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# State of Minnesota
# In Court of Appeals

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

*Appellants,*

v.

First Choice Bank,

*Respondent.*

## APPELLANTS' REPLY BRIEF AND RESTATED ADDENDUM

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[1] The Addendum is restated to include p. 7 of the district court's Findings of Fact, Conclusions of Law and Order made on April 30, 2008, as the same was inadvertently left off the original Addendum.

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## APPELLANTS' REPLY BRIEF ARGUMENTS

## I. INTRODUCTION

In Respondent's Brief, Respondent utterly ignores and deflects substantive arguments. Respondent's arguments border on the absurd and are illogical in an attempt to gloss over the clear errors that the district court made when it essentially ratified, without critical analysis, the positions and arguments of the Respondent on summary judgment. Summary judgment should not allow a district court to summarily reach a conclusion without a thorough and critical examination of the moving parties' facts and arguments. Yet, in this case, that is what happened at the district court level. A careful and thoughtful examination of the issues warrants reversal.

## II. RESPONDENT'S ARGUMENTS ON THE REDEMPTION PERIOD BEING 6 MONTHS ARE ILLOGICAL BECAUSE RESPONDENT'S POSITION WOULD ALLOW FOR AN EVER CHANGING "ORIGINAL" PRINCIPAL AMOUNT SECURED BY THE MORTGAGE.

A 12-month redemption period applies if "the amount due and owing as of the date of the notice of the foreclosure sale is less than 66-2/3% of the original principal amount secured by the mortgage." (emphasis supplied). Minn. Stat. § 580.23, Subd. 2(2). In its argument, Respondent contends that the original principal amount secured by the mortgage is the very precise sum of $4,530,307.02. Respondent's Brief, p. 26. In Respondent's view, the "original principal amount secured by the mortgage" is the same as the principal balance purportedly due on the on the date of the notice of the foreclosure sale. Accordingly, under Respondent's view, the original principal amount secured by the mortgage would be a

fluctuating number and would change as Respondent made advances. For instance, it is clear that at the time the loan closed in 2005, Respondent had only advanced the sum of $3,680,813.06[1] as per the Settlement Statement. A.A. 23. This fact is irreconcilable with Respondent now arguing that the "original principal amount secured by the mortgage" is a different sum, the sum of $4,530,307.02.

Appellants' argument that the original principal amount secured by the mortgage is $19.125M does not suffer from this contradiction or the weakness that the amount to be used is a fluctuating number when the statute clearly envisions that the "original principal amount secured by the mortgage" is a singular number that is known at the time the loan is made. In fact, the Settlement Statement itself shows and reflects that the "PRINCIPAL AMOUNT OF NEW LOAN" is $19.125M, consistent with the Appellants' position.

In short, Respondent's argument simply cannot be correct because it would mean that the numerator of the equation envisioned in the application of Minn. Stat. § 580.23, Subd. 2(2) would be a fluctuating number and that the word "original" as used in the phrase "original principal amount secured by the mortgage" as set forth in the statutory language would be meaningless. The term "original" means or implies that it is first and precedes all others in time or that it is in the very first form. An "original" cannot be something that is

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[1] Of the $4,944,363.06 paid out at loan closing, $30,000 came from JADT Development Group and $1,233,550 came from River View Muir Doran, LLC, leaving the remainder, $3,680,813.06 coming from Respondent, First Choice Bank. On First Choice's own loan statement at A.A. 48-49, the sums of $3,613,386.06 and $67,427.00 are shown as being advanced on March 18, 2005 and March 22, 2005, which when added together, come to a total of $3,680,813.06.

changing or is modified after its genesis/origination.

Additionally, Minn. Stat. § 580.04(1) may be instructive on this point in that in the notice of foreclosure sale discussed therein, this statutory section equates the terms "original" and "maximum" when discussing a principal amount of a loan. Although § 580.04 deals with foreclosures by advertisement, it is within the same statutory chapter regarding foreclosures. Since § 580.04(1) envisions a singular principal sum being set forth on the foreclosure notice, it is clear that the original principle amount secured by the mortgage is the same as the maximum principle amount secured by the mortgage. In this case, the use of the word "or" in § 580.04(1) obviously envisions the notion of a construction loan and that the principal amount being foreclosed is the one and only number that is the maximum principal amount secured by the mortgage.

