IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2019-CA-008660-AI

B. & B. PROPERTIES, INC., a Florida corporation, and on behalf of all others similarly situated,

Plaintiff,

vs.

PALM BEACH COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

ANSWER & AFFIRMATIVE DEFENSES OF DEFENDANT PALM BEACH COUNTY

Defendant Palm Beach County ("County" or "Defendant"), by and through undersigned counsel, hereby files this Answer and Affirmative Defenses to the Third Amended Complaint ("TAC") of Plaintiff B. & B. Properties, Inc. ("B&B") and in response thereto states:

1. As to paragraph 1, Defendant admits this action is a class action for declaratory, injunctive, and monetary relief, however Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the paragraph and therefore denies same and demands strict proof thereof.

2. As to paragraph 2, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same and demands strict proof thereof.

3. As to paragraph 3, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the paragraph and therefore denies same and demands strict proof thereof.

THE PARTIES

4. As to paragraph 4, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same and demands strict proof thereof.

5. As to paragraph 5, Defendant denies the allegations contained therein.

6. As to paragraph 6, Defendant admits that it is a home rule charter county and is a subdivision of the State in accordance with the Florida Constitution, the remainder of the allegations are therefore denied.

THE PALM BEACH COUNTY CHARTER

7. As to paragraph 7, Defendant admits that it has operated the County Government in conformity with its Charter, the remainder of the allegations are denied.

8. As to paragraph 8, the terms of the Charter speak for itself, any allegations not in conformity with same are denied.

9. As to paragraph 9, the terms of the Charter speak for itself, any allegations not in conformity with same are denied.

FLORIDA LAW

10. As to paragraph 10, the terms of the Act speak for itself, any allegations not in conformity with same are denied.

11. As to paragraph 11, the terms of the Act speak for itself any allegations not in conformity with same are denied.

12. As to paragraph 12, Defendant admits it has utilize Special Magistrates in conformity with State Law, any allegations to the contrary are specifically denied.

PALM BEACH COUNTY ORDINANCES

13. As to paragraph 13, Defendant admits it adopted the Code, and the terms of the Code speak for itself, any allegations to the contrary are specifically denied.

14. As to paragraph 14, the terms of the Code speak for itself.

15. As to paragraph 15, the exhibit speaks for itself, any allegations at variance with the written terms of the exhibit are specifically denied.

16. As to paragraph 16, the exhibit speaks for itself, any allegations at variance with the written terms of the exhibit are specifically denied.

17. As to paragraph 17, Defendant denies the allegations and demands strict proof thereof.

18. As to paragraph 18, Defendant denies the allegations and demands strict proof thereof.

19. As to paragraph 19, Defendant denies the allegations and demands strict proof thereof.

20. As to paragraph 20, Defendant denies the allegations and demands strict proof thereof.

21. As to paragraph 21, Defendant denies the allegations and demands strict proof thereof.

22. As to paragraph 22, Defendant denies the allegations and demands strict proof thereof.

23. As to paragraph 23, Defendant denies the allegations and demands strict proof thereof.

24. As to paragraph 24, Defendant denies the allegations and demands strict proof thereof.

25. As to paragraph 25, the statutes speak for themselves and any allegations at variance with the statutes are specifically denied.

