

No. A09-151

STATE OF MINNESOTA
IN COURT OF APPEALS

First Choice Bank, an Illinois state
banking corporation,

Respondent,

vs.

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

Appellants,

and

Riverview Muir Doran, LLC, Darg, Bolgrean,
Menk, Inc. and KKE Architects, Inc.,

Defendants.

RESPONDENT'S BRIEF

Stephen M. Harris
Attorney Registration No. 0264179
Meyer & Njus, P.A.
1100 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, Minnesota 55402
(612) 341-2181
*Attorneys for Appellants JADT
Development Group, LLC,
Timothy O. Baylor & Doris P. Baylor*

Stephanie A. Ball
Attorney Registration No. 191991
Fryberger, Buchanan, Smith &
Frederick, P.A.
700 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
(218) 722-0861
Attorney for Respondent First Choice Bank

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
LEGAL ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	5
ARGUMENT	14
I. The District Court’s Conclusions of Law and Granting of Summary Judgment Should be Upheld Under the Applicable Standard of Review.	14
II. The District Court Properly Granted Summary Judgment in Favor of First Choice Bank Based on the Plain and Unambiguous Terms and Conditions of the Loan Agreement and Admitted Default by JADT and the Baylors on Their Obligations.	15
A. First Choice Bank had no funding obligation on Phase II of the project until JADT satisfied a 40% presales requirement, a requirement which was never satisfied.	16
B. Pursuant to Minnesota’s statute of frauds applicable to credit agreements, JADT and the Baylors are foreclosed from claiming a funding obligation on the part of the bank which is not the subject of a written agreement signed by the parties.	19
C. Appellants’ theory based on claimed ambiguity as to the scope of the bank’s funding obligation on Phase II of the project, fails as a matter of law and does preclude entry of summary judgment in favor of First Choice Bank.	19
D. Appellants are foreclosed from relying on extrinsic and parol evidence to establish a genuine issue of material fact.	21
E. Appellants have released all claims against First Choice Bank, including a waiver of all defenses, and are foreclosed from now claiming that First Choice Bank breached any obligation owed to them.	23

III. The District Court Correctly Applied Minn. Stat. § 580.23 and in Concluding that the General Six Month Redemption Period is Applicable to the Mortgage Foreclosure Proceedings.25

IV. The District Court Properly Awarded First Choice Bank Its Attorneys' Fees and Costs Incurred in Exercising Its Default Rights and Remedies in Collecting Sums Due and Owing by JADT and the Baylors.....27

V. The District Court Properly Concluded First Choice Bank is Entitled to a Late Charge in Accordance with the Provisions of the Loan Agreement.31

CONCLUSION34

TABLE OF AUTHORITIES

Cases	Page
<i>Abdallah, Inc. v. Martin</i> , 242 Minn. 416, 65 N.W.2d 641 (1954).....	14
<i>Anda Construction Co. v. First Federal Sav. and Loan Ass'n, Duluth</i> , 349 N.W.2d 275, 279 (Minn. Ct. App. 1984)	28
<i>Betlach v. Wayzata Condominium</i> , 281 N.W.2d 328 (Minn. 1979).....	14
<i>Blattner v. Forster</i> , 322 N.W.2d 319 (Minn. 1982).....	18
<i>Cut Price Super Mkts. v. Kingpin Foods, Inc.</i> , 256 Minn. 339, 98 N.W.2d 257 (1959).....	16
<i>Donnay v. Boulware</i> , 275 Minn. 37, 144 N.W.2d 711 (1966).....	16
<i>Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc.</i> , 268 Minn. 176, 128 N.W.2d 334 (1964)	17
<i>Krogness v. Best Buy Co., Inc.</i> , 524 N.W.2d 282 (Minn. Ct. App. 1994).....	18
<i>Lidstrom v. Mundahl</i> , 310 Minn. 1, 246 N.W.2d 16 (1976).....	17
<i>Noreen v. Park Constr. Co.</i> , 255 Minn. 187, 96 N.W.2d 33 (1959).....	16
<i>Oleisky v. Midwest Federal Savings & Loan Ass'n</i> , 398 N.W.2d 627, 629 (Minn. Ct. App. 1986)	28
<i>Rooney v. Dayton-Hudson Corp.</i> , 310 Minn. 256, 246 N.W.2d 170 (1976).....	14
<i>Slezak v. Ousdigian</i> , 260 Minn. 303, 110 N.W.2d 1 (1961).....	14

<i>Southwest Fidelity State Bank of Edina v. Apollo Corporate Travel, Inc.,</i> 360 N.W.2d 668, 671 (Minn. Ct. App. 1985)	28
<i>Swanson v. American Hardware Mut. Ins Co.,</i> 359 N.W.2d 705 (Minn. Ct. App. 1984)	16
<i>Theis v. Theis,</i> 271 Minn. 199, 135 N.W.2d 740 (1965).....	24
<i>In re Turners Crossroad Dev. Co.,</i> 277 N.W.2d 364 (Minn. 1979).....	16
<i>Twin City Const. Co. of Fargo v. ITT Indus. Credit Co.</i> 358 N W 2d 716 (Minn. Ct. App. 1984)	17

Statutes

Minn. Stat. § 513.33.....	19
Minn. Stat. § 580.23.....	2, 5, 15, 25, 26, 27

LEGAL ISSUES

I. Whether the district court correctly granted summary judgment in favor of First Choice Bank and against JADT and the Baylors?

A. Whether the district court correctly concluded First Choice Bank is entitled to exercise its default rights and remedies against JADT and the Baylors based on their admitted default?

The district court held: The district court recognized that JADT and the Baylors acknowledged default on their obligations and concluded that pursuant to Minnesota law and the operative loan documents, First Choice Bank is entitled to entry of money judgments against JADT and the Baylors and foreclosure of a mortgage.

B. Whether the district court correctly concluded First Choice Bank did not breach any obligation owed to JADT, excusing JADT's default, because the loan agreement unambiguously defines First Choice Bank's funding obligation with respect to Phase II of the project as conditional and subject to a 40% presales requirement, a requirement which was never satisfied by JADT?

The district court held: The district court concluded that the loan agreement unambiguously defines First Choice Bank's funding obligation with respect to Phase II of the project as conditional and conditions that obligation on satisfaction of a 40% presales requirement, a requirement which was never satisfied by JADT.

C. Whether the district court correctly concluded that JADT and the Baylors could not rely on claimed ambiguity as to the scope of First Choice Bank's conditional funding obligation to create a genuine issue of material fact?

The district court held: The district court rejected appellants' theory based on claimed ambiguity as to the scope of First Choice Bank's conditional funding obligation, recognizing that the bank's funding obligation for Phase II of the project only arises upon satisfaction of a 40% presales requirement, a requirement which was never satisfied by JADT. Therefore, any claimed ambiguity as to the scope of First Choice Bank's funding obligation and whether it was inclusive of hard and soft costs is immaterial.

D. Whether appellants' theory based on an alleged funding obligation on the part of First Choice Bank is foreclosed because appellants have released all claims against First Choice Bank?

The district court held: In light of its disposition of other issues, the district court did not reach this issue.

II. Whether the district court correctly applied Minn. Stat. § 580.23 in concluding that the general six month redemption period is applicable?

The district court held: The district court correctly applied Minn. Stat. § 580.23 to the principal amount secured by the mortgage and concluded that the general six month redemption period is applicable.

III. Whether the district court properly concluded that pursuant to attorneys' fees provisions in the loan agreement, mortgage and guaranty, First Choice Bank is entitled to recover its reasonable attorneys' fees and costs incurred in exercising its default rights and remedies and collecting sums due and owing?

