

NO. A09-151

State of Minnesota  
**In Court of Appeals**

JADT Development Group, LLC,  
Timothy O. Baylor, and Doris P. Baylor,

*Appellants,*

v.

First Choice Bank,

*Respondent.*

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**APPELLANTS' BRIEF, ADDENDUM AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ISSUES

1. Whether the district court erred in granting summary judgment for the lender. Specifically, whether the district court erred in rejecting Appellants' arguments that the lender breached the agreements by failing to advance on the loan for marketing expenses and architectural fees that were crucial to and caused Appellant to not meet the 40% presale requirement or whether this presents a genuine issue of material fact for determination at trial. In other words, whether the district court erred by not concluding that Appellants' purported breach of the loan agreement (failing to make payment) was caused or procured by the lender's breach of failing to advance funds.

The district court adopted the lender's argument and held that the lender had no obligation to advance funds for costs such as marketing and architectural fees until Appellant JADT Development Group, LLC ("JADT") had met a 40% pre-sales requirement. Add. 7, ¶¶ 32-33.

2. Alternatively: Even if the district court did not commit error in granting summary judgment to the lender, whether the district court's conclusions of law allowing for only a 6-month redemption period is correct, instead of a 12-month redemption period under Minn. Stat. § 580.23.

The district court adopted the lender's argument and effectively concluded, without directly stating the same, that JADT had only a 6-month redemption period by holding that the original principal amount secured by the mortgage under the relevant statute is \$4,530,307.02. Add. 10, ¶¶ 19-21.

3. Alternatively: Even if the district court did not err in granting summary judgment to the lender, did the district court err in granting the lender the sums that lender requested, including over \$200,000 in late fees and significant sums of attorney's fees, including fees for prosecution or defense of claims involving other parties and fees which were unrelated to the prosecution of claims against the Appellants.

The only attorney's fees which the lender requested which were denied were fees pertaining to Winthrop & Weinstine's unsuccessful work in attempting to foreclose the mortgage by advertisement. Add. 9, ¶¶ 11-12. Otherwise, the district court awarded the lender its attorney's fees in full. Add. 7, ¶ 30. In addition, the district court awarded the lender its full amount of requested late fees. Add. 6, ¶ 24.

## STATEMENT OF THE CASE

Respondent First Choice Bank ("First Choice") sued Appellant JADT Development Group, LLC ("JADT") for Default on a \$19.125 million Note and sought to foreclose the real estate, essentially vacant land, which secured the Note. (Counts I and IV of the Complaint). The purpose of the Note was to advance sufficient funds to construct condominiums on one of the few parcels of land located in Minneapolis that bordered the Mississippi River which could be developed. However, funds were never advanced by First Choice to actually construct the units. Rather, the funds advanced were sufficient to purchase the parcels, do some site development such as the demolition of an eyesore building on one of the parcels, and to cover initial project costs such as architectural fees and marketing costs to presell the condominium units prior to construction.

Respondent also sued the principles of JADT, Appellants Timothy and Doris Baylor, husband and wife (the "Baylors") for Breach of Guaranty that the Baylors had entered into in connection with the Note between JADT and Respondent. (Count II of the Complaint).

Respondent brought a motion for summary judgment. Respondent's motion for summary judgment was heard by the Honorable Robert A. Blaeser, Hennepin County District Court Judge, on March 31, 2008. Add. 2. The District Court took the motion for summary judgment under advisement.

Ultimately, the District Court granted First Choice's motion for summary judgment. Pursuant to a Judgment and Amended Findings of Fact, Conclusions of Law

and Order entered on May 13, 2008, amended on August 22, 2008, and later amended on November 26, 2008, the district court caused judgment to be entered in favor of Respondent First Choice Bank ("First Choice") against JADT in the sum of \$5,578,577.59. Add. 1-15.

Subsequently, the real estate has been sold at a sheriff's sale and pursuant to the district court's order which is being appealed herein, the mortgaged parcels are under a 6-month redemption period as opposed to the 12-month redemption period which Appellant contends is appropriate.

Appellants' appeal from the judgments that have been entered against them, specifically challenging the District Court's grant of summary judgment; and alternatively the district court's legal conclusion that a 6-month redemption period applies and that Respondent is entitled to the attorney's fees and late fees that it was awarded.