26. As to paragraph 26, Defendant denies the allegations and demands strict proof thereof.

27. As to paragraph 27, Defendant denies the allegations and demands strict proof thereof.

28. As to paragraph 28, Defendant denies the allegations and demands strict proof thereof.

29. As to paragraph 29, Defendant denies the allegations and demands strict proof thereof.

CROSS-ATTACHING LIENS

30. As to paragraph 30, the statute speaks for itself.

31. As to paragraph 31, Defendant admits the allegations.

32. As to paragraph 32, Defendant denies the allegations and demands strict proof thereof.

DUE PROCESS REQUIREMENTS

33. As to paragraph 33, the statute speaks for itself.

34. As to paragraph 34, the statute speaks for itself.

35. As to paragraph 35, Defendant denies the allegations and demands strict proof thereof.

36. As to paragraph 36, Defendant denies the allegations and demands strict proof thereof.

37. As to paragraph 37, Defendant denies the allegations and demands strict proof thereof.

38. As to paragraph 38, Defendant denies the allegations and demands strict proof thereof.

39. As to paragraph 39, Defendant denies the allegations and demands strict proof thereof.

VIOLATION OF THE 14TH AMENDMENT FOR WHICH 42 U.S.C. § 1983 PROVIDES A REMEDY

40. As to paragraph 40, the Amendment speaks for itself.

41. As to paragraph 41, the statute speaks for itself.

42. As to paragraph 42, Defendant denies the allegations and demands strict proof thereof.

43. As to paragraph 43, Defendant denies the allegations and demands strict proof thereof.

44. As to paragraph 44, Defendant denies the allegations and demands strict proof thereof.

45. As to paragraph 45, Defendant denies the allegations and demands strict proof thereof.

46. As to paragraph 46, Defendant denies the allegations and demands strict proof thereof.

VIOLATIONS OF THE EIGHTH AND 14TH AMENDMENTS FOR WHICH 42 U.S.C. § 1983 PROVIDES A REMEDY

47. As to paragraph 47, the Amendment speaks for itself.

48. As to paragraph 48, Defendant denies the allegations and demands strict proof thereof.

CLASS REPRESENTATIVE

49. As to paragraph 49, the exhibit speaks for itself.

50. As to paragraph 50, the exhibit speaks for itself.

51. As to paragraph 51, the exhibit speaks for itself.

52. As to paragraph 52, the exhibits speak for themselves, however Defendant denies the remaining allegations in the paragraph and demands strict proof thereof.

53. As to paragraph 53, Defendant denies the allegations and demands strict proof thereof.

54. As to paragraph 54, Defendant denies the allegations and demands strict proof thereof.

55. As to paragraph 55, Defendant denies the allegations and demands strict proof thereof.

56. As to paragraph 56, Defendant denies the allegations and demands strict proof thereof.

57. As to paragraph 57, the exhibit speaks for itself and any allegations at variance with the written terms of the exhibit are specifically denied.

58. As to paragraph 58, the exhibit speaks for itself and any allegations at variance with the written terms of the exhibit are specifically denied.

59. As to paragraph 59, the exhibit speaks for itself and any allegations at variance with the written terms of the exhibit are specifically denied.

CLASS REPRESENTATION ALLEGATIONS

60. As to paragraph 60, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same and demands strict proof thereof.

61. As to paragraph 61, Defendant denies the allegations and demands strict proof thereof.

62. As to paragraph 62, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same and demands strict proof thereof.

63. As to paragraph 63, Defendant denies the allegations and demands strict proof thereof.

64. As to paragraph 64, Defendant denies the allegations and demands strict proof thereof.

65. As to paragraph 65, Defendant denies the allegations and demands strict proof thereof.

66. As to paragraph 66, Defendant denies the allegations and demands strict proof thereof.

67. As to paragraph 67, Defendant denies the allegations and demands strict proof thereof.

68. As to paragraph 68, Defendant denies the allegations and demands strict proof thereof.

69. As to paragraph 69, Defendant denies the allegations and demands strict proof thereof.

70. As to paragraph 70, Defendant denies the allegations and demands strict proof thereof.

71. As to paragraph 71, Defendant denies the allegations and demands strict proof thereof.

72. As to paragraph 72, Defendant denies the allegations and demands strict proof thereof.

73. As to paragraph 73, Defendant denies the allegations and demands strict proof thereof.

74. As to paragraph 74, Defendant denies the allegations and demands strict proof thereof.

75. As to paragraph 75, Defendant denies the allegations and demands strict proof thereof.

76. As to paragraph 76, Defendant denies the allegations and demands strict proof thereof.

77. As to paragraph 77, Defendant denies the allegations and demands strict proof thereof.

78. As to paragraph 78, Defendant denies the allegations and demands strict proof thereof.

79. As to paragraph 79, Defendant denies the allegations and demands strict proof thereof.

80. As to paragraph 80, Defendant denies the allegations and demands strict proof thereof.

81. As to paragraph 81, Defendant denies the allegations and demands strict proof thereof.

82. As to paragraph 82, Defendant denies the allegations and demands strict proof thereof.

83. As to paragraph 83, Defendant denies the allegations and demands strict proof thereof.

COUNT I – INJUNCTIVE RELIEF (Florida Law and Section 1983)

84. Defendant re-asserts and re-alleges its responses to Paragraphs 1-59 and 81 of the Complaint, as though fully set forth herein.

