

COPY

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2016 DEC 22 P 2:28

TEAM IA v CICERO LUCAS

C/A No.: 2009-CP-32-01078

BETH A. CARRISG
CLERK OF COURT
LEXINGTON SC

Plaintiff initiated Supplemental Proceedings to collect on the underlying judgment.

Plaintiff argues that it is entitled to “Any and all” attorney fees awarded at trial, meaning any fees and costs related to any trial, appeal, statutory supplemental proceedings, and bankruptcy proceedings. Defendant argues that Plaintiff is not entitled to fees from a collection or Supplemental Proceeding action. The parties requested that the Court rule upon Team IA’s right to add its post-judgment attorney’s fees and expenses to the judgment. As set forth below, the Court holds that Team IA is not entitled to include its post-judgment attorney’s fees and expenses in the outstanding indebtedness under the judgment.

BACKGROUND

Team IA brought action and obtained a judgment against Lucas for breach of an Employment Agreement (the “Employment Agreement”). Team IA obtained a jury verdict on March 27, 2015, after which the parties filed post-trial motions. The Circuit Court filed its Order on Post Trial Motions on November 24, 2015, and judgment was entered on December 1, 2015 (the “Judgment”). Pursuant to the Order on Post Trial Motions, the Judgment was entered for Team IA in the amount of \$278,137.34 for breach of contract damages, and in the amount of \$526,334.52 for attorney’s fees, expenses and costs incurred by Team IA in enforcing its rights under the Employment Agreement, for a total judgment amount of \$804,471.86.

In awarding Team IA attorney’s fees, expenses and costs as part of the Judgment, the Circuit Court stated, “In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney’s fees, costs, and expenses incurred in Team IA, Inc.

enforcing the terms of the Employment Agreement.” See Order on Post Trial Motions, page 28.

The Circuit Court cited Paragraph VII (G) of the Employment Agreement as providing:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney’s fees, expenses, and court costs incurred in connection with the enforcement of Employer’s rights hereunder.

Id., page 29.

In the Order on Post Trial Motions, the Circuit Court awarded Team IA attorney’s fees, expenses and costs after consideration of the six factors identified in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993), as applicable to a request for attorney’s fees and expenses. As noted above, the Circuit Court determined that Team IA was entitled to an award of \$526,334.52 for the legal expenses it incurred in enforcing its rights under the Employment Agreement. This amount constitutes over 65% of the total Judgment amount.

Team IA asserts that it is entitled to add attorney’s fees and expenses it incurs post-judgment in pursuing collection of the Judgment to the amount due upon the Judgment. Lucas asserts that Team IA is not entitled to add post-judgment attorney’s fees and expenses to the Judgment.

ANALYSIS

Team IA argues that it is entitled to post-judgment attorney’s fees and expenses based on (1) the Circuit Court’s ruling, as a matter of the law of the case, and (2) the same provision in the Employment Agreement cited by the Circuit Court, which is quoted above. Team IA also argues that the doctrine of merger does not apply to the contract provision for attorney’s fees and expenses. Lucas argues that the Circuit Court made no ruling on post-judgment attorney’s fees and expenses, and that the doctrine of merger provides that, upon entry of the Judgment, the Employment Agreement merged into the Judgment, the contract provision – which did not

expressly provide for post-judgment attorney's fees and expenses – was extinguished, and Team IA's remedy is upon the Judgment, not the contract. Lucas also argues that there is no statute or rule in South Carolina providing that a judgment creditor is entitled to post-judgment attorney's fees and expenses.

For the reasons discussed below, this Court finds that Team IA is not entitled to post-judgment attorney's fees and expenses.

1. The Claim for Post-Judgment Attorney's Fees and Expenses Is Not Supported by the Law of the Case.

The Circuit Court's Order on Post Trial Motions does not include a ruling upon, and makes no mention of, post-judgment attorney's fees and expenses. The language in the Order on Post Trial Motions cited by Team IA for its law of the case argument is as follows: "Based on the language of the fee-shifting provision, I must conclude that Lucas is liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Team IA rights. I find that the attorney's fees, costs, and expenses incurred by Team IA were reasonable and necessary." See Order on Post Trial Motions, page 29. The language immediately follows the quoted Paragraph VII (G) of the Employment Agreement (quoted above), and is stated in the context of reviewing Team IA's claimed attorney's fees and expenses for purposes of determining the amount of the Judgment. The Circuit Court then proceeds to apply the *Blumberg v. Nealco, Inc., supra.* factors to determine the allowability of the claimed attorney's fees and expenses as part of the judgment to be entered.