## STATEMENT OF THE FACTS

Appellant JADT is a developer of real estate. A.A. 60. The principle owners of JADT are Timothy and Doris Baylor, although Mr. Baylor is the primary actor in terms of JADT's involvement in this matter. Id. JADT planned to develop parcels of real estate along the Mississippi River in Minneapolis, Minnesota. A.A. 60-69. As a part of the planned development, JADT sought financing from lenders. Id. Ultimately, the lender became First Choice (not Franklin National Bank) and First Choice underwrote a \$19.125 million loan to fund and develop the real estate which JADT was developing, to wit, Phases II, III, and IV which correlate to the three parcels of land subject to Respondent's Mortgage. Id. and A.A. 133 specifying the three parcels of real estate and how each would be a separate phase of development, Phases II, III, and IV.

The \$19.125 million loan with First Choice closed on March 22, 2005. A.A. 70. The Loan Agreement did not mature until March, 2007, although the precise date that the loan was to mature in March does not appear to have been filled in on the Loan Agreement. A.A. 74.

Prior to closing in March, 2005, First Choice was presented with and approved of a prospectus/plan for the development of Phases II, III, and IV. A.A. 21-22 at ¶ 18 of the Baylor Affidavit; A.A. 59-69. The prospectus/plan called for funding of architectural fees and marketing expenses, propounded a budget for the same to be funded with the loan proceeds, and the anticipated timing of when these loan proceeds to fund such expenses would be needed. A.A. 63-69. For instance, the early months of the development show that after land acquisition and demolition of an "eyesore" building

(A.A. 66) which was supposed to happen right away (but did not due to lender delays of approximately one year – A.A. 19 at ¶ 9), consulting, overhead, marketing, brokerage, and other “soft costs” would be significant in the subsequent months and that overall “marketing” costs for Phase II of the development alone were anticipated to be \$250,000. A.A. 63. In fact, the prospectus labeled “architectural” fees as a “hard cost”<sup>1</sup> and not a “soft cost.” A.A. 63. First Choice knew and understood that funding marketing expenses and architectural fees were critical to the success of the development. A.A. 18-20 at ¶¶ 5, 9, 10, 11, 12, and 13.

At the closing on March 22, 2005, First Choice did fund some initial marketing and architectural expenses in the sums of \$97,139.33 for KKE Architects and \$42,686.45 to the Star Tribune. A.A. 23. And JADT reasonably expected, consistent with the loan closing as well as the Loan Agreement and other loan documents and the lender approved prospectus/development plan, that the following would occur: timely funding of the tear down of the “eyesore” building on the real estate, timely and sufficient funding of marketing expenses to be able to presell the planned condominium units, and timely and sufficient funding of architectural fees so that the architects could timely finish development of necessary drawings. A.A. 17-20; A.A.23; A.A. 59-69.

However, after the loan closing, the funds dried up. First Choice failed and/or refused to timely fund necessary marketing expenses, architectural fees, and demolition costs associated with the removal of the “eyesore” building. A.A. 17-21 at ¶¶ 5, 6, 10,

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<sup>1</sup> The loan documents do not define a “hard cost” as opposed to a “soft cost.” Given the lack of definition, what is a per se “hard cost” as opposed to a “soft cost” is unclear.

11, 12, 13, 14; A.A. 49 showing that funds for demolition of the eyesore building were not advanced until June 30, 2006 even though this was an expense that was anticipated from the beginning; A.A. 46 showing issues with funding so that a demolition permit can be obtained in August 2005.

As a result of the lack of sufficient funding and funding delays to permit JADT to appropriately and timely market the project, no condominium units were actually ever constructed, and it became an obvious impossibility to pay the First Choice loan. Hence, the instant suit.

## ARGUMENTS

### I. SUMMARY JUDGMENT STANDARD AND STANDARD OF REVIEW

Summary judgment is only appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The evidence must be viewed in the light most favorable to the nonmoving party. Grondahl v. Bulluck, 318 N.W.2d 240, 242 (Minn. 1982). A "material fact" is one which will affect the result or outcome of the case depending on its resolution. Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524 (Minn. App. 1993). A trial court is not to decide factual issues on a motion for summary judgment, but rather is to determine whether any factual issues exist. Johnson v. State, 478 N.W.2d 769 (Minn. App. 1991), rev. den. (1992).

To the extent that credibility issues exist, these issues must be resolved in favor of the nonmoving party as the trial court is not to make credibility determinations on a summary judgment motion. Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (Minn. 1957). All doubts and inferences as to the existence of a genuine issue of material fact must be resolved against the moving party. Id.