85. As to paragraph 85, Defendant denies the allegations and demands strict proof thereof.

86. As to paragraph 86, Defendant denies the allegations and demands strict proof thereof.

87. As to paragraph 87, Defendant denies the allegations and demands strict proof thereof.

WHEREFORE Defendant requests that this Honorable Court enter a Final Judgment in favor of the Defendant, deny all relief requested by Plaintiff, dismiss the Complaint in its entirety and with prejudice and award such other and further relief as this Court deems just and proper.

COUNT II – 42 U.S.C. § 1983 (14th Amendment Procedural Due Process)

88. Defendant re-asserts and re-alleges its responses to Paragraphs 1-59 of the Complaint, as though fully set forth herein.

89. As to paragraph 89, Defendant denies the allegations and demands strict proof thereof.

90. As to paragraph 90, Defendant denies the allegations and demands strict proof thereof.

91. As to paragraph 91, Defendant denies the allegations and demands strict proof thereof.

92. As to paragraph 92, Defendant denies the allegations and demands strict proof thereof.

93. As to paragraph 93, Defendant denies the allegations and demands strict proof thereof.

94. As to paragraph 94, Defendant denies the allegations and demands strict proof thereof.

95. As to paragraph 95, Defendant denies the allegations and demands strict proof thereof.

96. As to paragraph 96, Defendant denies the allegations and demands strict proof thereof.

WHEREFORE Defendant requests that this Honorable Court enter a Final Judgment in favor of the Defendant, deny all relief requested by Plaintiff, dismiss the Complaint in its entirety and with prejudice and award such other and further relief as this Court deems just and proper.

COUNT III – 42 U.S.C. § 1983 (Eighth and 14th Amendments Excessive Fines)

97. Defendant re-asserts and re-alleges its responses to Paragraphs 1-59 of the Complaint, as though fully set forth herein.

98. As to paragraph 98, Defendant denies the allegations and demands strict proof thereof.

WHEREFORE Defendant requests that this Honorable Court enter a Final Judgment in favor of the Defendant, deny all relief requested by Plaintiff, dismiss the Complaint in its entirety and with prejudice and award such other and further relief as this Court deems just and proper.

COUNT IV – DECLARATORY JUDGMENT (Florida Law and Section 1983)

99. Defendant re-asserts and re-alleges its responses to Paragraphs 1-59 of the Complaint, as though fully set forth herein.

100. As to paragraph 100, Defendant denies the allegations and demands strict proof thereof.

101. As to paragraph 101, Defendant denies the allegations and demands strict proof thereof.

WHEREFORE Defendant requests that this Honorable Court enter a Final Judgment in favor of the Defendant, deny all relief requested by Plaintiff, dismiss the Complaint in its entirety and with prejudice and award such other and further relief as this Court deems just and proper.

GLOBAL DENIAL

Defendant expressly denies each and every allegation and inference of the Complaint not specifically admitted above and demand strict proof of all denied matters.

AFFIRMATIVE DEFENSES

Defendant re-alleges and re-asserts its responses to Paragraphs 1-101 of the Complaint as fully set forth herein. Defendant states the following Affirmative Defenses without assuming any burden of proof on the issues where Plaintiffs bear such burden:

FIRST AFFIRMATIVE DEFENSE

The statute of limitations bars the procedural due process claims. The statute of limitations governing claims brought pursuant to § 1983 in Florida state court is four (4) years. *See Sneed v. Pan Am. Hosp*., 370 F. App'x. 47, 49 (11th Cir. 2010). Here, the alleged injury is the denial of a modification hearing before a Special Magistrate after the lien was referred to OFMB. B&B was notified of this denial in the March 7, 2007, Order Imposing Fine/Lien. B&B was or should have been aware that "no modification requests" would be accepted by the County 90 days after recording of the lien, at the latest, when the lien was recorded on April 27, 2007. *See* § 695.11, Fla. Stat. (all persons are on notice of recorded instruments on the date of recording). Accordingly, the statute of limitations ran in April 2011, a decade ago, and the procedural due process claims should be dismissed with prejudice because they are time barred.