The district court held: The district court concluded that pursuant to Minnesota law and contractual provisions in the loan agreement, mortgage and guaranty, First Choice Bank is entitled to recover its reasonable attorneys' fees and costs.

IV. Whether the district court correctly determined the amount due and owing First Choice Bank, including principal, accrued interest and a late charge pursuant to the terms and conditions of the loan agreement and Minnesota law?

The district court held: The district court concluded First Choice Bank is entitled to recover principal, accrued interest and a late charge pursuant to the terms and conditions of the loan agreement.

STATEMENT OF THE CASE

This appeal involves a collection action arising out of a failed town home development project involving property located on the west side of the Mississippi River, north of downtown Minneapolis. The developer of the project was JADT Development Group, LLC ("JADT"), an entity controlled by Timothy and Doris Baylor (collectively, the "Baylors").

First Choice Bank (the "Bank") made a loan to JADT, secured by, among other security, a mortgage on certain property and a guaranty executed by Timothy and Dorothy Baylor. The Bank agreed to borrow up to a maximum of \$19,125,000 by means of periodic advances to JADT, subject to JADT satisfying certain conditions. The Bank's obligation to advance funds on Phase II of the project was conditioned on JADT satisfying a 40% presales requirement, a requirement which was never satisfied.

JADT defaulted on its loan obligations and the Baylors defaulted on their guaranty. On May 18, 2007, Bank commenced an action against JADT, Timothy Baylor and Doris Baylor.¹ In its complaint, Bank requested entry of money judgments against JADT and the Baylors and foreclosure of a mortgage. *Id.* First Choice Bank, Riverview Muir Doran, an entity providing a loan to JADT which was subordinated to Bank's loan, and KKE Architects, an architectural firm that performed services on the project, each filed a district court action against JADT and the Baylors. These actions were consolidated into a single Hennepin County case presided over by Hennepin County District Court Judge Robert Blaeser.

The rights and obligations of the parties are governed by various contracts, including a loan agreement, mortgage and guaranty. Based on the plain and unambiguous terms and conditions of the operative loan documents and admitted default by JADT and the Baylors on their obligations on the loan and guaranty, respectively, Bank moved for summary judgment in its favor. On April 30, 2008, the district court

¹ Riverview Muir Doran, LLC, Darg, Bolgrean, Menk, Inc. and KKE Architects, Inc. were named as defendants based upon their claimed interest in certain real estate which is the subject of the collection action.

granted Bank's motion for summary judgment. *See* Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated April 30, 2008. The court's original order for judgment was subsequently amended to expressly provide for entry of a money judgment in the portion of its order granting relief (required by the Hennepin County Court Administrator) and to include Rule 54.02 language necessary to make the judgment a final and appealable judgment. *See Amended Findings of Fact, Conclusions of Law and Order* dated July 16, 2008; *Amended Findings of Fact, Conclusions of Law and Order for Judgment* dated October 3, 2008.²

On January 23, 2009, JADT and the Baylors filed a notice of appeal, without posting a supersedeas bond or requesting a stay of the underlying action and mortgage foreclosure proceedings. *See* Respondents' Notice of Appeal dated January 23, 2009. On December 12, 2008, a sheriff's sale was held. On February 5, 2009, an order was entered confirming the sheriff's sale and providing for entry of a deficiency judgment against Timothy Baylor and Doris Baylor. *See* February 5, 2009 order.

On appeal, JADT and the Baylors challenge the district court's conclusions of law and its granting of summary judgment in favor of Bank. As outlined herein, the district court properly decided the questions of law which were the subject of a summary judgment motion and are now the subject of this appeal. The district court correctly granted summary judgment in favor of Bank based on the plain and unambiguous language of the contracts governing the rights and obligations of the parties. The district

² The court expressly provided for entry of a money judgment in its conclusions of law but not in the "it is hereby ordered" section of its order.

court correctly concluded that Bank had a conditional funding obligation on Phase II of the project and the condition precedent for that funding obligation, a 40% presales requirement, was never satisfied such that the bank's funding obligation never became operative. The district court correctly recognized Bank's right to exercise its default rights and remedies based on admitted default by appellants on their obligations to Bank. The district court correctly recognized that Bank is entitled to reimbursement of its attorneys' fees and a late fee in accordance with express contractual provisions providing for recovery of such fees. Finally, the district court properly applied Minn. Stat. § 580.23 in concluding that a six month redemption period is applicable to the mortgage foreclosure proceedings. Because the district court properly applied contractual provisions and the law to the undisputed facts of record, its decision should be upheld on appeal.

STATEMENT OF FACTS

The record before the district court included the following undisputed facts:

1. On March 22, 2005, JADT and Bank entered into a Construction and Term Loan Agreement (the "Loan Agreement") whereby Bank agreed to loan funds to JADT for a construction project on real estate located in Hennepin County, subject to certain terms, provisions and conditions described in the Loan Agreement. Affidavit of Thomas Bolduc ("*Bolduc Aff.*"), Exhibit 1; Affidavit of Shawn Dunlevy ("*Dunlevy Aff.*"), Exhibits

1 and 3; Complaint, ¶ 8;³ Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor, ¶ 3 (admitting execution of Loan Agreement). RA – 9-17, 25-29, 62-99.

2. In connection with the Loan Agreement, JADT executed a promissory note in favor of Bank dated March 22, 2005 by which Bank agreed to advance up to the principal amount of \$19,125,000, plus interest (the “Note”). *Bolduc Aff.*, Exhibit 2; *Dunlevy Aff.*, Exhibits 1 and 3; Complaint, ¶ 9; Joint and Several Answer of JADT Development Group, Timothy O. Baylor and Doris P. Baylor, ¶ 3. RA – 9-17, 25-29, 100-103. Bank’s agreement to make periodic advances was subject to certain conditions, including a conditional funding obligation for Phase II of the project subject to a 40% presales requirement. Bank made advances totaling \$4,530,307.02 under the loan agreement before JADT and the Baylors were declared in default. *Valete Aff.*, RA – 142.

3. As security for repayment of monies advanced by Bank under the loan agreement, Bank obtained a guaranty from the Baylors. On March 22, 2005, Timothy O. Baylor and Doris P. Baylor executed a guaranty (the “Guaranty”) whereby they personally secured JADT’s obligations under the Note. *Bolduc Aff.*, Exhibit 3; *Dunlevy Aff.*, Exhibits 1 and 3; Complaint, ¶ 10; Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor, ¶ 3. The Guaranty is an absolute and unconditional guaranty of all indebtedness owed by JADT to Bank. RA – 9-17, 25-29, 104-111.

³ References to a complaint in this memorandum are references to the complaint of First Choice Bank in the action entitled *First Choice Bank v. JADT Development Group, LLC, Timothy O. Baylor, Doris P. Baylor, Riverview Muir Doran, LLC, Darg, Bolgrean, Menk, Inc. and KKE Architects, Inc.*

4. As additional security for repayment of amounts advanced by the bank, Bank obtained a mortgage on certain property. *Valete Aff.*; RA – 145-164. The mortgage provides as follows:

The obligations secured by this Mortgage (collectively, the “Obligations”) are the prompt payment and/or performance of the following:

- (i) The principal amount of \$19,125,000.00 or so much thereof as may be advanced by Lender under the Note and pursuant to the Loan Agreement[.]

Valete Aff.; Mortgage (underlining added). RA – 147.