The function of the appellate court on appeal from summary judgment is to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. Lahr v. American Family Mutual Insurance, 528 N.W.2d 257 (Minn. App. 1995). The appellate court is to presume that all genuinely disputed issues of fact may be resolved in favor of the party against whom the judgment was rendered. Unborn Child v. Evans, 310 Minn. 197, 245 N.W.2d 600 (Minn. 1976). The nonmoving party is to receive "the benefit of that view of the evidence which is most

favorable and is entitled to have all doubts and factual inferences resolved against the moving party.” Lindner v. Lund, 352 N.W.2d 68, 70 (Minn. App. 1984) citing Nord v. Herried, 305 N.W.2d 337, 339 (Minn. 1981). If the Court of Appeals determines that a genuine issue of material fact exists, the case must be remanded to the trial court for a determination of those factual issues. See Caledonia Community Hospital v. Liebenberg Smiley Glotter & Assocs., 308 Minn. 255, 248 N.W.2d 279 (Minn. 1976).

**II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE LENDER BY REJECTING APPELLANTS’ ARGUMENTS THAT THE LENDER BREACHED THE AGREEMENTS BY FAILING TO TIMELY AND SUFFICIENTLY ADVANCE FUNDS SO THAT ANY PRE-SALES REQUIREMENT COULD BE MET.**

Respondent First Choice’s own breaches of the agreements at issue prompted the breach (failure to pay) of which First Choice complains. This principles of the law involved here are such bedrock contractual principles law that it almost goes without saying that: (1) breach of contract by one party excuses performance by the other party; (2) contract performance by a party is excused when it is hindered or rendered impossible by the other party; and (3) it is a breach of contract when one party unjustifiably impedes the other’s performance because every contract in Minnesota contains an implied covenant of good faith and fair dealing that each party will not unjustifiably hinder the other from performing. See 4 Minnesota Practice, Jury Instruction Guide – Civil, CIVJIG 20.45; National Union Fire Ins. v. Schwing America, Inc., 446 N.W.2d 410, 413 (Minn. App. 1989) (Indicating approval of jury instructions to the same effect as CIVJIG 20.45 as well as jury instructions to the effect that a breach of the parties’ agreement includes a breach of provisions that may be implied from express language in a contract); Wasser v.

Western Land Securities, Co., 107 N.W. 160, 162, 97 Minn. 460, 466 (Minn. 1906) (“It is elementary that a breach of a contract by one party excuses performance by the other.”); Peterson v. Mayer, 49 N.W. 245, 46 Minn. 468 (Minn. 1891) (Plaintiff employee who failed to perform his contract of employment because he failed to perform an implied condition of honesty in the contract and embezzled the employer’s funds, was not due any wages under the contract as a result of his breach of the contract.)

It is also not beyond the realm of reason that aside from a lender’s breach excusing a borrower’s breach, that a lender such as First Choice can even be liable for damages to a borrower when that lender fails to fund a loan as agreed. See Native Alaskan Reclamation and Pest Control, Inc. v. United Bank Alaska, 685 P.2d 1211 (Alaska 1984) (Borrower could receive expectation damages where the borrower’s inability to obtain replacement financing was a foreseeable consequence of the bank’s breach of a loan agreement and bank did not fund as required.); Sergeant Co. v. Clifton Bldg. Corp., 423 A.2d 257 (Md. App. 1980) (Borrower could receive damages where home buyers rescinded their contracts with the builder to purchase as a result of the lender’s breach.)

***A. There is a Genuine Issue of Material Fact as to Whether the Lender’s Failure to Timely Advance Funds Caused Appellants’ Default.***

Respondent First Choice had an obligation to timely and adequately fund architectural fees and marketing expenses so that JADT could presell the units as required. How is JADT supposed to presell 40% of the units if the lender does not fund the necessary marketing expenses that are and always have been a part of the projected plans that the lender approved and agreed with in making the loan? How is JADT

supposed to presell units if the lender, inconsistent with the plans that the lender approved from the beginning, does not timely or sufficiently disburse so that the architect can complete plans and drawings which allow JADT to market and presell units or where the lender does not timely disburse for the tear down of an eyesore building that negatively impacts a prospective condominium owner's viewing of the property. In other words, how is the car going to go without gasoline?