There is no ruling on the allowability of post-judgment attorney's fees and expenses in the Order on Post Trial Motions, or upon the survival of the contract provision following entry of the Judgment. "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Sloan Construction Company, Inc. v.*

Southco Grassing, Inc., 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011) (quoting *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957)).

The issue before the Circuit Court was the allowability and amount of attorney's fees, expenses and costs to be included in the judgment to be entered. No ruling, discussion or mention of the allowability of post-judgment attorney's fees and expenses is made in the Order on Post Trial Motions, and Team IA's claim for post-judgment attorney's fees and expenses is not deemed decided under the case of the law doctrine.

Further, the parties make no argument that the underlying trial order made a ruling about who drafted the contract the Plaintiff /Employer or the Defendant/ Employee. A broad universal reading of this clause could be inferred; however, a narrower version of the scope could construe the clause to mean any and all actions taken to enforce the agree would mean such attorney fees for such actions as (a) injunctive action (b) trial for money damages (c) arbitration or (d) mediation employed at trial level to enforce the contract.

Existing case law dictates that Plaintiff's argument is flawed when applied to (1) Appeals. RULE 222, SCACR allows for current statutory rate of \$1,000.00. The appellate courts do not hold a six factor hearing to determine reasonable amount of attorney fees for the appellate action. See also *Thornton V Thornton* 492 S.E. 2d 96 (1996) ruling that family court award of attorney fees should not include those fees incurred in the course of appellate representation, as costs on appeal shall be taxed only in the appellate court under Rule 222 SCACR.

The same logic applies to fees incurred in (2) Bankruptcy court. First, this court takes Judicial notice of various attorney fee clauses in notes in foreclosure actions. Some notes do not mention attorney fees in bankruptcy and other specifically have separate clauses for recovery of attorney fees to enforce note and mortgage in state court and a separate clause allowing recovery of attorney fees if case moves to Bankruptcy court. *Youngman, Trustee v. Fleet Bank, N.A.* (In

re *A&P Diversified Technologies Realty, Inc.*), 467 F.3d 337, 343 (3rd Cir, 2005) (merger of mortgage into the foreclosure judgment precluded mortgagee's claim for post-judgment attorney's fees in the bankruptcy case of the borrower).

Plaintiff argues that this court should follow same logic as in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct.App. 1997). While admittedly not controlling since reversed on other grounds, Plaintiff notes that the ruling was on the basis of a contract provision stating that, "[i]f arbitration and/or litigation shall become necessary," the prevailing party would be entitled to recovery of "reasonable attorney's fees and all other costs of such arbitration and/or litigation." *Id.*, 326 S.C. at 469, 483 S.E.2d at 801.

The court ruled that supplemental proceedings were brought to collect on the debt, and thus these attorney fees should also be allowed pursuant to the contract.

However, several points must also be noted. First, this decision was reversed (on other grounds) by the South Carolina Supreme Court in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), and thus it has no precedential effect. Second, the contract provision specifically references litigation "and all . . . costs of such . . . litigation." In finding the provision should include post-judgment fees, the Court of Appeals stated, in footnote 2, "Further the amount of fees awarded appears to be negligible in consideration of the amount of money in dispute and the fact that not all issues have been resolved in favor of Ocean Resorts." 326 S.C. at 469, 483 S.E.2d at 801. In this case, over 65% of the Judgment amount, \$526,334.52, is for attorney's fees and expenses incurred by Team IA in enforcing its rights under the Employment Agreement, and in light of the size and scope of that award, the addition of post-judgment fees and expenses cannot be deemed negligible. In this regard, allowing additional attorney's fees and expenses for post-judgment collection efforts would have the effect of compounded attorney's fees. The provision in the Employment