## III. THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES IS CLEARLY ERRONEOUS.

The district court in this matter was little more than a "rubber stamp" for Respondent bank's attorney's fees. The district court, erroneously, did not require Respondent to comply with the complete requirements of Minn. Gen. R. Prac. 119 in making an application for attorney's fees. The district court, because it did not force Respondent's attorneys to describe their time and actions to justify their fees, paid or no heed as to whether Respondent's requests for attorney's fees was reasonable. The law simply does not support the award of either unreasonable or unsupported attorney's fees, and that is what happened here.

For instance, Appellants took issue with the notion that the district court awarded

Respondent attorney's fees for an unsuccessful motion to restrain the parties under an Intercreditor Agreement that primarily involved another co-defendant, Riverview Muir Doran, LLC. Respondent does not dispute that it requested fees involving an unsuccessful motion from the district court and that it was awarded the same in its arguments. Respondent's Brief, p. 30. Rather, Respondent now makes the maddeningly disingenuous argument that it should get fees associated with its futile motion because Appellants breached the Intercreditor Agreement. The notion or claim that Appellants' breached the Intercreditor Agreement is not a claim that Respondent ever made against Appellants and thus was not a claim in the case. See the Complaint at RA 10-17. In this litigation, Respondent has only claimed that River View Muir Doran, LLC violated the Intercreditor Agreement, and Appellants, to the extent that it matters, vigorously deny that they breached the Intercreditor Agreement. It is wholly unreasonable and outrageous for Respondent to overreach and request attorney's fees for claims not made against Appellants and for unsuccessful claims and motions. And it is not justified that the district court simply glossed over these issues and made such an award.

The fact that the district court simply glossed over and did not critically examine the Respondent's claim for attorney's fees is further exhibited by the fact that the district court did not require that Respondent fully comply with Minn. Gen. R. Prac. 119.02. Under Minn. Gen. R. Prac. 119.02(1), a party seeking an award of attorney's fees is supposed to submit an affidavit which shows a "description of the each item of work performed." Without a description of each item of work performed, the district court would not be able to discern if

the attorneys were requesting fees for "thumb twiddling" and Appellants herein would not have the necessary information to argue more specifically as to the reasonableness of the sums claimed. Even though the affidavit of Respondent's counsel, Shawn M. Dunlevy, states that his submissions "contain a description of each item of work performed," Mr. Dunlevy's affidavit clearly just parroted rule 119's language without complying with the same. A.A. 0000114, ¶ 3. One only need look at the "Matter Ledger Report" attached to Mr. Dunlevy's affidavit (the accounting provided for attorney time) to see that there is absolutely no description of the work performed and thus it is impossible to know whether the attorneys involved were "thumb twiddling" or doing something else, including prosecuting an unsuccessful motion for injunctive relief as discussed *infra.* Thus, Paragraph 3 of Mr. Dunlevy's affidavit submitted in support of an award of attorney's fees was not even facially accurate.[2] Yet, the district court, went along with the Respondent's request for a significant award of fees.

Fundamental fairness and due process would logically dictate that the reason that Minn. Gen. R. Prac. 119 requires that an attorney requesting fees submit a description of the work is so that parties such as Appellants have the fair and reasonable opportunity to assert that the requested fees are unreasonable or should not be awarded because they were duplicative, were unnecessary, were for work which did not benefit the client, or for any

[2] At page 29 of Respondent's Brief, Respondent states, "Bank complied with the Rule 119 requirements for an attorneys' fee award." Respondent, like in many of its arguments, has simply divorced itself from reality and the truth of the matter. There is clearly no description of the work performed which is clearly required by Minn. Gen. R. Prac. 119.

other reason which would warrant denial of the request.[3] Due process is involves the right of a party to controvert, by proof, every material fact that bears on the questions involved. See definition of "Due process of law" contained in Black's Law Dictionary, p. 500 (6th Ed. 1990).

Additionally, the district court made no specific finding that the attorney's fees requested by Respondent were reasonable. The district court only discussed an amount in its finding numbered as paragraph 30 (Add. 007) and does not make any legal conclusion that the same are reasonable. Perhaps this is because the requested amount of fees are in fact unreasonable and because the district court provides no trail in its findings and conclusions of law as to the precise amount of fees that it deemed to be reasonable. For all of these reasons and the lack of compliance with Minn. Gen. R. Prac. 119, the district court erred when it failed to simply deny Respondent's request for fees in their entirety.