First Choice's argument to the district court, an argument which the district court accepted, is that First Choice had no obligation to fund any architectural expenses, to fund the tearing down of the eyesore building, or to fund any marketing expenses until JADT reached a 40% presale requirement. This notion is entirely absurd.<sup>2</sup> If JADT, and the Baylors, as guarantors, thought for one instant that First Choice would not fund necessary marketing expenses, necessary architectural expenses, and the necessary demolition costs associated with the eyesore building, all as built into the development plans prior to JADT and the Baylors signing the loan agreements, JADT and the Baylors would have never signed the loan agreements. This is the case because all of this funding, which First Choice either did not advance in sufficient amounts or did not

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<sup>2</sup> What was the point of preparing a budget for the condominium units which showed the demolition of the eyesore building being funded immediately? What was the point of preparing a budget for the development that showed consistent funding of marketing expenses and/or architectural expenses prior to construction of any condominium unit? First Choice's suggestion that its loan documents did not require it to advance a single penny for the demolition of the eyesore building or for marketing expenses or architectural costs until JADT, by some miracle, presold 40% of the condominium units, is a tortured argument that is entirely inconsistent with general business and real estate development as well as inconsistent with the actual loan documents and the documents

advance on a timely basis, was the very gasoline that was needed to have any realistic expectation that a 40% presales requirement could be met.

In this matter, JADT submitted evidence, which really was undisputed, that the lender failed to fund marketing, architectural, and other expenses on a sufficient and a timely basis to allow JADT to sufficiently presell the units. A.A. 17-20. As just one example, JADT in particular alleged that an eyesore building on the site needed to be demolished so that the site appeared to be more attractive to interested condominium buyers. Although the lender ultimately funded this demolition, it did so many months after it was asked to do so, causing JADT invaluable lost time and opportunity to presell the units. See and compare A.A. 46 where in August, 2005, it is clear that JADT and a contractor are ready to proceed with demolition with A.A. 49 which shows that First Choice did not advance funds to accomplish this until June 30, 2006. Whether the issue of the lender's failures (breaches) caused JADT to fall short on the presale requirements is inherently an issue of causation that a fact finder would need to determine upon a full hearing on the merits. See Hamilton v. Independent School District No. 114, 355 N.W.2d 182, 184 (Minn. App. 1984) (Causation issues are fact issues to be determined by a finder of fact after a hearing/trial and cannot be determined on summary judgment.)

***B. The Lender's Reliance on Paragraph 5.10 of the Loan Agreement to Refuse to Fund the Loan is Erroneous. The Provision is Inapplicable.***

It is black letter contract law that if a contract provision is ambiguous, the provision must be construed against the drafter, the lender, in this case. Rusthoven v.

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such as the project prospectus and budgets that led to the loan being closed on March 22,

Commercial Standard Ins. Co., 387 N.W.2d 642 (Minn. 1986); Deutz & Crow Co, Inc. v. Anderson, 354 N.W.2d 482, 486 (Minn. App. 1984). Furthermore, if there is an ambiguity in the contract, parol evidence may be looked at to explain it. Id.

Whether contract language is ambiguous is a question of law. Columbia Heights Motors, Inc. v. Allstate Ins. Co., 275 N.W.2d 32, 34 (Minn. 1979). Any term or provision of a contract that is susceptible to more than one meaning is ambiguous. Id. The term “ambiguous” means: 1) liable to more than one interpretation; 2) uncertain or indefinite. Synonyms for the word ambiguous include: cloudy, equivocal, nebulous, uncertain, unclear, unexplicit. Webster’s II, New Riverside Dictionary, Revised Edition (Paperback 1996).

What First Choice contends is that because JADT did not meet the pre-sale requirement of 40% of the units (JADT ultimately presold 28% of the planned units as per A.A. 20, ¶ 13), it had no obligation to fund anything. Appellants would agree that First Choice would not have to fund construction work to actually construct the condominium units, but that is not the relevant issue to be considered. Section 5.10 of the Loan Agreement, which is the provision that First Choice strenuously cited to the district court, does not resolve the issue that is Appellants’ complaint. Rather, Section 5.10 deals with construction costs. What Appellants contend is that First Choice failed to adequately and timely fund the architectural costs and marketing costs which were planned for, anticipated, understood and which would naturally occur prior to the first

brick being laid. These are the costs which were necessary to actually meet and get to the 40% pre-sale requirement.