5. JADT and the Baylors are in default on their obligations to Bank. JADT is in default under the terms of the Loan Agreement and Note for failure to make payments due under the Note and for failure to comply with the terms, covenants and conditions of the Loan Agreement. *Dunlevy Aff.*, Exhibits 1 and 3; Complaint, ¶ 13; Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor, ¶ 4 (admitting plaintiff has advanced funds pursuant to the Note and Loan Agreement and funds have not been repaid); RA – 9-17, 25-29.

6. Due to default by JADT, the outstanding balance of the Note became due and payable in full. *Dunlevy Aff.*, Exhibits 1 and 3; Complaint, ¶ 14; Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor, ¶ 4. RA – 9-17, 25-29.

7. The amount due and owing on the Note as of the date Bank commenced the collection action on May 17, 2007, is \$5,087,068.21, plus interest accruing thereafter, late fees and attorney’s fees and costs of collection. *Bolduc Aff.*; *Dunlevy Aff.*, Exhibits 1 and

3; Complaint, ¶ 15; Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor, ¶ 4 (admitting that the loan agreement, note, guaranty and mortgage provide for costs and attorney's fees in the event of collection by the holder of the note). RA – 9-17, 25-29. Interest on the Note accrues at the rate of \$1,478.64 per day from May 17, 2007, subject to change in the interest rate as defined by the Note and the Loan Agreement. *Id.*

8. JADT's default under the Note constitutes a default under the terms of the Guaranty and Bank is entitled to exercise its remedies under the guaranty, including entry of money judgments against the guarantors. *Bolduc Aff.*, Exhibit 3; Complaint, ¶ 16. RA – 104-111.⁴

9. The loan agreement, note and guaranty provide Bank is entitled to recover from JADT and the Baylors its costs and attorney's fees incurred in collection of the amount due under the Note and Loan Agreement. *Dunlevy Aff.*, Exhibits 1 and 3;

⁴ Section 1 of the Guaranty states:

Guarantor hereby primarily, absolutely, irrevocably and unconditionally guarantees to Lender the following (collectively referred to herein as the "Obligations"): (i) the prompt payment when due (whether as a stated maturity date or earlier by reason of acceleration or otherwise) of all indebtedness (principal, interest and other), liabilities and monetary obligations of Borrower to Lender of every kind, nature and description under the Loan Documents; (ii) the prompt performance of all other covenants, obligations and agreements to be kept and performed by Borrower under the Loan Documents, including but not limited to (a) construction of the Improvements and Completion thereof on or before the Completion Date, free and clear of all mechanics', materialmen's and laborers' liens, (b) the installation of all fixtures, furnishings and equipment in the Improvements (as that term is defined in the Loan Agreement), and (c) compliance with all environmental covenants and indemnities set forth in the Mortgage; and (iii) all representations and warranties made by Borrower in the Loan Documents being true, correct and complete. This is a guaranty of payment and performance and not of collection. This Guaranty shall be a joint and several obligation of each Person who signs this Guaranty or a counterpart hereof.

Bolduc Aff., Exhibit 3.

Complaint, ¶ 17; Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor, ¶ 4; *Bolduc Aff.*, Exhibits 1, 2 and 3. RA – 9-17, 25-29, 62-111. The Note incorporates by reference the terms and conditions of the Loan Agreement and provides that the borrower is obligated to pay all costs of collection, including attorney’s fees, as follows:

Borrower agrees to pay all costs of collection when incurred, whether suit be brought or not, including attorneys’ fees and costs of suit and preparation therefore, and to perform and comply with each of the covenants, conditions, provisions and agreements of Borrower contained in this Note, the Loan Agreement, the Mortgage and the other Loan Documents. It is expressly agreed by Borrower that no extensions of time for the payment of this Note, nor the failure on the part of Lender to exercise any of its right hereunder, under the Mortgage or under the Loan Documents, shall operate to release, discharge, modify, change or affect the original liability under this Note, the Loan Agreement, the Mortgage or the other Loan Documents, either in whole or in part.

Bolduc Aff., Exhibit 2; RA – 100-103. Section 13 of the Guaranty similarly provides that the guarantors are responsible for all costs of collection, including attorney’s fees:

Section 13. Costs and Expenses. Guarantor shall pay or reimburse Lender on demand for all out-of-pocket expenses (including in each case all fees and expenses of counsel) incurred by Lender arising out of or in connection with the enforcement of this Guaranty against Guarantor arising out of or in connection with any failure of Guarantor to fully and timely perform the obligations of Guarantor hereunder, in any case except to the extent the Guarantor prevails against the Lender in any such enforcement action.

Bolduc Aff., Exhibit 3; RA – 104-111.

10. Article VIII of the Loan Agreement specifies events of default as follows:

Section 8.1 Events of Default by Borrower. The occurrence of any one or more of the following shall constitute an “Event of Default” herein and in the other Loan Documents:

(a) Borrower shall default in the payment of principal or interest payable to Lender hereunder, under the Note or under any of the other Loan Documents;

(b) Borrower shall default in the payment of any fees or other amounts payable to Lender hereunder, under the Note or under any of the other Loan Documents, and such failure shall continue for five (5) days notice to the Borrower of such failure;

Bolduc Aff., Exhibit 1, Loan Agreement, Section 8.1. RA – 80-83. The Loan Agreement also identifies Bank's remedies in the event of default. *Bolduc Aff.*, Exhibit 1. RA – 83-84. The Loan Agreement provides that the Bank may exercise all default rights and remedies provided by law, equity or statute, including entry of money judgments against JADT and the guarantors. *Id.*

11. The loan agreement setting forth the rights and obligations of the parties provides that the bank had a conditional funding obligation on Phase II of the project. Bank only had an obligation to advance funds on Phase II of the project, including soft costs, after JADT sold at least 40% of the total number of units to be constructed on the project. Section 5.10 of the Loan Agreement provides:

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.

Bolduc Aff, Exhibit 1 (underlining added). RA – 73. JADT did not satisfy the presales condition precedent and the bank never had an obligation to advance any funds, including soft costs, pursuant to Section 5.10.

12. After JADT initially defaulted, JADT, the Baylors and Bank entered into a forbearance agreement. *Valete Aff.*, Exhibit 4A. RA – 174-180. In the forbearance agreement, JADT and the Baylors acknowledge default and Bank's right to exercise its default rights and remedies. RA – 176. For and in consideration of Bank making certain concessions as set forth in the forbearance agreement, including an extension of the maturity date, JADT and the Baylors agreed to a release of all claims against the Bank, as follows:

General Release. In exchange for the concessions made by Lender under this Agreement, Borrower and Guarantors, and each of them, on behalf of themselves and all predecessors in interest, and each of their respective past, present and future officers, directors, attorneys, insurers, servants, representatives, employees, shareholders, subsidiaries, affiliates, participants, partners, predecessors, principals, agents, successors, assigns, family, heirs, executors, administrators, personal representatives, and legal representatives, hereby release and forever discharge Lender and Lender's past, present and future officers, directors, attorneys, insurers, servants, representatives, employees, shareholders, subsidiaries, affiliates, participants, partners, predecessors, principals, agents, successors, and assigns of and from any and all claims, defenses, demands, obligations, interests, suits, actions or causes of action, at law or in equity, whether arising by contract, statute, common law or otherwise, both direct and indirect, of whatsoever kind or nature, including without limitation those arising out of or by reason of or in connection with the Loan Documents, or any acts, omissions, or conduct occurring in connection therewith on or before the date hereof. In addition, and notwithstanding anything to the contrary, Borrower and Guarantors hereby waive all defenses, counterclaims, and setoffs against Lender.