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[3] Respondent cannot argue that it is not obligated to provide Appellants with some description of the work performed when requesting fees. Minn. Gen. R. Prac. 119.02 clearly requires that the motion papers, which would necessarily be served on Appellants, include a description of each item of work performed. Additional information may be submitted *in camera* as set forth in Minn. Gen. R. Prac. 119.03, but the very basic information of describing the work performed must be provided so that it can be fairly challenged. For instance, Appellants know that Respondent spent more than the 7.5 hours of time on September 24, 2007 pursuing its unsuccessful motion for injunctive relief. This 7.5 hours, as discussed in Appellants' initial brief, could be identified by Appellants because Appellants know the date that the motion hearing was conducted and presume that Attorney Mihalek spent that time arguing the motion and traveling to and from Duluth for the motion hearing. See p. 21 of Appellants' initial Brief. However, it is obvious that a number of additional attorney hours were spent preparing and researching the motion prior to the hearing date. However, Appellants are unable to fairly discern these hours because there is no "description of the work" performed and the district court obviously provided no discerning eye to the same either.

## IV. THE RESPONDENT IS CLEARLY NOT ENTITLED TO THE LATE FEES THAT IT CLAIMS AND THAT THE DISTRICT COURT AWARDED.

The Respondent is a financial institution that overreaches and either does not read or understand the very documents that it (or its attorneys) drafted. The fact that Respondent overreaches and simply makes a mess of things is illustrated by Respondent's initial ineptitude in the incorrect legal descriptions for the mortgage instruments which caused this matter to proceed as a foreclosure by action. On top of this, Respondent's closing agent and title company did not take precautions to ensure that Respondent's mortgage was in the first priority position and not overtaken by a mechanic's lien. This lien priority issue is the subject of a different appeal, Appellate Court Case No. A09-312. In addition, Respondent's failure to fund marketing and the very architectural expenses that would have resulted in a successful project have turned the entire situation into a financial disaster and legal mess for all involved.

Despite all of the ineptitude and failures of Respondent, Respondent continues to assert positions as if they are gospel based upon the imprimatur that they come from Respondent. However, one only need have some skepticism towards Respondent to realize how flatly wrong Respondent's position is. In this regard, on the late payment charges which Respondent asserts, the claim and the argument is simply outrageous and nonsensical. For example, Respondent recites Section 2.6 of the Loan Agreement to support its claim for late charges. This is the same section recited by Appellants. However, Respondent misapplies the same.

As Respondent's Brief recites, and as Appellants restate herein, Section 2.6 provides,

> Late Payment Charge. In the event that any required payment of principal or interest hereunder (other than the final payment to be made on the Maturity Date) is not made within ten days after the due date thereof, Borrower shall pay to Lender a late payment charge equal to five percent (5%) of the amount of the overdue payment....

The problem for Lender/Respondent is that Respondent's calculation of a late payment is based upon the final payment to be made on the Maturity Date. The express language of the Loan Agreement does not provide for a late payment for the final maturity date payment. See A.A. 110 wherein it is clear that the Respondent/Lender is calculating a 5% late charge based on a final payment to be made on the Maturity Date because it is based upon 5% of the alleged principal amount, plus interest, of over $4.5M due on maturity in November, 2006.

In addition, there another simple problem with the Lender/Respondent's argument. The Lender/Respondent made principal advances on the loan to make any interim payments prior to the final, maturity date, balloon payment. If the Lender/Respondent is making a loan advance to make any interim payments, the Lender/Respondent is accruing interest on those principal advances and the payment is timely made and not late according to Respondent's own loan accounting. One only need examine the Lender/Respondent's account at A.A. 48-49 to see that the Respondent is making loan advances for each interim or monthly payment that would be due. There is not a single speck of language in any of the loan documents that allows Respondent to charge a late fee when the Respondent is making principal advances to make the payment. This notion is confirmed by the fact that there are no interim late charges

reflected on the Respondent's accounting for the time period from the initial making of the loan in March, 2005, until the maturity in November, 2006. Again, Respondent overreaches and is divorced from reality.

## V. APPELLANTS ARE NOT PRECLUDED FROM CLAIMING THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE RESPONDENT BREACHED ITS OBLIGATIONS TO TIMELY ADVANCE FUNDS.