Specifically, Section 5.10 of the Loan Agreement states:

Section 5.10 Pre-sales. Prior to any disbursement of Loan Proceeds to pay for any construction work (including soft costs) on Phase II of the Premises, Borrower shall provide to Lender evidence, satisfactory to Lender, that Borrower has sold not less than forty percent (40%) of the total number of Units to be constructed on Phase II and, prior to any disbursement of Loan Proceeds to pay for any construction work (including soft costs) on the Phase IV portion of the Premises, Borrower shall provide to Lender evidence, satisfactory to Lender, that Borrower has sold not less than sixty percent (60%) of the total number of Units to be constructed on Phase II and Phase IV in the aggregate.  
(emphasis supplied)

Section 5.10 governs the funding of construction work, including soft costs [which are not definitively defined in the loan documents] which exist during construction. The provision says nothing and does not apply to costs or start up expenses that are incurred during a the start up or pre-construction phase of the development and the loan. First Choice's argument contradicts the reality that there would be many months between the loan closing and actual commencement of construction wherein JADT would be finalizing the architectural plans, marketing itself and the condominium units to be built, and needing to have the eyesore building tore down. The prospectus with project budget showing lender advances, a document that First Choice would have received in approving to be the lender in this project, makes this clear. A.A. 59-69. For instance, it goes without dispute that the lender did not fund the demolition of the eyesore building

until the summer of 2006 even though this was a known expenditure when the loan closed and even though JADT was obviously prepared to proceed with the demolition, at the latest, in the fall of 2005. See A.A. 63 and A.A. 66 wherein it is projected immediately that \$91,000 in demolition costs would be needed immediately, in month one.<sup>3</sup>

The district court utterly ignored the significance of the Affidavit of Timothy Baylor in entering summary judgment but rather simply rationalized, consistent with First Choices argument, that Section 5.10 was the “everything” as far as the contract was concerned as to whether First Choice had any obligation to fund a single penny. If such was actually the case, the loan agreement and documents simply could have said that First Choice will not fund any expenses of any kind, whether they be architectural, whether they be for marketing, whether they be for tearing down of the eyesore building, or whether they be for general site preparation, until JADT has presold 40% of the units. The loan documents do not say this and are certainly not clear that this is the case.

Rather, aside from the prospectus and budgets that led to the loan agreement which clearly show lender funding of architectural, marketing, and demolition expenses (A.A. 59-69), and aside from the loan closing statement which show that architectural expenses and marketing expenses are funded and clearly envisioned by the loan agreements (A.A. 23), other provisions of the loan agreement (A.A. 73-109), which the district court ignores, support Appellants’ position; or at a minimum, suggest that the

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<sup>3</sup> Ultimately, it took just shy of \$89,00 to demolish the building. See A.A. 47.

loan documents are ambiguous. For instance, the following provisions of the loan agreement certainly suggest that there will and ought to be funding prior to a 40% presales requirement being met:

Section 1.33 Sworn Construction Cost Statement. The detailed hard and soft cost budget for the costs of acquiring the Real Estate and constructing the Improvements, a copy of which is attached as Exhibit D.<sup>4</sup>

Section 7.1 Using Loan Proceeds. Borrower shall use the Loan Proceeds solely to pay, or to reimburse Borrower for paying, costs and expenses shown on the Sworn Construction Cost Statement and incurred by Borrower in connection with the acquisition of the Real Estate, the construction of the Improvements and the equipping of the Improvements, together with other expenses set forth on the Sworn Construction Cost Statement and such incidental costs and expenses relating thereto as may be approved from time to time in writing by Lender. No proceeds of the Loan may be used to pay any construction, management, development or contractor's fees to Borrower, Guarantor or any Affiliate.<sup>5</sup>

Section 7.8 Loan in Balance.

(a) Anything in this Agreement to the contrary notwithstanding, it is expressly understood and agreed that the Loan at all times shall be in balance. The Loan shall be deemed to be in balance only when the undisbursed Loan Proceeds equal or exceed the amount necessary, based on Lender's estimates, to pay all unpaid costs to complete the Improvements in accordance with the Plans and to pay the amounts necessary for the estimated or actual costs of start-up expenses, sales commissions, interest expense, initial

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<sup>4</sup> This provision makes it clear that there is a budget, some other document or documents which is being followed in the funding of the loan (e.g. the budget contained in the prospectus for the loan), and that there are both hard and soft costs which should be funded by the lender. Although hard and soft costs are undefined by the Loan Agreement, a hard cost is typically the actual brick and mortar expense, so that such things as marketing and architectural fees are clearly contemplated as being costs which would become a part of the loan.

