages constitute a new cause of action, a new action may, and must, be brought. If on the other hand, the damages are only new damages resulting from the original cause of action, all the damages arising from the breach must be recovered in a single action.

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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> *Accordingly, where there is a total breach of a contract, all the damages, past or future,* which are reasonably certain to occur to the plaintiff may, as a general rule, be recovered in a single action. This is also generally true in the case of an anticipatory breach, as where one party incapacitates himself from performance or unequivocally refuses to perform.

Id., quoting 17 Fla.Jur.2d, *Damages* § 16 (1980) (emphasis supplied by court).

Similarly, in *Hyman v. Cohen*, 73 So. 2d 393 (Fla. 1954), the Florida Supreme Court held:

> 'A material breach, as where the breach goes to the whole consideration of the contract, gives to the injured party the right to rescind the contract or to treat it as a breach of the entire contract-in other words, an entire or total breach-and to maintain an action for damages for a total breach. Whenever there is a total breach of a contract by one party to it, the other is at liberty to treat the contract as broken and desist from any further effort on his part to perform it. In other words, he may abandon it and recover as damages for the breach the profits he would have received by a full performance. Such an abandonment is not technically a rescission of the contract, but a mere acceptance of a situation created by the wrongdoing of the other party.'

Hyman, 73 So. 2d at 397.

Here, as in *Kirkland* and *Hyman*, there has been a "total breach" of contract. To be sure, Evergreen not only stopped making monthly lease payments but it stopped payment on the $20,000.00 lease down payment. Under these facts (which are not in dispute) it is clear that All Florida was justified in treating the whole contract as breached, and therefore, the trial court did not err in awarding both past

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
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and future contractual damages notwithstanding the absence of an acceleration clause.

Finally, it must be remembered that Appellants were duly noticed of the hearing on summary judgment, but failed to appear or otherwise present argument to the trial court concerning any supposed breach by All Florida. As with the other issues addressed above, Appellants have waived their right to raise this issue on appeal.

II. CONTRARY TO APPELLANT'S CONTENTION, THE LOWER COURT *DID* ACCOUNT FOR ALL FLORIDA'S RECOVERY OF THE EXCAVATOR.

The trial court correctly calculated the damages due under the lease. Specifically, the lease provided that Evergreen would make 31 monthly rental payments in the amount of $4,703.52. Evergreen acknowledged that it only made three rental payments. Therefore, 28 rental payments were due and owing under the lease agreement, to wit: $131,699.08. The trial court entered a joint and several judgment against Evergreen and Farooq for this exact amount pursuant to the breach of lease count and breach of guarantee counts.

The trial court did not set-off the value of the excavator against the damages awarded to All Florida because the un-rebutted summary judgment evidence reveals that All Florida has been unable to rent, lease, or sell the excavator due to the damage caused by Evergreen. Further, neither Evergreen nor Farooq raised

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

failure to mitigate damages or set-off as an issue in the case. Accordingly, those issues cannot be raised for the first time on appeal. *Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) ("it is inappropriate for a party to raise an issue for the first time on appeal from summary judgment.").

Finally, Appellants agreed to both the calculation and division of damages under the agreed Corrected Final Judgment from which they now appeal. Appellants requested the trial court to correct its original final judgment by re-apportioning liability, but did not request that the trial court recalculate the damages awarded. Thus, Appellants have waived the right to the relief they seek in this regard. *See Green v. Keagle*, 4 So. 3d 1231 (Fla. 2d DCA 2008)("A [party] may not ask for a particular ruling and then complain about that same ruling on appeal."), *quoting Sierra v. Public Health Trust of Dade County,* 661 So.2d 1296, 1298 (Fla. 3d DCA 1995). Thus, the trial court's Corrected Final Judgment should be affirmed.

III. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES WAS REASONABLE, AND THE REASONABLENESS OF THE AWARD WAS NEVER CHALLENGED IN THE TRIAL COURT.

All Florida submitted an affidavit of attorney fees and an affidavit of reasonableness of attorney fees in connection with its motion for summary judgment. Accordingly, All Florida met its burden with respect to summary

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

judgment. Fla. R. Civ. P. 1.510(e); *see also Sloan v. Freedom Sav. & Loan Ass'n*, 525 So. 2d 1000, 1001 (Fla. 5th DCA 1988)("any claim for damages, liquidated or unliquidated, or for attorneys' fees and costs can be decided by summary judgment.").

Evergreen did not file an affidavit in opposition to the amount of attorney fees that All Florida sought. As such, there was no genuine issue of material fact presented regarding the reasonableness of the attorney fees awarded. Therefore, it cannot be said that the trial court abused its discretion in awarding All Florida attorney fees in the amount of $15,575.00. Moreover, neither Evergreen nor Farooq raised any objections to the trial court as to the reasonableness of the attorney fees awarded, and this issue has been waived by Appellants. *See Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) ("it is inappropriate for a party to raise an issue for the first time on appeal from summary judgment.").

Therefore, the trial court's award of attorney's fees should be affirmed.

CONCLUSION

WHEREFORE, based upon the above facts and authorities, Appellee ALL FLORIDA, respectfully requests this Court to affirm the corrected final judgment of the trial court.

Respectfully submitted,

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com

TAPANES LAW, P.A.
Attorney for All Florida
Land Cleaning, Inc.
990 Biscayne Blvd. Suite O-903
Miami, Florida, 33132
(305) 514-0985 Telephone
(305) 514-0987 Facsimile
-And-

THE POWELL LAW FIRM, P.A.
Attorneys for Appellee
18001 Old Cutler Rd. Suite 646
Palmetto Bay, Florida 33157
T. 305-232-0131
F. 305-232-0191
Brett@powellappeals.com

BY: _____
Brett C. Powell
Fla. Bar No.: 610917
P. Brandon Perkins
Fla. Bar No.: 568635

CERTIFICATE OF COMPLIANCE

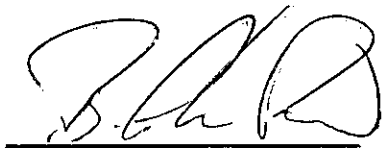
This brief complies with font requirements; it is typed in Times New Roman 14 point font, and is proportionately spaced type.

BY: _____
Brett C. Powell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2013, a true and correct copy of the foregoing has been furnished electronically to:

Ramon Abadin, Esq. Ramon.abadin@abadincook.com, and
Kai Jacobs, Esq., kjacobs@abadincook.com, service@abadincook.com.

BY: 

Brett C. Powell
Fla. Bar No.: 610917

The Powell Law Firm, P.A.
18001 Old Cutler Rd., Suite 646 Palmetto Bay, FL 33157
Tel. 305-232-0131; Fax. 305-232-0191
www.powellappeals.com