No party can reasonably dispute that the condominiums needed to be built in order for there to be a revenue stream by which any funds advanced by Respondent would be repaid. No party can reasonably dispute that the Respondent, in an agreement drafted by it, contained a 40% presales requirement before the "brick and mortar" that would constitute the condominium units would be built. However, these are not the issues that create a genuine issue of material fact to be sorted out. What is the issue, and it is also an issue that no party can reasonably dispute, is that the Respondent would be funding expenses such as architectural fees, site preparation expenses, and marketing expenses so that the 40% pre-sales requirement could be met. Nevertheless, Respondent disputes this notion and takes the extreme and unreasonable position that it was not obligated to advance a single penny prior to Appellant JADT reaching a 40% presale requirement. This notion falls part under the microscope of logic because if the 40% pre-sales requirement had to be met prior to Respondent having any obligation to fund such things as architectural fees, marketing expenses, site preparation expenses such as the demolition of an eyesore building on the parcels, then there would have been no reason to make the loan in the first place. Appellant

JADT would have simply had to go out and presell 40% of the proposed units and the Respondent/Lender would have only come in later to fund the actual construction of the "brick and mortar" of actually constructing the condominiums. However, this was not the deal and was not the purpose of the loan. The Respondent/Lender was to finance things such as architectural fees to have plans and working models of what the condominium buildings and units would look like, costs to demolish the eyesore building which detracted from the impression that potential condominium purchasers had of the site, and marketing costs so that Appellant JADT could effectively reach consumers in the marketplace to sell the units.[4] If the Appellants had known that the Respondent/Lender was not going to follow through and fund the amounts that had been anticipated and budgeted for these expenses, Appellants would never have agreed to the loan because the entire purpose of the loan would be defeated and the frustration and failure of the Project would be a *fait accompli*.

The Respondent's arguments are incorrectly dismissive of the logic and realities that underscored the entire purpose for the loan in the first place because that purpose was not just to find "brick and mortar" expenses. The purpose and the budgets supporting the purpose and the amounts needed to fund expenses which would need to be funded prior to actual commencement of construction were set forth in detailed budgets contained in the prospectus that the Respondent accepted prior to making the loan. Respondent does not deny this fact in

[4] Lender/Respondent was to finance these things regardless of whether they are a "soft" cost or a "hard" cost. To the extent that the loan documents use the term soft costs, there is an inherent ambiguity as to what these are because none of the loan documents ever define what is a "soft" cost or a "hard" cost.

any of its affidavits but merely asserts that these budgets or prospectus should be ignored. To turn a blind eye would be to ignore the facts and realities that underscored the essence of and purpose of the loan. Furthermore, one would also have to ignore the actual language contained in the various loan documents which either explicitly or implicitly make it clear that Respondent is to fund start-up expenses prior to actual construction such as architectural fees, marketing expenses, ongoing real estate taxes (which had to be paid current for Appellant JADT to obtain a permit to demolish the eyesore building as per A.A. 24-25), and the demolition expenses necessary to prepare the site as well as make the site more attractive to potential buyers. See Appellants' Brief, pp. 15-17 wherein other provisions of the loan documents are recited which support the notion that Respondent should fund these expenses. Significantly, Respondent's Brief fails to address the language in any of these other loan document provisions which is supportive of Appellants' position. See Sections 1.33, 7.1, 7.8, and 9.2 of the Loan Agreement at A.A. 73- 109 as well as paragraph 6 of the Disbursing Agreement seen at A.A. 50-58.

Taken to its logical extension and conclusion, what Respondent really argued to the district court and is continuing to argue on appeal, is that post-closing, it had no obligation to fund a single dollar of expense related to the Project, whether that be one more dollar for the architects to create a model of the buildings and units, whether that be a single dollar to tear down the eyesore building, or whether that be a single dollar so that Appellant JADT could advertise in local magazines or newspapers about the development. This notion is as absurd as it seems to be.