<sup>5</sup> Section 7.1 makes it clear that there are other miscellaneous or incidental costs which are envisioned as being a part of the loan, not just brick and mortar costs.

operating deficits, including all operating expenses and interest expenses though the date Lender projects breakeven operations, the expense of items set forth in Section 7.3 hereof, and all other non-construction costs associated with the Loan and with Borrower's actual or proposed use of the Premises and Improvements.<sup>6</sup>

Section 9.2 Time of the Essence. Time is of the essence of this Agreement.<sup>7</sup>

Also, per the Disbursing Agreement (A.A. 50-58), the following language exists:

6. Other Costs. The provisions of this Agreement requiring submission of the architect's certificate and related documents specified in Paragraph 5, shall not apply with respect to Loan Proceeds to be disbursed for the items listed below, which may be disbursed in full upon submission of a Draw Request listing such items signed by Borrower or Lead Lender, and/or the following special documentation, if any, to Lender, Lead Lender and Title Company (unless said disbursement is made to Lead Lender), or as otherwise provided by the Loan Agreement:

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<sup>6</sup> This section of the loan agreement specifically discusses start-up expenses which would include architectural fees to get the drawings in a finalized state to be able to show potential condominium owners and marketing expenses to attract condominium buyers so that the pre-sale requirement could be met. In addition, this provision discusses that there are to be loan monies advances for "non-construction costs" and that there are "Lender's estimates" and a date where the "Lender projects breakeven operations." These concepts have their genesis in the prospectus and how JADT has laid out how funding is needed prior to construction. In addition, the fact that this section of the loan agreement discusses funding for "interest expenses" suggests that the lender will be and expects to be funding by advances any interest payments required on the loan until the project cash flows from the sale of the units. This provision therefore is contrary to the suggestion that the lender is entitled to late fees as the lender was awarded by the district court.

<sup>7</sup> This provision means that the lender's funding for expenses should be timely. As real estate markets may change, timeliness is critical. Appellants submitted evidence that if viewed in a light most favorable to them, that the lender did not act in either a timely or a sufficient manner in funding architectural expenses, marketing expenses, and even the demolition of the eyesore building such that the lender made it impossible for JADT to meet the 40% pre-sale requirement.

ITEM

SPECIAL  
DOCUMENTATION

Lead Lender charges (interest, fees, etc.)	None
Property management fees (to the extent Set forth on Lender-approved Sworn Construction Cost Statement)	Invoice
Attorney's fees (including Lead Lender's counsel) and Inspecting Architect's fees	Copy of Statement
Real estate taxes on the Real Estate and Improvements	Copy of Bill
Insurance Premiums	Copy of Statement
Other indirect costs	As specified by Lender, Lead Lender and Title Company

Subject to Lender's, Lead Lender's and Title Company's approval, if Borrower has paid certain costs of construction, Title Company may disburse Loan Proceeds advanced for payment of such construction costs directly to the operating account of Borrower with Lead Lender, as a reimbursement for such payment; provided that all of the other requirements of this Agreement, including but not limited to the presentation of waivers of lien with respect thereto, are fulfilled.<sup>8</sup>

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<sup>8</sup> This section makes it clear that contrary to the district court's conclusions, the loan documents clearly envision the disbursement of loan proceeds prior to construction beginning and a 40% presale requirement being met. Items which might be construed as "soft costs," such as attorney's fees, architect's fees, and insurance premiums, and other indirect or incidental costs such as marketing expenses, are supposed to be funded. In addition, the lead lender is funding such things as property taxes and interest accrued on the actual loan (so that there is no late charge on the interest payment). Significantly, as is evidenced by the documents, real estate taxes had to be paid current for the City of Minneapolis to issue a demolition permit to tear down the eyesore building and First Choice delayed in not only funding the actual demolition expense but also in funding the payment of the real estate taxes to allow the contractor to get a permit to do the work. (See and compare A.A. 46 to A.A. 49).

Based upon the parties' own agreements, the lender's failure to fully and timely fund marketing costs needed to effectively presell units, architectural fees effectively required to be able to presell units, and demolition costs for an "eyesore" building, meant that the lender was not living up to its end of the bargain. This presents a genuine issue of material fact that should have precluded any grant of summary judgment.