Valete Aff., Exhibit 4A (emphasis added). RA – 178. JADT subsequently failed to pay by the maturity date set forth in the forbearance agreement and was provided with notice of its default. Notice of default was also provided to the guarantors. *Valete Aff.*, Exhibits 2A and 3A; RA – 168-169 and RA – 171-172.

13. In accordance with the terms and conditions of the Note, Loan Agreement and Guaranty, Bank commenced an action against JADT and the Baylors, among others, seeking entry of money judgments against JADT and the Baylors and foreclosure of a mortgage. *Dunlevy Aff.*, Exhibit 1; RA – 9-17; see *First Choice Bank v. JADT Development Group, LLC, Timothy O. Baylor, Doris P. Baylor, Riverview Muir Doran, LLC, Darg, Bolgrean, Menk, Inc. and KKE Architects, Inc.* (the “collection action”). The collection action was consolidated with two other actions, including an action by Riverview Muir Doran and a mechanic’s lien action commenced by an architectural firm, KKE Architects. See *Riverview Muir Doran, LLC v. JADT Development Group, LLC, Timothy O. Baylor, Doris P. Baylor, First Choice Bank and Darg, Bolgrean, Menk, Inc.*, Court File No. 27-CV-06-21709 and *KKE Architects, Inc. v. JADT Development Group, LLC, First Choice Bank, Riverview Muir Doran, LLC, Darg Bolgrean, Menk, Inc. and XYZ Corporations, ABC Partnership, John Doe and Mary Roe, whose true names are unknown to plaintiff* (the “mechanic’s lien action”).

14. Defendants JADT, Timothy O. Baylor and Doris P. Baylor interposed a joint answer to the complaint in which they admit many of the allegations in the complaint and allege only one matter by way of a purported affirmative defense. *Dunlevy Aff.*, Exhibit 3; *Joint and Several Answer of JADT Development Group, LLC,*

*Timothy O. Baylor and Doris P. Baylor.*⁵ RA – 25-29. In their answer, JADT and the Baylors allege that Bank had an obligation to fund certain soft costs, such as marketing and architectural fees, failed to fund such costs and, as a result, JADT inevitably defaulted on its loan obligations. *Dunlevy Aff.*, Exhibit 3; *Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor*, ¶ 5, 10, 11 and 12. RA – 25-29.⁶

⁵ The answer contains numerous allegations which may liberally be construed as purported affirmative defenses, although there is no label identifying them as affirmative defenses, but each allegation is essentially a restatement or permutation of the same allegation concerning an alleged failure by the Bank to advance funds for certain “soft costs”. See *Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor*. RA – 25-29.

⁶ Bank served discovery on defendants JADT and the Baylors, directed at determining the factual basis for the matters pled as purported affirmative defenses in their answer. The interrogatories directed to JADT and the Baylors requiring them to identify the factual basis for the matters pled as purported affirmative defenses, as well as their answers, are as set forth below:

INTERROGATORY NO. 12: Please state in detail all soft costs, marketing costs and architectural fees you claim that the plaintiff failed to fund as alleged in paragraph 5 of your Answer. With respect to each such cost, provide an itemization as follows:

- a. The nature of the soft cost for which you claim a financing request was made.
- b. The amount of the request for funding.
- c. The date of the request for funding.
- d. The person at First Choice Bank to whom the request was submitted.
- e. Identify all documents that refer or relate to the request.
- f. Identify all documents that refer or relate to the response to the funding request.
- g. The actual amount financed.
- h. The person to whom the amount financed was paid.
- i. Identify and produce all documents that refer or relate to the payment of the “soft cost”.

RESPONSE: Any nonprivileged responsive documents relating to soft costs will be produced in accordance with Plaintiff’s requests for production of documents.

INTERROGATORY NO. 13: State in detail all reasons why:

- a. You failed to make the payments required under the promissory note and mortgage with plaintiff; and
- b. You failed to keep the secured property free of liens and encumbrances.

ARGUMENT

I. The District Court's Conclusions of Law and Granting of Summary Judgment Should be Upheld Under the Applicable Standard of Review.

On appeal from a summary judgment, the function of the appellate court is to determine whether the district court properly concluded there were no genuine issues of material fact and correctly applied the law. *Bellach v. Wayzata Condominium*, 281 N.W.2d 328 (Minn. 1979). The appellate court must view the evidence in the light most favorable to the one against whom the motion for summary judgment was granted. *Abdallah, Inc. v. Martin*, 242 Minn. 416, 65 N.W.2d 641 (1954).

Questions of law are properly decided on a motion for summary judgment. *Rooney v. Dayton-Hudson Corp.*, 310 Minn. 256, 246 N.W.2d 170 (1976); *Slezak v. Ousdigian*, 260 Minn. 303, 110 N.W.2d 1 (1961). In this case, the court was presented with several questions of law:

- Whether, given the rights and remedies set forth in the loan agreement, mortgage and guaranty, Bank is entitled to exercise its default rights and remedies based on admitted default by JADT and the Baylors;
- Whether Bank had a *conditional* obligation to provide funding for Phase II of the project and that obligation was conditioned upon JADT satisfying a

RESPONSE: JADT and the Baylors object to this Interrogatory as invasive of the mental impressions of counsel and the work product doctrine. Without waiving these objections, JADT and the Baylors restate and incorporate herein their Answer to the Complaint and their answer to Interrogatory No. 12.

Dunlevy, Exhibit 4 (underlining added). RA – 30-42. Interrogatory No. 12 requires JADT and the Baylors to specifically identify persons and documents which are not identified in their response other than by reference to documents to be produced by JADT and the Baylors.

40% presales requirement, a requirement which was admittedly not satisfied;

- Whether a six month redemption period is applicable to the mortgage foreclosure proceedings pursuant to Minn. Stat. § 580.23;
- Whether, pursuant to the provisions of the operative loan documents and Minnesota law, Bank is entitled to reimbursement of its reasonable attorneys' fees incurred in exercising its default rights and remedies; and
- Whether, pursuant to the loan agreement, Bank is entitled to assess a late charge?

The district court properly resolved each of the questions of law which came before it on Bank's summary judgment motion and correctly granted summary judgment in favor of the bank. Under the appropriate standard of review, the district court's decision should be upheld.

II. The District Court Properly Granted Summary Judgment in Favor of First Choice Bank Based on the Plain and Unambiguous Terms and Conditions of the Loan Agreement and Admitted Default by JADT and the Baylors on Their Obligations.

JADT and the Baylors acknowledge they defaulted on their obligations to the bank by failing to make payments due the bank. *Dunlevy Aff.*, Exhibits 1 and 3; *Joint and Several Answer of JADT Development Group, LLC, Timothy O. Baylor and Doris P. Baylor*, ¶ 4 (in response to ¶ 12-17 of the complaint which allege default by JADT and the Baylors, defendants admit that the plaintiff had advanced funds pursuant to the note and loan agreement and that the funds have not been repaid). JADT and the Baylors

admit default on the loan agreement and the guaranty. *Valete Aff.*, Exhibit 4A (admitting default). Although JADT and the Baylors admit they were in default on their obligations to Bank, they contend that their default should be excused. JADT and the Baylors claim that their default should be excused because the bank had an unconditional funding obligation on Phase II of the project and breached that obligation.⁷ However, the loan agreement plainly provides that Bank had a conditional funding obligation subject to a 40% presales requirement. Bank's conditional funding obligation never became operative because JADT failed to satisfy the 40% presales requirement.