SECOND AFFIRMATIVE DEFENSE

The availability of state court remedies bars B&B's federal procedural due process claims. "A violation of procedural due process does not become complete unless and until the state refuses to provide adequate due process. … An appeal of a final administrative order to the Florida State Circuit Court satisfies due process because the circuit court has the power to remedy any procedural defects and cure due process violations." *Lindbloom v. Manatee County*, 808 F. App'x. 745, 750 (11th Cir. 2020), *cert. denied sub nom. Lindbloom v. Manatee County, Florida*, 141 S. Ct. 679 (2020). B&B could have appealed the March 7, 2007 Order, which provided for interest, collections costs, and a limited period to request a modification, to this Court pursuant to §162.11, Fla. Stat (2020). *See id*. That B&B chose not to take direct appeal to this court does not transform an available process into an unavailable one. *See id.* at 751. B&B's choice not to appeal the March 7, 2007, Order, to this Court, which was constitutionally

adequate process, prevents B&B from now stating a claim for a denial of procedural due process. Additionally, B&B is also presently pursuing the state court remedies of a declaratory judgment action and an injunction, which the Fourth District Court of Appeal has found to be available, adequate state court remedies that would bar a federal procedural due process claim. *See Walton v. Health Care Dist. of Palm Beach County*, 862 So. 2d 852, 857 (Fla. 4th DCA 2003) (affirming dismissal with prejudice of a federal procedural due process claim where a suit for declaratory or injunctive relief was available).

THIRD AFFIRMATIVE DEFENSE

The time has passed for B&B to present its due process violations to this Court, which now lacks subject matter jurisdiction to consider the alleged procedural due process objections concerning the March 7, 2007, Order. *See Hardin v. Monroe Cty.*, 64 So. 3d 707, 710 (Fla. 3d DCA 2011) ("Therefore, as the Violation Order was not timely appealed, the Circuit Court did not and does not have jurisdiction to review the Violation Order."); *City of Miami v. Cortes*, 995 So. 2d 604, 606 (Fla. 3d DCA 2008) (finding the enforcement order to be outside the scope of the circuit court's review because it was not timely appealed); *Kirby v. City of Archer*, 790 So. 2d 1214, 1214 (Fla. 1st DCA 2001) ("Having failed to challenge the Board's action, Kirby cannot raise factual disputes with the Board's findings in the foreclosure action."); *City of Plantation v. Vermut*, 583 So. 2d 393, 394 (Fla. 4th DCA 1991) ("Because no appeal had been taken from the March 29, 1988 final order, we find that the circuit court lacked jurisdiction to set aside the March 29, 1988 final order."); *City of Ft. Lauderdale v. Bamman*, 519 So. 2d 37, 38 (Fla. 4th DCA 1987) (A code enforcement order "was beyond the jurisdictional reach of the circuit court" because the violator failed to timely appeal the order). Accordingly, the claim must be dismissed with prejudice as this court lacks jurisdiction over the claim.

FOURTH AFFIRMATIVE DEFENSE

B&B was provided the paradigm of due process. *See City of Fort Lauderdale v. Scott*, 551 F. App'x. 972, 975 (11th Cir. 2014) ("A hearing, had it been requested, would have afforded the property owner a right to be heard in full—to contest the violation. And judicial review would have been available. This is a paradigm of due process."). Here, the County provided Plaintiff with a hearing and opportunity to be heard. Additionally, the County, in mailing the Order Imposing Fine/Lien to the correct address provided B&B with all the pre-fine-imposition notice provided all the process it was due.