**III. THE DISTRICT COURT ERRED BY CONCLUDING THAT A 6-MONTH REDEMPTION PERIOD IS CORRECT INSTEAD OF THE 12-MONTH REDEMPTION PERIOD ALLOWED BY MINN. STAT. § 580.23, SUBD. 2(2).**

The district court has misapplied Minn. Stat. § 580.23 in effectively holding that JADT is only entitled to a 6-month redemption period. Minn. Stat. 580.23, subd. 2(2) provides that the redemption period shall be twelve months when "the amount claimed to be due and owing as of the date of the notice of foreclosure sale is less than sixty-six and two-thirds percent of the **original principal amount secured by the mortgage.**" (emphasis supplied) In this case, the original principal amount secured by the mortgage is \$19.125 million. Any other figure would be illogical and incorrect.

Inclusive of interest and fees, First Choice has alleged that it is due approximately \$5.5 million. The district court concludes at ¶ 21 of its Conclusions of Law that the original principal amount secured by the mortgage is approximately \$4.5 million, not \$19.125 million. First Choice argued and the district court concluded that the **original principal amount secured by the mortgage is whatever First Choice claims that it advanced on the loan.** However, it cannot be disputed that the face amount of the loan is \$19.125 million. This is the original loan amount and the original mortgage amount.

Accordingly, since \$5.5 million is less than 30% of \$19.125 million (and therefore less than 66 and 2/3rds %), a 12-month redemption period should exist.

The legal conclusion which the district court reaches is simply contrary to the plain language of the applicable statute. It is also not logical in that consistent application of what the district court did in this case would result in an absurdity that one could never be below 100% in the calculation because the denominator would be the present principle balance and the numerator in the calculation would be that present principle balance plus interest and fees, a result which invariable means that the numerator is greater than the denominator.

The issue of what redemption period applies is of particular importance given that the foreclosure sale has already occurred at the time of the writing of this appeal. Thus, the Appellants are presently in the midst of the redemption period.

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT ITS REQUEST FOR ATTORNEYS' FEES AND COSTS.**

The District Court awarded Respondent its attorney's fees with a singular exception. Although the district court has discretion in making an award of attorney's fees, it should exercise that discretion with some scrutiny in that it must ultimately determine the reasonableness of the fees. See Kittler & Hedelson v. Sheehan Properties, 203 N.W.2d 835 (Minn. 1975). Furthermore, when making an award of attorney's fees, duplicative billings should not be awarded and billings spent on unsuccessful claims should be factored in so as to reduce the award. See Johns v. Harborage I, Ltd., 585 N.W.2d 853, 863 (Minn. App. 1998). In addition, Minn. Gen. R. Prac. 119 should be

followed in making any application for attorney's fees, and where the Respondent has not strictly followed this rule and submitted insufficient information in keeping with the rule, the requested fees should be denied. In making its award of fees in this matter, the District Court abused its discretion and did not give appropriate credence to a number of issues which strongly suggest the unreasonableness of the fees.

First, the entire, if not the great majority, of the expense of this litigation was unnecessary in that the only reason that First Choice proceeded with a foreclosure by action is because its attorneys made a mistake in the legal description on the original mortgage, thus necessitating reformation of the mortgage. Consequently, the litigation itself was necessitated by the fact of First Choice's errors. The district court recognized in a small sense the impropriety of First Choice's request by disallowing the fees from the Winthrop & Weinstine firm because the Winthrop firm, which drafted the defective mortgage instrument, attempted to foreclose improperly by advertisement when the mortgage needed to be reformed so as to provide for a correct legal description.

However, the district court did not go far enough in just excluding the fees for the false starts on the foreclosure by advertisement because the district court did not discount or reduce all of First Choice's other attorney's fees would not have been incurred but for the initial error of Winthrop & Weinstine in the mortgage. It defies equity that the Appellants should be charged with paying for fees that are born out of Winthrop & Weinstine's error.

Second, much of the litigation expense in this matter by First Choice was not incurred in prosecuting the Note or Mortgage against Appellants. Rather, comparatively,

less legal time was incurred in this process than in the process of First Choice prosecuting or defending against claims of other parties. For instance, First Choice Bank brought a motion for temporary injunctive relief primarily against another party in this matter, Riverview Muir Doran, LLC, a second mortgagee. That motion really involved a dispute between these parties on the Intercreditor Agreement entered into between them.