A. First Choice Bank had no funding obligation on Phase II of the project until JADT satisfied a 40% presales requirement, a requirement which was never satisfied.

Bank's funding obligation is defined in a written agreement between the parties and presents a question of law properly resolved by the court on a motion for summary judgment.

The construction and effect of a contract are questions of law for the court; a question of fact for the jury exists only when a contract is ambiguous. *Swanson v. American Hardware Mut. Ins. Co.*, 359 N.W.2d 705 (Minn. Ct. App. 1984); *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364 (Minn. 1979); *Donnay v. Boulware*, 275 Minn. 37, 144 N.W.2d 711 (1966); *Cut Price Super Mkts. v. Kingpin Foods, Inc.*, 256 Minn. 339, 98 N.W.2d 257 (1959); *Noreen v. Park Constr. Co.*, 255 Minn. 187, 96

⁷ Appellants contend the bank had an unconditional funding obligation for Phase II of the project and breached that obligation. In its brief, appellant refers to First Choice Bank having an obligation to "timely and adequately fund architectural fees and marketing expenses."

N.W.2d 33 (1959); *Twin City Const. Co. of Fargo v. ITT Indus. Credit Co.*, 358 N.W.2d 716 (Minn. Ct. App. 1984).

Performance under a contract may be subject to a condition precedent or subsequent. *Lidstrom v. Mundahl*, 310 Minn. 1, 246 N.W.2d 16 (1976) (a conditional promise prevents anyone from acquiring any rights under the contract unless those conditions occur); *Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc.*, 268 Minn. 176, 128 N.W.2d 334 (1964). The presales requirement is a condition precedent.

Bank's funding obligation is specifically governed by a provision of the loan agreement. Article 5 of the loan agreement provides the following:

Lender will not be required to make any disbursement of Loan Proceeds unless and until the following conditions have been satisfied by Borrower, each in a manner acceptable to Lender.

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.

Bolduc Aff., Exhibit 1 (underlining added). The introduction to Article 5 states that the lender will not be required to make any disbursement of loan proceeds unless and until certain conditions are satisfied, including the pre-sales requirement of Section 5.10.

Section 5.10 provides that the bank's funding obligation on Phase II is conditional. The section of the loan agreement identifying an obligation on behalf of the bank to advance certain funds for "soft costs" clearly provides that obligation only arises *after* JADT first satisfies a condition precedent concerning presales which admittedly was not satisfied by JADT. JADT and the Baylors admit that they have not satisfied the 40% presales requirement set forth in Section 5.10. Therefore, Bank had no obligation to advance funds on Phase II of the project.

Section 5.10 is unambiguous – it sets forth a requirement which must be satisfied *before* Bank has an obligation to provide funding for Phase II of the project. As a matter of law, the loan agreement is unambiguous as to the bank's funding obligation.⁸ Appellants' statements and assertions concerning a funding obligation are contrary to and not supported by the terms and conditions of the loan agreement, fail to create a genuine issue of material fact and were properly rejected by the district court. *Blattner v. Forster*, 322 N.W.2d 319 (Minn. 1982); *Krogness v. Best Buy Co., Inc.*, 524 N.W.2d 282 (Minn. Ct. App. 1994) (the question of whether an ambiguity exists in a contract is to be determined by the court as a matter of law). Appellants' theory that its failure to perform is excused – predicated on an alleged funding obligation contrary to the terms and conditions of the loan agreement – is without merit.

⁸ At the district court level, First Choice noted that with respect to appellants' theory based on an obligation to fund architectural fees and marketing expenses, First Choice targeted its discovery directed at JADT and the Baylors requiring them to identify the factual basis for alleging that the bank owed such an obligation. JADT and the Baylors failed to present any facts in support of this claimed funding obligation.

B. Pursuant to Minnesota's statute of frauds applicable to credit agreements, JADT and the Baylors are foreclosed from claiming a funding obligation on the part of the bank which is not the subject of a written agreement signed by the parties.

As noted in the preceding section, the unconditional funding theory advanced by the appellants is not supported by the plain language of the loan agreement. At the district court level, JADT and the Baylors relied on statements made by Tim Baylor in an affidavit as to an alleged funding obligation owed by the bank. Mr. Baylor's statements as to an alleged unconditional funding obligation on the part of the bank, not the subject of any written agreement, is deficient and does not support a viable cause of action. Minnesota's statute of frauds applicable to credit agreements forecloses JADT and the Baylors from relying on matters other than a written agreement, signed by the parties, in support of alleging a contractual obligation on the part of the bank. Minn. Stat. § 513.33, subd. 2 (credit agreements to be in writing).

C. Appellants' theory based on claimed ambiguity as to the scope of the bank's funding obligation on Phase II of the project, fails as a matter of law and does preclude entry of summary judgment in favor of First Choice Bank.

As outlined in Section A, Bank had a conditional funding obligation. Thus, appellants' theory based on the bank having an unconditional funding obligation fails as a matter of law. As an alternative to claiming Bank has an unconditional funding obligation, appellants claim that Bank's funding obligation on Phase II is ambiguous as to its scope (whether it includes both hard and soft costs) and, therefore, a genuine issue of material fact exists as to whether the bank breached its funding obligation. The district court properly concluded the loan agreement is unambiguous as to the bank's funding

obligation on Phase II of the project, and that obligation never arose. The loan agreement is not ambiguous as to whether bank's funding obligation includes both hard and soft costs. Moreover, even assuming an ambiguity as to that obligation, that ambiguity does not create a genuine issue of *material* fact.

In support of the claim that the scope of the bank's funding obligation is ambiguous, appellants recite scattered provisions from different agreements, including the loan agreement and disbursing agreement. The relevant agreement for purposes of defining the bank's funding obligation is the loan agreement, not the disbursing agreement. Even assuming ambiguity as to the scope of the bank's funding obligation (disputed by the bank and not supported by the plain language of the loan agreement), that ambiguity as to the scope of the obligation and whether it includes both hard and soft costs does not raise a genuine issue of material fact. Any funding obligation on the part of the bank with respect to Phase II (regardless of whether it includes both hard and soft costs) never became operative. Bank's obligation to provide funding of any kind on Phase II only arose upon appellants satisfying a 40% pre-sales requirement, a requirement admittedly never satisfied. Appellants' theorizing as to whether or not the funding obligation includes hard and/or soft costs is immaterial precisely because the obligation to provide any kind of funding, however defined and regardless of whether it included both hard and soft costs, never arose. Bank never had an obligation to provide any funding with respect to Phase II, regardless of whether it included hard or soft costs.

Moreover, the various provisions of the disbursing agreement and loan agreement which are referenced in appellants' brief are all entirely consistent with Section 5.10 of

the loan agreement. Appellants contend that the disbursing agreement somehow obligates Bank to provide funding with respect to Phase II notwithstanding their failure to satisfy the presales requirement. A review of the disbursing agreement does not support this contention. The disbursing agreement expressly incorporates by reference the loan agreement. The disbursing agreement sets forth the mechanics for disbursing of monies and the role of the borrower, lender and title company with respect to administering applications for and disbursements of loan proceeds. Paragraph 5 of the disbursement agreement provides that the borrower, JADT, shall provide to the lender and lead lender, Bank, that borrower has satisfied the conditions for each disbursement under the loan agreement[.] See Disbursing Agreement, ¶ 5. JADT never made a draw request for monies to be advanced on Phase II in which it demonstrated it satisfied the conditions for such a disbursement, including the pre-sales requirement. None of the cited provisions alter the conditional nature of the bank's funding obligation.