FIFTH AFFIRMATIVE DEFENSE

"Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). Here, though B&B bemoans the fact that it cannot present witnesses "under oath" to the Board of County Commissioners, B&B does not allege that there are any factual issues that it wishes to present to a Special Magistrate regarding "1. The gravity of the violation; 2. Any actions taken by the violator to correct the violation; [or] [a]ny previous violations committed by the violator." *See* §162.09(2)(b), Fla. Stat. B&B does not allege that the code violations did not exist or were corrected at a time prior to November 2007 (the date of compliance reflected on the Statement of Account, TAC Exhibit A). In short, B&B does not dispute that a lien was properly recorded against its Property. Consequently, B&B fails to claim that there was an erroneous deprivation of property, *i.e*. an erroneously entered lien. B&B did not then, nor cannot it now, assert that it was not in clear violation of the ordinances of Palm Beach County or that it timely corrected those violations when provided notice of the same.

SIXTH AFFIRMATIVE DEFENSE

B&B has not alleged a "liberty interest" upon which to base a procedural due process claim. To bring and maintain a §1983 action for the deprivation of procedural due process under the Fourteenth Amendment of the United States Constitution, the plaintiff "must first establish the existence of a constitutionally protected property or liberty interest that has been interfered with by the State." *Crocker v. Pleasant*, 778 So. 2d 978, 983 (Fla. 2001).

Legally, there is no such liberty interest at issue here. "The imposition of a fine fails to implicate a protected liberty interest." *Versatile v. Kelly*, 3:12CV333-HEH, 2013 WL 4807554, at *4 (E.D. Va. Sept. 9, 2013), *aff'd,* 556 F. App'x. 266 (4th Cir. 2014) (citing *Whitmore v. Hill,* 456 F. Appx 726, 728–29 (10th Cir. 2012); *Dowd v. New Castle Cnty., Del.,* 739 F. Supp. 2d 674, 683–84 (D. Del. 2010)). "The right to use one's property as he or she wishes is not a fundamental right in the constitutional sense," and is therefore not a protected liberty interest for a due process claim. *See Dowd*, 739 F. Supp. 2d at 684. This Court should dismiss all claims that allege a due process violation premised on a liberty interest as they are legally insufficient and fail to state a cause of action.

SEVENTH AFFIRMATIVE DEFENSE

B&B's Eighth Amendment claims fail to state a cause of action because they are a collateral attack on a code enforcement order, which this Court has no subject matter jurisdiction to hear. In a case concerning fines and pre-judgment interest on a Chapter 162 code enforcement lien, United States District Judge Darrin Gayles dismissed a plaintiff's Eighth Amendment excessive fines claim as a collateral attack on a final administrative decision. *Innova Inv. Group, LLC v. Vill. of Key Biscayne*, 1:19-CV-22540, 2020 WL 6781821, (S.D. Fla. Nov. 18, 2020). The appeal provided in §162.11 is a party's remedy if they dispute the code enforcement final

order, and failure to bring those disputes, even constitutional disputes, in a timely appeal waives the issue. *Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 1st DCA 2001). In the instant case, the order similarly advised B&B of both of the charges it now complains are "excessive" fines: The order advised that the lien amount "shall accrue interest" and that B&B would be responsible for any collection fees incurred by the County. B&B does not allege any excuse for its failure to timely appeal the Special Magistrate's Order. It had a statutory right to argue in that appeal that the Special Magistrate did not have authority to "award interest" and that it should not be responsible for collection fees. Because these complaints could have been brought in an appeal challenging the Special Magistrate's Order Imposing Fine/Lien, this Court lacks subject matter jurisdiction to now consider the collateral attacks on the Order.

EIGHTH AFFIRMATIVE DEFENSE

B&B's Eighth Amendment claims are time-barred. The Eighth Amendment claims brought pursuant to §1983 in Count III fail to state a cause of action because they are time barred. B&B had four years from the alleged unlawful practice to bring Count III. *See Innova Inv. Group, LLC*, 1:19-CV-22540, 2020 WL 6781821, at *3 (S.D. Fla. Nov. 18, 2020). B&B was or should have been aware that interest would accrue, that no modification requests would be accepted after referral to OFMB, and that B&B would be responsible for collections costs upon receipt of the March 7, 2007 Order, or at the latest, upon recording of the Order on April 27, 2007. All persons are deemed to be on notice of instruments authorized to be recorded at the time and the date of recording. §695.11, Fla. Stat. (2020). Plaintiff's §1983 claims were time barred a decade ago, in April 2011 and an assertion now is a futile endeavor.