Agreement indicates no intent that it should be given this effect. Third, the doctrine of merger is not discussed, or even mentioned, in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, raising the question of whether the non-prevailing party argued the merger doctrine. Without discussion, or even mention, of the merger doctrine it is not proper to assume that the Court of Appeals rejected the doctrine or found it inapplicable to the facts of that case.¹

Fourth, the practical application of this ruling could lead to unintended consequences. A judgment is good for ten (10) years. A creditor can bring any amount of supplemental proceedings during this ten year period. Assuming a prudent attorney would bring an action at least once a year during the ten year period, then the costs of the reference fee and reasonable attorney fees would be, presumably at least ten times, be added to the underlying judgment amount which would increase and continue to compound interest at the statutory judgment rate. For these reasons, the court finds the logic in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, is distinguishable to this case.

2. The Doctrine of Merger Precludes Reliance Upon Paragraph VII (G) of The Employment Agreement.

Team IA's claim for post-judgment attorney's fees and expenses is premised upon application of Paragraph VII (G) of the Employment Agreement. The contract provision, by its literal wording, applies to attorney's fees, expenses and court costs "*incurred in connection with the enforcement of [Team IA's] rights hereunder.*" (emphasis added). See Order on Post Trial Motions, page 29, quoting Paragraph VII (G) of the Employment Agreement. However, the doctrine of merger precludes this claim. Team IA's post-judgment attorney's fees and expenses

¹ It is well settled that issues not preserved for appeal are deemed abandoned in the appeal and the appellate court need not rule upon them. See, e.g., *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992).

are incurred in enforcing rights as a judgment creditor, which rights were obtained as a result of the Judgment. Although an exception to the merger doctrine may exist if the contract expressly provides for *post-judgment* attorney's fees and expenses, Paragraph VII (G) does not state that Lucas is liable for post-judgment attorney's fees and costs incurred on account of, or in attempting to collect on, a judgment awarded to Team IA. Paragraph VII (G) states that it applies to enforcement of rights existing under the Employment Agreement.

Upon entry of the Judgment, Team IA's rights under the Employment Agreement merged into the Judgment; under the doctrine of merger, the original claim under the contract is extinguished, and Team IA's remedy is upon the Judgment. *See Ryan v. Southern Mutual Building & Loan Association*, 50 S.C. 185, 27 S.E. 618, 619-620 (1897) (merger of the contract into the judgment precluded a post-judgment claim that the contract was usurious); *Monarc Construction, Inc. v. Aris Corporation, et al.*, 188 Md.App. 377, 392-398, 981 A.2d 822, 831-834 (2009) (doctrine of merger precluded claim for post-judgment attorney's fees, in the absence of a contract provision expressly providing for post-judgment attorney's fees and expenses); *Allison v. John M. Biggs, Inc., et al.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992) ("While I.C. § 12-120(3) provides for an award of attorney fees in a civil action to recover on a promissory note, it is also elementary that after judgment a cause of action based on a note is merged into the judgment thereby extinguishing the note as the basis for the post-judgment collection proceedings."); and *Woodcraft Construction, Inc. v. Hamilton*, 56 Wash.App 885, 887-888, 786 P.2d 307, 308 (1990) ("Here, as in *Caine*, the judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision in the note merged into the judgment and ceased to exist. Therefore, there was no contractual basis upon which to award attorney fees and costs to either party."). *See also Kaniawha-Gauley Coal & Coke Company v. Pittston Minerals Group, Incorporated*, 501

Fed.Appx. 247, 254-255 (4th Cir. 2012) (“Without the necessary clear, unambiguous, and unequivocal language indicating the parties’ express intent to agree on a post-judgment interest rate,” the doctrine of merger eliminated the contract interest rate provision, and interest would not accrue on the judgment at the contract rate.).²

The merger doctrine has long been recognized in South Carolina, and was explained in the *Moore v. Holland*, 16 S.C. 15, 27 (1881), as follows: “A judgment of this sort involves two ideas, - the contract upon which it is rendered, and the judgment itself. The one is the act of the parties, the other is the act of the court. They are entirely separate and distinct.” *Accord, Ryan v. Southern Mutual Building & Loan Association*, 27 S.E. at 620.