D. Appellants are foreclosed from relying on extrinsic and parol evidence to establish a genuine issue of material fact.

At the district court level and on appeal, appellants rely on extrinsic and parol evidence, including a Franklin National Bank loan offering and statements and assertions of Timothy Baylor as to his understanding of obligations owed and breached by Bank. Neither the statements of Timothy Baylor nor the Franklin National Bank loan offering establish a genuine issue of material fact.⁹

⁹ Baylor makes statements in his affidavit concerning his feelings, beliefs and alleged obligations on the part of the Bank which are not embodied in the written agreement. Such feelings, beliefs and allegations have no bearing upon contractual rights and obligations of the parties and do not create a genuine issue of material fact. For example, Baylor alleges that Bank cut off funding before the condominiums were

The statement of facts portion of appellants' brief are primarily based on an affidavit of Timothy Baylor. *See Affidavit of Timothy Baylor* dated January 8, 2008. JADT and the Bayers rely on the affidavit to create a genuine issue of material fact. The Baylor affidavit contains several statements by Timothy Baylor as to his understanding of the rights and obligations of the parties which are not supported by any written agreement between the parties. The Baylor affidavit attaches certain documents as exhibits which are not part of any written agreement between Bank and JADT.¹⁰ The terms and conditions of the financing relationship between Bank and JADT is memorialized in various written agreements. *See Construction and Loan Agreement*. Thus, Mr. Baylor's allegations which are not supported by any written agreement and the exhibits attached to the Baylor affidavit do not create a genuine issue of material fact because there is a written agreement which controls the rights and obligations of the parties.

Extrinsic evidence is only admissible in the event a written agreement is ambiguous. In this case, Section 5.10 of the loan agreement is plain and unambiguous as

constructed and further alleges that if Bank had provided funding, he would have been able to meet the pre-sales requirement. Baylor's allegation fails to recognize that the pre-sales requirement had to be satisfied *before* funding would be provided by the bank and Bank was only contractually obligated to provide funding in the event that pre-sales requirement was satisfied. Bank did not have an obligation to provide funding so that Bank could satisfy its pre-sales requirement. The contract provides the exact opposite. The statements contained in Baylor's affidavit attesting to claimed failure by the bank to provide certain funding is unsupported and contrary to the express language of the contract.

¹⁰ The Baylor affidavit includes a settlement statement as an exhibit. The settlement statement attached as Exhibit A to the Baylor affidavit concerns the initial disbursement of loan proceeds, expressly approved by Timothy Baylor as denoted by his signature at the bottom of the settlement statement. *See Baylor Affidavit, Exhibit A*. The pre-closing requirement for the initial disbursement of loan proceeds are as set forth in Section 4.3 of the loan agreement and were satisfied by the borrower; thus, the initial disbursement was made. After the initial disbursement was made and as reflected in the settlement statement expressly approved by Timothy Baylor, Bank's obligation to provide further funding would only arise upon JADT satisfying certain requirements, including a 40% pre-sales requirement, as set forth in Section 5.10 of the loan agreement.

to under what circumstances Bank has a funding obligation with respect to Phase II – satisfaction of the 40% pre-sales requirement – an event which never occurred. Therefore, extrinsic evidence is inadmissible.¹¹

E. Appellants have released all claims against First Choice Bank, including a waiver of all defenses, and are foreclosed from now claiming that First Choice Bank breached any obligation owed to them.

Appellants have released all claims against the bank, including all defenses, and are foreclosed from now alleging First Choice Bank breached any obligation owed to them.

Appellants and Bank entered into a forbearance agreement. At the time the parties entered into a forbearance agreement, the appellants had already defaulted on their obligations to Bank. At that time, Bank made certain concessions, including extending the maturity date by eight months and advancing monies to appellants that it was not otherwise obligated to advance, for and in consideration of the appellants releasing all claims against Bank. The release provides:

General Release. In exchange for the concessions made by Lender under this Agreement, Borrower and Guarantors, and each of them, on behalf of themselves and all predecessors in interest, and each of their respective past, present and future officers, directors, attorneys, insurers, servants, representatives, employees, shareholders, subsidiaries, affiliates, participants, partners, predecessors, principals, agents, successors, assigns,

¹¹ Appellants repeatedly reference a Franklin National Bank loan offering, attached as Exhibit F to the Baylor affidavit, as a basis for claiming a genuine issue of material fact exists. The Franklin National Bank loan offering made to a financial institution other than First Choice, constitutes extrinsic evidence or preliminary negotiations which may not be relied upon to vary the terms of a written agreement. Moreover, a review of the Franklin National Bank loan offering indicates that it is entirely consistent with and parallels the rights and obligations of the parties embodied in the written loan agreement, also providing that any funding obligation with respect to Phase II of the project would only become operative upon satisfaction of a 40% pre-sales requirement.

family, heirs, executors, administrators, personal representatives, and legal representatives, hereby release and forever discharge Lender and Lender's past, present and future officers, directors, attorneys, insurers, servants, representatives, employees, shareholders, subsidiaries, affiliates, participants, partners, predecessors, principals, agents, successors, and assigns of and from any and all claims, defenses, demands, obligations, interests, suits, actions or causes of action, at law or in equity, whether arising by contract, statute, common law or otherwise, both direct and indirect, of whatsoever kind or nature, including without limitation those arising out of or by reason of or in connection with the Loan Documents, or any acts, omissions, or conduct occurring in connection therewith on or before the date hereof. In addition, and notwithstanding anything to the contrary, Borrower and Guarantors hereby waive all defenses, counterclaims, and setoffs against Lender.

Valete Aff., Exhibit 4A (emphasis added). Appellants agreed to release all claims against Bank, whether arising by contract, statute, common law or otherwise, of whatsoever kind or nature, including without limitation, claims arising out of or in connection with the loan documents or any acts, omissions or conduct occurring in connection therewith on or before the date of the forbearance agreement. Pursuant to the general release, appellants also agreed to waive any defenses, counterclaims and setoffs against Bank. Appellants cannot claim Bank breached a funding obligation on Phase II as a defense to the present collection action because it falls within the scope of the general release and is a claim which has been released by appellants. By operation of the general release, appellants cannot assert a claim against Bank in the form of an affirmative claim or defense. *Theis v. Theis*, 271 Minn. 199, 135 N.W.2d 740 (1965) (a valid settlement is final, conclusive and binding upon the parties).

III. The District Court Correctly Applied Minn. Stat. § 580.23 and in Concluding that the General Six Month Redemption Period is Applicable to the Mortgage Foreclosure Proceedings.

JADT and the Baylors contend that the district court's conclusion of law as to the applicable redemption period is erroneous. This contention is without merit. The district court properly applied Minn. Stat. § 580.23 and determined the general six month redemption period is applicable to the mortgage foreclosure proceedings. Therefore, JADT and the Baylors are not entitled to any relief based upon the district court's conclusion as to the applicable redemption period.

JADT and the Baylors contend that the redemption period is twelve months, rather than the ordinary six months, and that the district court's conclusion as to the applicable redemption period is erroneous and must be reversed. However, the applicable redemption period is six months in accordance with Minn. Stat. § 580.23, subd. 1. The statute defining the applicable redemption period, Minn. Stat. § 580.23, provides in general for a six month redemption period.¹² The district court properly concluded the general six month redemption period is applicable.