First Choice was ultimately unsuccessful in its motion against Riverview Muir Doran as the district court denied the motion. This was the very first motion brought in these proceedings. Nonetheless, the district court has allowed First Choice to add the attorney's fees and costs associated with that legal work to the judgment against JADT. For instance, in reviewing the billings that First Choice submitted, one can see that counsel charged \$1,575 (7.5 hours of time) just for an attorney to travel from Duluth to Minneapolis and argue and lose a motion against Riverview Muir Doran.<sup>9</sup> This small example does not include the unnecessary and unsuccessful attorney hours spent preparing and prosecuting the motion prior to the actual motion hearing, all of which have now been included in the judgment against Appellants. However, it is not discernible as to what amounts were also incurred on the unsuccessful task of preparing the unsuccessful motion paperwork because First Choice never submitted a "description of its work" to Appellants so that the same could be challenged by Appellants. Instead, First Choice only submitted a redacted copy of its billings, which is not in compliance with Minn. Gen. R. Prac. 119.

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<sup>9</sup> On September 24, 2007, Attorney Mihalek for Respondent traveled to the Twin Cities to unsuccessfully argue this motion.

In addition, the district court, after entry of judgment against Appellants, has allowed First Choice to continue to supplement and add to its claims of attorney's fees, even after final judgment has been entered in this matter. Neither First Choice, nor the district court, set forth any authority which allows for amendment of a judgment after it has become final or after its entry.

**V. THE LOAN DOCUMENTS DO NOT SUPPORT THE "LATE CHARGES" CLAIMED BY THE LENDER AND ADOPTED BY THE DISTRICT COURT IN ITS JUDGMENT.**

Below is an accounting of what First Choice advanced towards payment of actual costs such as the purchasing of land, demolition of the eyesore building, and funding of costs to third parties such as architectural fees and legal fees:

	<u>Amount</u>	<u>Advance Date</u>
	\$3,613,386.06	3/18/05 <sup>10</sup>
	\$67,427.00	3/22/05
	\$30,000.00	5/9/05
	\$104,957.42	5/15/06
	<u>\$178,636.86</u>	6/30/06
Total	\$3,994,407.34	

Despite the above, First Choice claims that it advanced the principle figure of \$4,530,307.02 to JADT. The difference between \$4,530,307.02 and \$3,994,407.34 is all capitalized interest or capitalized bank fees. This process of loan accounting used by First Choice is entirely unsupported by any authority which allows First Choice to both

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<sup>10</sup> It is unclear how this is really an advance date because the closing documents for the loan all reflect a close date of March 22, 2005. For instance, the Construction and Term Loan Agreement which is Exhibit 1 of the Thomas Bolduc affidavit is dated March 22, 2005. The Promissory Note is also dated March 22, 2005. Consequently, it would seem to be incorrect and inappropriate for First Choice's accounting system to start the interest

capitalize interest and/or fees and then presumably charge interest or fees on top of interest and fees, in essence, "double dipping." Fundamental fairness, and the lack of authority in any of the loan documents to allow for "double dipping" dictates that there should not be any late fee at all if interest is being capitalized; meaning essentially that any interest payment required is getting paid each month by virtue of its addition to the principal balance of the loan. First Choice was making advances on the loan to make any required interest payment. Given this, how can there be any late fee where First Choice's own accounting reflects a payment being made by virtue of an advance on the loan?

Furthermore, First Choice's calculation of over \$229,000 in late fees is bizarre and not in keeping with any reasonable reading of the loan documents. According to the terms of the Loan Agreement, Section 2.4 (A.A. 77), the payments are interest only payments until "Maturity" is reached sometime in March, 2007. Furthermore, per Section 2.6 of the Loan Agreement (A.A. 78) which governs late charges, late charges are only to be assessed against the monthly interest payments and are not assessed against the payment of principle due at maturity. Assuming accrued interest of about \$30,000 a month, as can be seen from First Choice's own accounting (A.A. 48-49), a 5% late charge is only \$1,500 a month. There are only 24 months between when the loan was made in March, 2005, and when it matured in March, 2007 (one cannot have a late charge after maturity in March, 2007 because the loan documents do not support the

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clock on March 18, 2005. Nevertheless, the district court simply adopted First Choice's loan accounting without question.

same), so the most that could exist in late charges is around \$36,000 (\$1,500 times 24), not the \$229,708.09 awarded by the district court.

### CONCLUSION

Based on the arguments herein, Appellants respectfully submit that the district court's grant of Summary Judgment must be reversed, and accordingly, any and all judgment amounts pursuant to the same must be vacated. In the alternative, any and all monetary judgments pursuant to the same should be reduced to eliminate the Respondent's claims for late fees and for the amounts claimed for attorney's fees as set forth herein.

Dated: February 23, 2009

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