The doctrine of merger is applicable to this case. The Employment Agreement provision does not expressly provide for post-judgment attorney’s fees and expenses, and South Carolina does not have a statute or rule providing that judgment creditors are entitled to post-judgment attorney’s fees and expenses. In this regard, the decision in *Dilling, Baker & Co. v. Foster*, 21 S.C. 334 (1884), is instructive in this matter. The decision was in the context of a receivership, and included the issue of the allowance of an attorney’s fee for the attorneys for the plaintiff. The Court found that the statute involved in the receivership matters did not provide for the allowance of attorney’s fees for a judgment creditor, and that no other basis existed for the attorney’s fee for the plaintiff. *Id.*, at 340. There was no authority supporting the award of an attorney’s fee to the plaintiff.

Likewise, in the present case, there is no statutory authority or rule providing for post-judgment attorney’s fees and expenses, and any claim made by Team IA based upon Paragraph

² The Court notes that post-judgment attorney’s fees have been allowed where the contract provision expressly provided for post-judgment attorney’s fees and expenses, *e.g.*, *Arbor Lake, LLC v. Enterprise Bank & Trust*, 334 P.3d 344 (2014), or where a statute specifically provides for post-judgment attorney’s fees, *e.g.*, Cal. Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney’s fees and expenses incurred in pursuing collection of a judgment.

VII (G), which was extinguished by merger upon entry of the Judgment, is without valid basis. Team IA's claim must be denied.

3. No Statutory Basis for Post-Judgment Attorney's Fees and Expenses.

Team IA argues that the doctrine of merger is inapplicable because, in the same manner that interest may accrue on a judgment at the contract rate instead of the legal rate established for judgments, the contract provision for attorney's fees and expenses should survive the judgment. However, this argument overlooks the fact that the accrual of interest on a judgment is authorized and provided by statute, S.C. Code Ann. §34-31-20 (Supp. 2015). This statute states, "A money decree or judgment of a court enrolled or entered *must* draw interest according to law." S.C. Code Ann. §34-31-20(B) (emphasis added). The statutory rate under this statute is applicable only in the absence of a written agreement between the parties setting a different rate of interest. *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. 289, 293, 251 S.E.2d 738, 741 (1979). There is no comparable statutory provision in South Carolina providing for post-judgment attorney's fees and expenses on a judgment.

CONCLUSION

Both parties note that South Carolina follows the American attorney fee rule that each side pays its own attorney fees unless there is a fee shifting statute or contract. Here, there is no such fee shifting statute, the underlying language is capable of a broad or narrow reading, comparable attempts to expand award of attorney fees to bankruptcy or appellate actions has been rejected, and same analysis would seem to apply to Supplemental Proceedings, a separate legal action to collect a non-exempt assets. Team IA's remedy is upon its Judgment, not upon the Employment Agreement. The doctrine of merger applies to this case, to the effect that the claims under the Employment Agreement are merged into the Judgment and the contract provisions are extinguished. The attorney's fee and expense provision in the Employment Agreement does not

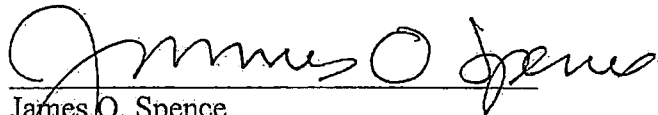
expressly include post-judgment attorney's fees and expenses, so as to survive merger into the Judgment, and it is now extinguished by merger into the Judgment. Team IA's request for post-judgment attorney's fees, expenses and costs is denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that Team IA is not entitled to include post-judgment attorney's fees and expenses as part of Lucas' indebtedness under the Judgment, and its claim for post-judgment attorney's fees and expenses is hereby denied.

AND IT IS SO ORDERED.

December 15, 2016

Lexington, South Carolina


James O. Spence
Master-in-Equity for Lexington County

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3201078**

TEAM IA INC Bryan Michael James Triplett		Cicero Lucas 5 Point Solutions LLC	George Lawson IV
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT**, This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

1/3/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on 12/22/2016, and a copy mailed first class or placed in the appropriate attorney's box on 1/3/2017, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Fredrick Goings, Esq.
PO Box 436
Columbia, SC 29202

W. Andrew Arnold, Esq.
307 Pettigru St.
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa Comer/ppb

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