JADT and the Baylors rely upon Minn. Stat. § 580.23, subd. 2(2) in support of their position that a twelve month redemption period is applicable. Minn. Stat. § 580.23, subd. 2, provides, in relevant part:

12-month redemption period. Notwithstanding the provisions of subdivision 1 hereof, when lands have been sold in conformity with the preceding sections of this chapter, the mortgagor, the mortgagor's personal

¹² Under Minnesota law, the general redemption period in a foreclosure by action is six months unless certain exceptions apply. In contrast, the general redemption period for foreclosure by advertisement is twelve months.

representatives or assigns, within 12 months after such sale, may redeem such lands in accordance with the provisions of payment of subdivision 1 thereof, if:

(2) the amount claimed to be due and owing as of the date of the notice of foreclosure sale is less than 66-2/3 percent of the **original principal amount secured by the mortgage;**

Minn. Stat. § 580.23, subd. 2(2) (emphasis added). Subdivision 2 provides that under certain circumstances, not present in this case, a twelve month redemption period may be applicable. Subdivision 2(2) of Minn. Stat. § 580.23 is defined in reference to the amount claimed to be due and owing as of the date of the notice of foreclosure sale and the *original principal amount secured by the mortgage*. JADT and the Baylors have misapplied Minn. Stat. § 580.23, subd. 2(2). In applying Minn. Stat. § 580.23, subd. 2(2), JADT and the Baylors have improperly utilized \$19,125,000, the *unfunded* portion of the loan, as equivalent to the original principal amount *secured* by the mortgage. It is undisputed that the original principal amount secured by the mortgage is \$4,530,307.02, the amount of the loan which has been funded. Only \$4,530,307.02 represents the original principal amount secured by the mortgage.¹³ The original principal amount secured by the mortgage is the amount of the loan advanced to date, not the unfunded

¹³ The flawed interpretation advanced by JADT and the Baylors to gain the benefit of a longer redemption period would, if we applied their logic, carry with it the consequence that the original principal amount secured by the mortgage is \$19,125,000 and that sum is actually owed by JADT and the Baylors. Obviously, JADT and the Baylors are not conceding they owe \$19,125,000 to Bank, a sum greater than was loaned to them. JADT and the Baylors are obviously not taking the position that they are obligated to pay \$19,125,000 to First Choice, the amount that *could have been* advanced under the loan provided all conditions were satisfied. JADT and the Baylors cannot adopt a position with respect to the applicable redemption period which is inconsistent with the original principal balance secured by the mortgage and the amount due and owing by them.

portion of the loan. Minn. Stat. § 580.23, subd. 2(2) applies to \$4,530,307.02, the principal amount secured by the mortgage, not the unfunded portion of the loan.¹⁴ For purposes of applying Minn. Stat. § 580.23, subd. 2(2), the numerator is \$5,528,773.15 and the denominator is the amount advanced and secured by the mortgage, \$4,530,307.02, a quotient greater than one, establishing that the six month redemption period is applicable.

The redemption statute is framed in terms of reality, not the hypothetical. The redemption period is defined in terms of what was actually secured, not what could have been secured. The district court properly concluded the redemption period is the general six month redemption period.

IV. The District Court Properly Awarded First Choice Bank Its Attorneys' Fees and Costs Incurred in Exercising Its Default Rights and Remedies in Collecting Sums Due and Owing by JADT and the Baylors.

JADT and the Baylors object to the district court's attorneys' fees award on four grounds. First, JADT and the Baylors mistakenly contend that the majority of attorneys' fees incurred by Bank arise out of a scrivener's error in the legal description contained in the mortgage which is being foreclosed such that the bank is not entitled to recover its attorneys' fees. Second, JADT and the Baylors contend that attorneys' fees incurred by Bank in connection with injunctive relief is not recoverable. Third, JADT and the Baylors contend that Bank is not entitled to recover any attorneys' fees it incurs following entry of judgment. Fourth, JADT and the Baylors contend that Bank is not

¹⁴ While the mortgage could secure up to \$19,125,000 if all sums were advanced to JADT and the Baylors, it did not at the time of collection and only secured the actual amount advanced by Bank plainly provides that it secures \$19,125,000 or any portion thereof actually advanced by the bank.

entitled to an award of attorneys' fees because it failed to comply with Rule 119. None of these objections are valid or require reversal of the attorneys' fees award.

Minnesota recognizes that where a contract expressly provides that a party is entitled to recover its attorneys' fees, such attorneys' fees provisions are enforceable. *Anda Construction Co. v. First Federal Savings & Loan Ass'n, Duluth*, 349 N.W.2d 275, 279 (Minn. Ct. App. 1984) (where provided for by a contract between the parties, a party is entitled to recover attorneys' fees incurred in collection of a debt); *Oleisky v. Midwest Federal Savings & Loan Ass'n*, 398 N.W.2d 627, 629 (Minn. Ct. App. 1986); *see also Southwest Fidelity State Bank of Edina v. Apollo Corporate Travel, Inc.*, 360 N.W.2d 668, 671 (Minn. Ct. App. 1985) (where a promissory note and guaranty contract provide for recovery of attorneys' fees, attorneys' fees are properly awarded). In accordance with contractual provisions authorizing a lender to recover its attorneys' fees from a borrower in default, trial courts routinely award attorneys' fees in collection actions.

The district court properly concluded that attorneys' fees provisions are enforceable under Minnesota law and Bank is entitled to recover its attorneys' fees. The district court properly exercised its discretion in reviewing Bank's application for an attorneys' fees award and awarded Bank the attorneys' fees and costs it incurred in exercising its default rights and remedies.

The General Rules of Practice for the District Courts set forth a procedure for recovering attorneys' fees upon application. Minn. R. Gen. Prac. 119. Rule 119.02 requires that an application for an award of attorneys' fees be accompanied by an affidavit of an attorney of record which satisfies certain criteria. Bank submitted the

requisite affidavit of an attorney of record. See *Amended Affidavit of Shawn M. Dunlevy* dated December 13, 2007). Bank complied with the Rule 119 requirements for an attorneys' fees award.

JADT and the Baylors erroneously contend that the majority of the attorneys' fees incurred by the bank were incurred as a result of a scrivener's error in the legal description for the mortgage and the need for the bank to commence a lawsuit rather than proceed by way of foreclosure by advertisement.¹⁵ Bank commenced a legal action to exercise *all* of its default rights and remedies, including money judgments against JADT and the Baylors as well as foreclosure of a mortgage. In order to obtain money judgments against JADT and the Baylors, Bank must proceed by way of a lawsuit. The attorneys' fees and costs incurred by Bank in this collection action arise out of the bank's exercise of default rights and remedies and are recoverable pursuant to the attorneys' fees provisions.

JADT and the Baylors wholly ignore that they asserted a host of affirmative defenses necessitating discovery on such defenses and, ultimately, a motion for summary judgment which they vigorously defended. As a result of appellants' assertion of numerous affirmative defenses and the need for motion practice, Bank incurred substantial attorneys' fees and costs. Bank proceeded with a lawsuit, rather than foreclosure by action, as necessary to avail itself of all of its default rights and remedies, including entry of money judgments against JADT and the Baylors. In the lawsuit, Bank

¹⁵ First Choice withdrew that portion of its attorneys' fees application inclusive of the Winthrop & Weinstine attorneys' fees. See *First Choice Bank's Memorandum of Law Responsive to Issues Raised by KKE Architects, Inc. at March 31, 2008 Hearing* dated April 4, 2008 at p. 10.

sought to reform the legal description in the mortgage based on a scrivener's error. However, that aspect of the collection action was not disputed and the bank did not incur attorneys' fees and costs related to reformation of the mortgage. Pursuant to the express attorneys' fees provisions of the note, guaranty and mortgage, Bank is entitled to recovery of its attorneys' fees.