NINTH AFFIRMATIVE DEFENSE

Neither interest nor collections costs are "fines" subject to the Eighth Amendment. Florida law rejects the concept that prejudgment interest is a penalty. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985); *see also City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 197 (1995) ("But prejudgment interest is not awarded as a penalty; it is merely an element of just compensation."). "Prejudgment interest, like any other interest, is to compensate one for the time value of money." *Gore, Inc. v. Glickman*, 137 F.3d 863, 868 (5th Cir. 1998) (citations omitted). Because the prejudgment interest about which B&B complains is not a "fine" regulated by the Eighth Amendment, the Court should dismiss the claim with prejudice since it is premised upon the charging of prejudgment interest as being a punishment which as a matter of law it is not.

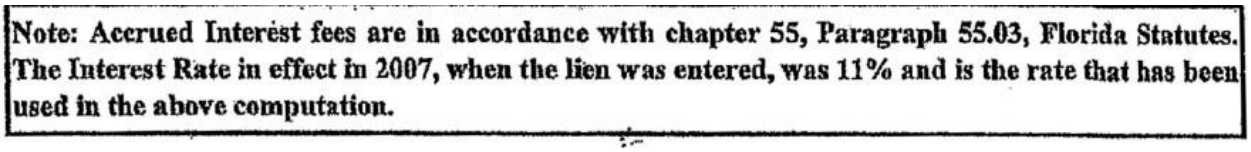
Similarly, collections costs are not "fines" or punitive. *C.f. Browning v. Angelfish Swim Sch., Inc.*, 1 So. 3d 355, 359–60 (Fla. 3d DCA 2009) (preliminarily discussing the merits of an excessive fines claim, discussing the nature of the late charges and reinstatement application fees at issue as less "fines" and more "civil administrative penalty"). By their nature, they are remedial, designed to reimburse an incurred cost.

TENTH AFFIRMATIVE DEFENSE

Even if interest and collections costs were subject to the Eighth Amendment, their statutory authorization and proportionality precludes B&B from stating an excessive fines claim. "No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Newell Recycling Co., Inc. v. U.S. E.P.A.*, 231 F.3d 204, 210 (5th Cir. 2000). Here, neither the interest nor collections costs exceed the amount permitted by the authorizing

statutes. Therefore, these charges, even if construed as fines, cannot be constitutionally "excessive." First, prejudgment interest is authorized by section 162.09(3), Florida Statues, which states, "After 3 months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest." (Emphasis added). The past tense "accrued" indicates that interest has already been accruing and in fact had accrued prior to the entry of the judgment. *See, generally*, INTEREST, Black's Law Dictionary (11th ed. 2019) ("-accrued interest. (18c) Interest that is earned but not yet paid…").

The Statement of Account indicates that:


Note: Accrued Interest fees are in accordance with chapter 55, Paragraph 55.03, Florida Statutes. The Interest Rate in effect in 2007, when the lien was entered, was 11% and is the rate that has been used in the above computation.

> Section 687.01 refers to section 55.03, Florida Statutes (2003), for the rate to be used for prejudgment interest where no contractual interest rate applies. The governing version of section 55.03 provides that Florida's Chief Financial Officer shall set the interest rate on January 1 of each year and that "[t]he interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid." § 55.03(1), (3), Fla. Stat. (2003). The same should apply to prejudgment interest. Once the rate is obtained based on the date of loss, it should remain the same.

Regions Bank v. Maroone Chevrolet, L.L.C., 118 So. 3d 251, 257–58 (Fla. 3d DCA 2013).