The Respondent artfully, but without legitimacy, seeks to evade its obligations to fund costs prior to construction so that a 40% presales figure could be met underscores the error committed by the district court. For instance, Respondent discuses waiver clause contained in a Forbearance Agreement. The Forbearance Agreement cannot be a bar to what Appellants assert because that particular agreement was signed on May 22, 2006. R.A. 180. However, the consistent funding problems (breaches of contract) caused by or perpetrated by the Respondent which led to JADT's inability to presell 40% of the units continued after May 22, 2006. The Forbearance Agreement itself discusses the long-delayed teardown of the eyesore building on the site to be developed (the Bellcomb Building discussed at ¶ 10 of the Forbearance Agreement) and that Respondent would be advancing the funds to tear down the same. See R.A. 177-178. However, Respondent, in keeping with its typical methods of operational failure, did not advance the funds immediately so that the tear down of the eyesore building was not accomplished until the fall of 2006. Any release contained in the Forbearance Agreement cannot apply to subsequent events and periods of time and cannot apply to an action which the Forbearance Agreement actually obligated the Respondent to perform – the funding of demolition costs of the eyesore building.

The Affidavit of Timothy Baylor clearly established the lack of timely funding of said demolition costs which squarely placed a fact issue before the district court as to whether Respondent breached its funding obligations and whether these breaches, which would precede in time any failure to pay the loan by Appellant JADT, caused/precipitated any failure to pay. See Affidavit of Timothy Baylor, ¶ 5 at A.A. 17-18; ¶ 9 at A.A. 19 wherein

Mr. Baylor states, "Full and quick funding of the "tear down" of the eyesore building and full and quick funding of necessary marketing expenses and architectural fees were critical to JADT's ability to market and sell the condominium units. First Choice [Respondent] obstructed and failed to fund quickly and fully in several aspects. First, it took approximately a year for First Choice to fund the tear down of the eyesore building. This "tear down" of the eyesore was critical because it was a detraction to potential customers who saw this old and rickety commercial building on the property. In other words, as potential condominium buyers came to view the site, they were not impressed by the existence of the building. First Choice knew that the building was an eyesore, that the building added no value to the property, and that it absolutely needed to come down. Yet, for a year, First Choice refused and delayed to fund the tear down." See also ¶ 14 at A.A. 20-21 wherein Mr. Baylor states, "Attached hereto and marked as Exhibits B and C are true and correct copies of documents wherein I had complained and or request sufficient and timely funding as it relates to the "tear down" of the eyesore building and marketing expenses. As can be seen from Exhibit C, the demolition of the eyesore building could not be done until First Choice funded this portion of the project, and this delayed the demolition until the Fall of 2006."

In addition, Respondent discusses the statute of frauds contained at Minn. Stat. § 513.33. First, § 513.33 purpose is to prevent enforceability of oral promises and the statute was enacted in response to the farm crisis. Rural American Bank of Greenwald v. Herickhoff, 485 N.W.2d 702 (Minn. 1992). However, there is nothing verbal being discussed by Appellants here. The actual loan documents (the writings) support the

contention that Respondent had loan funding obligations other than just funding the "brick and mortar" after a 40% presale requirement was met. Again, see Appellants' Brief (initial Brief) pp. 15-17. Second, § 513.33 does not require a perfect written contract. Id. The Court in Herickhoff used common sense in holding that a writing existed. Here, common sense dictates that the loan documents provide for the Respondent bank to fund expenses incurred prior to any 40% presale requirement being an issue – the so-called startup expenses or pre-construction phase expenses.

Furthermore, Respondent's argument misses the point that if any of the loan provisions of the loan documents are ambiguous, said provisions would be interpreted against the drafter, Respondent, and that documents such as the prospectus which contained a funding budget ought to be used to assist in explaining or understanding the loan documents. These documents, as not disputed by Respondent, show the actual amounts that are to be funded and the timing of the funding as it respects marketing expenses, architectural expenses, and demolition expenses pertaining to the eyesore building. It has not been disputed by Respondent in these proceedings that Respondent did not fund in accordance with the budgets and plans that were the foundation for the making of the loan and for the loan documents in the first place. Thus, it is only be ignoring facts and reality and through mistaken artfulness, that Respondent has sought to excuse its failures and breaches of the loan documents and the fundamental purpose of the loan.

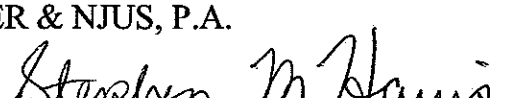
## CONCLUSION

The district court obviously glossed over the substance of Appellants' meritorious

arguments. For the reasons enumerated by Appellants, the district court's decision should be reversed.

MEYER & NJUS, P.A.

Dated: April 13, 2009

By: 

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