The attorneys' fees award represents approximately one percent of the balance due and owing. Judged against the criteria applicable to an attorneys' fees award (including the amount in controversy), the award is clearly reasonable.¹⁶

Bank is entitled to recover the attorneys' fees incurred in connection with a dispute concerning an intercreditor agreement and application for an injunction. Pursuant to the loan agreement, JADT was obligated to make payments in a certain manner. Rather than making payments in accordance with the loan agreement, JADT chose to make nearly \$900,000 in payments to Riverview Muir Doran, contrary to the loan agreement and its payments to Riverview Muir Doran constitute a breach of its obligations under the terms and conditions of the loan agreement (and, at the same time, constitute a breach of the intercreditor agreement for which Bank has a dispute with Riverview Muir Doran). Bank incurred such attorneys' fees as a result of JADT's breach of its obligations under the note and loan agreement. Thus, such attorneys' fees are recoverable pursuant to the attorneys' fees provisions.

¹⁶ The district court also provided for an award of attorneys' fees in favor of KKE Architects. The attorneys' fees award in favor of KKE Architects is greater than the attorneys' fees award in favor of Bank, even though Bank and its counsel had the laboring oar in this action and sought to recover a sum far greater than KKE Architects.

JADT and the Baylors contend that the district court is not authorized to make an award of attorneys' fees following entry of judgment. The attorneys' fees provisions of the loan, mortgage and guaranty provide that Bank is entitled to reimbursement of its attorneys' fees incurred in collection and the exercise of its default rights and remedies. Where, as in the present case, a lender continues to incur attorneys' fees following entry of judgment and such fees are incurred in collection and the exercise of its default rights and remedies, a lender is entitled to recover such attorneys' fees and costs. The district court has properly awarded Bank the attorneys' fees and costs it has incurred after final entry of judgment.

JADT and the Baylors challenged the district court's attorneys' fees award because Bank provided a redacted copy of its billing statements. However, Rule 119.03 permits submission of redacting billing statements provided that if the court requests unredacted versions of the billing statements, unredacted versions would be provided to the court. Thus, JADT and the Baylors can claim no error because the Rule 119 application included redacted billing statements.

V. The District Court Properly Concluded First Choice Bank is Entitled to a Late Charge in Accordance with the Provisions of the Loan Agreement.

JADT and the Baylors allege that the district court erroneously determined the amount due and owing Bank. The district court correctly calculated the amount due and owing in accordance with the operative loan documents.

In support of entry of a money judgment against JADT and the Baylors, Bank submitted an affidavit of James Valette. The Valette affidavit includes an exhibit setting

forth a complete accounting of the amount due and owing Bank, including principal balances (which increased over time as advances were made on the loan), interest accrual on a monthly basis and a late charge. As the Valete affidavit demonstrates, interest has been calculated in accordance with Section 2.3 of the loan agreement setting forth the terms and conditions upon which interest will accrue on the unpaid principal balance.

Section 2.3 states:

Section 2.3 Interest. The unpaid principal balance of the Note shall accrue interest at an annual rate (the "Interest Rate") equal to the greater of (a) 6.50% per annum, or (b) 1.50% plus the rate of interest published from time to time in the money rates section of the *Wall Street Journal* as the prime rate. The interest rate hereunder will be adjusted, to the extent that the prime rate shall change, effective as of the first day of each calendar month. Lender may lend funds to its customers at rates that are at, above or below the prime rate.

Bolduc Aff., Exhibit 1; *Valete Aff.* The accounting attached to the Valete affidavit shows, on a month to month basis, the applicable interest rate, which fluctuates based upon the prime rate. The accounting also shows when Bank began assessing a default rate of interest in accordance with the loan agreement. The detailed accounting provided by the bank in support of its motion constitutes a mathematical calculation based on contractual terms and conditions. The district court properly determined the amount due and owing Bank based on the accounting provided by Bank and the terms and conditions of the operative loan documents.

The district court properly determined Bank was entitled to assess a late charge in accordance with the terms and conditions of the loan agreement. Section 2.4 sets forth when payments are due. The maturity date established by the loan agreement was

originally March of 2006. The maturity date was subsequently extended to November 9, 2006 pursuant to a forbearance agreement. *Valete Aff.*, Exhibit 4A. Thus, in accordance with the original loan agreement, as amended by the forbearance agreement, payment was due on November 9, 2006. Section 2.6 governs circumstances under which a late payment charge may be assessed and provides:

Section 2.6 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, for the purpose of reimbursing Lender for a portion of the expense incident to handling the overdue payment. This late payment charge shall not be prorated on a daily basis as payments are received by Lender. This provision shall not be deemed to excuse a late payment or to be a waiver of any other rights Lender may have, including the right to declare the entire unpaid principal balance and accrued interest immediately due and payable. Borrower agrees that the "late payment charge" is a provision for liquidated damages and represents a fair and reasonable estimate of the damages Lender will incur by reason of the late payment, consideration all circumstances known to Borrower and Lender on the date hereof. Borrower further agrees that proof of actual damages will be difficult or impossible.

Bolduc Aff., Exhibit 1 (emphasis added). In accordance with Section 2.6, a one time late payment charge was assessed on November 20, 2006, ten days after the payment was due, in the amount of 5% of the amount of the overdue payment, all in accordance with Section 2.6 of the loan agreement.

Section 2.4(c) of the loan agreement expressly provides that the entire unpaid principal balance and all unaccrued interest shall be due and payable in full on the maturity date. JADT and the Baylors advance an incorrect interpretation of Section 2.6 of the loan agreement, claiming that a late payment charge may only be assessed on

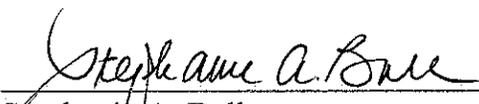
interest payments due and owing prior to the maturity date. Section 2.6 plainly provides that a late payment may be assessed if a required payment under the loan agreement is not made within ten days of its due date. The payment required to be made on the maturity date was not made within ten days of its due date. Bank properly assessed a late charge.

CONCLUSION

For all of the reasons set forth in this brief, First Choice Bank requests that the Court of Appeals uphold the district court's ruling granting of summary judgment in favor of the bank.

Dated this 30th day of March, 2009.

**FRYBERGER, BUCHANAN, SMITH
& FREDERICK, P.A.**



Stephanie A. Ball
Attorney Registration No. 191991
700 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
(218) 722-0861
Attorneys for First Choice Bank

STATE OF MINNESOTA

IN COURT OF APPEALS

First Choice Bank, an Illinois state
banking corporation,

Respondent,

vs.

**CERTIFICATION OF
RESPONDENT'S BRIEF
LENGTH**

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

Appellants,

and

Riverview Muir Doran, LLC, Darg, Bolgrean,
Menk, Inc. and KKE Architects, Inc.,

Defendants.

I hereby certify that this brief conforms to the requirements of Rule 132.01, subd. 3(a)(1) of the Minnesota Rules of Civil Appellate Procedure for a brief using a proportional font. This brief was prepared using Microsoft Office Word 2003. The length of the brief is 8,723 words.

Dated this 30th day of March, 2009.

**FRYBERGER, BUCHANAN, SMITH
& FREDERICK, P.A.**



Stephanie A. Ball
Attorney Registration No. 191991
700 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
(218) 722-0861
Attorneys for First Choice Bank