> The Legislature then amended the statute, effective July 1, 2011. Under the amendment, the Chief Financial Officer must establish a statutory interest rate each quarter. "The interest rate is established at the time a judgment is obtained and such interest rate shall be adjusted annually on January 1 of each year in accordance with the interest rate in effect on that date as set by the Chief Financial Officer until the judgment is paid. " § 55.03(3), Fla. Stat. (2011); *see also* Ch.2011–169, § 1, Laws of Fla. (effective July 1, 2011).

Genser v. Reef Condo. Ass'n, Inc., 100 So. 3d 760, 762 (Fla. 4th DCA 2012).

For purposes of calculating pre-judgment interest, the rate and law in effect at the "date of loss" should be used. *Id*. The "date of loss" is when the lien was entered, which was in 2007.

Thus, the governing version of section 55.03 when the lien was entered and recorded was the 2003 version of the statute. *See id*. So, the authorized, statutory rate of prejudgment interest is a fixed 11%, just as the Statement of Account provides. B&B's argument regarding when or how the County collects its prejudgment interest does not convert a non-excessive, statutorily authorized amount into a constitutionally "excessive" amount.

Moreover, the daily accrual of interest on non-paid sums due and owing is directly proportionate to "the offense" (if interest were a penalty, which it is not) of nonpayment. This proportionality precludes a finding that the interest is excessive. *See, generally, Moustakis v. City of Fort Lauderdale*, 338 F. App'x. 820, 822 (11th Cir. 2009). In *Moustakis*, the plaintiffs complained that the cumulative fine of $700,000, which was more than the value of the house found to have violated the city code, was excessive. *Id*. The Eleventh Circuit found that "the $700,000 fine was created by the Moustakises' failure to bring the house into compliance with the Code each day for 14 years. Rather than being grossly disproportionate to the offense, the $700,000 fine is, literally, directly proportionate to the offense." *Id*. The Eleventh Circuit then held that the plaintiffs had not alleged any facts to support a conclusion that the lien or underlying fines were excessive under either the Florida Constitution or the United States Constitution. *Id*.; *see also Conley v. City of Dunedin*, 808CV01793T24AEP, 2010 WL 146861, at *5 (M.D. Fla. Jan. 11, 2010) ("Of course, by failing to correct the code violations, the Conleys have allowed a small fine to grow into an enormous one.").

Second, §938.35, Florida Statutes authorizes the County to "pursue the collection of <u>any</u> fees, service charges, <u>fines</u>, or costs <u>to which it is entitled</u> which remain unpaid for 90 days or more, or refer the account to a … collection agent who is registered and in good standing pursuant to chapter 559." (Emphasis added). The TAC argues that §938.35 applies only to

"court costs," but that argument is refuted by the plain text of the statute that has been in effect since 2004.[1] "The collection fee, … paid to any … collection agent retained by the board of county commissioners … may be added to the balance owed, in an amount not to exceed 40 percent of the amount owed at the time the account is referred to the attorney or agents for collection." § 938.35, Fla. Stat. (emphasis added). The principal and interest balance owed to the County as reflected on the January 2019 Statement of Account, exceeded $100,000. The sum of the $25,000 collection fee on the Statement of Account does not exceed the statutorily authorized amount of 40 percent of the amount owed. Accordingly, the collection fee is not constitutionally excessive. *See Newell Recycling Co., Inc.*, 231 F.3d at 210. Therefore, Plaintiff cannot as a matter of law allege a claim based on the collection fees under any legal theory.

The amount of the accrued interest and collections fees relate to the amount of time that passed between the date B&B should have brought its Property into compliance, June 2006, and the date it obtained a Statement of Account, January 2019. *See Wemhoff v. City of Baltimore*, 591 F. Supp. 2d 804, 809 (D. Md. 2008) ("The fact that the overall fine has now grown to hundreds of dollars is more a reflection of Mr. Wemhoff's failure to timely pay or contest the original fine owed than it is a reflection of unconstitutional excess in the design of the late payment penalty."). This Court cannot allow B&B, by permitting approximately 12 and a half years to pass between its obligation to pay a fine and its attempt to pay a fine, to create a constitutionally excessive fine. *See Moustakis v. City of Fort Lauderdale*, 08-60124-CIV, 2008 WL 2222101, at *2 (S.D. Fla. May 27, 2008), *aff'd,* 338 F. App'x. 820 (11th Cir. 2009) (to do so

[1] Pre-2004 versions of the statute did contain language that may have supported B&B's interpretation of the statute, listing: "any fines, court costs, or other costs imposed by the court which remain unpaid for 90 days or more, …" (Emphasis added). This construction, which ends with "imposed by the court," is no longer the law, nor has it been at any time relevant to this case.

would be "contrary to reason and public policy"). Accordingly, Count III is legally insufficient for failure to state a claim that the prejudgment interest and collections costs are constitutionally excessive.

ELEVENTH AFFIRMATIVE DEFENSE

B&B has no standing to seek monetary damages because B&B has not paid any interest or collections costs nor suffered any damages. "It is fundamental that a person is not entitled to recover damages if he has suffered no injury." *Bank of Miami Beach v. Newman*, 163 So. 2d 333, 333 (Fla. 3d DCA 1964). Though B&B asserts in conclusory fashion, "Plaintiff and the Putative Class members have been damaged and have suffered losses as a result of liens cross-attaching to other real property owned by them in Palm Beach County, or real property acquired by them after the imposition of the lien," (TAC, ¶ 32), it alleges no ultimate facts regarding what these "damages" or "losses" are. B&B has paid neither interest, nor collection costs in this matter. Additionally, B&B fails to allege entitlement to the "refund" for moneys paid that it repeatedly requests. B&B does not allege that it paid interest or collections costs on the lien. Nor do the allegations of or attachments to the TAC support a conclusion that B&B paid interest or collections costs. To the contrary, the Statement of Account attached to the TAC indicates that the payment received was from the "COC," not B&B, from tax deed sale proceeds, not directly from B&B for the purpose of paying its lien:

Less: Partial Payment Received from COC on 5/25/18 from tax deed sales proceeds on cross attached parcel.	(44,761.60)

Accordingly, B&B has not properly alleged any injury that would give it standing to seek damages, and the requests for relief that seek damages should not be allowed to be brought forth in this its fourth attempt to allege such claims.

TWELFTH AFFIRMATIVE DEFENSE

A refund is not the appropriate remedy for a procedural due process violation. Count II alleges a procedural due process violation of the Fourteenth Amendment of the Unites States Constitution. The alleged denial of due process is the lack of a re-hearing before a Special Magistrate on the issue of interest and collections costs after the lien is referred to OFMB, after an evidentiary hearing. If such a hearing were required, the remedy would be to provide the hearing, not to return moneys which in fact remain due and owing due to Plaintiff's uncontested violation of the codes of Palm Beach County. *See City of Hollywood v. Miller*, 471 So. 2d 655, 656 (Fla. 4th DCA 1985) (discussing without deciding that, if there were a procedural due process violation, "the appropriate remedy would be the hearing to which Miller would have been entitled, and not the return of monies which might in fact be due should he be found guilty of the parking violation"). Accordingly, the requested relief of an "award" of "damages" against the County "sufficient in amount to refund, with interest, the unlawful sums collected from B&B and the Putative Class" is legally insufficient and therefore should be dismissed.

RESERVATION OF RIGHTS

Discovery and investigation may reveal that one or more of the following defenses and affirmative defenses will be available to the County. The Defendant thus gives notice it intends to rely upon any other defense or defenses that may become available including, without limitation, defenses related to the statute(s) of limitations and repose, standing, waiver, estoppel and laches. The Defendant further reserves the right to amend its Answer to assert any additional defenses, whether specifically identified herein or otherwise, as further information becomes available. The Defendant further reserves all of its rights to seek reimbursement of its costs and reasonable attorneys' fees incurred in the defense of this action under any applicable statute or

contract.

WHEREFORE the Defendant, having answered the Complaint, requests that judgment be entered in its favor on the Complaint in its entirety, and request such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to all individuals registered to receive service through the Florida Court's E-Filing Portal on this Tuesday, January 4, 2022.

By: *s/ Phillip H. Hutchinson*
Phillip H. Hutchinson, Esq.