11-30-2012

Bank of Commerce v. Jefferson Enterprises Respondent's Brief Dckt. 40034

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE BANK OF COMMERCE, an Idaho banking corporation

Plaintiff//Respondent,

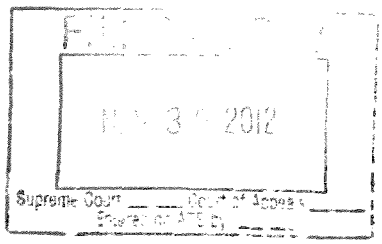
vs.

JEFFERSON ENTERPRISES, LLC, an Idaho limited liability company,

Defendants/Appellant.

Docket No. 40034-2012

Bannock County Case No. CV-08-4231-OC



RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Bannock County.

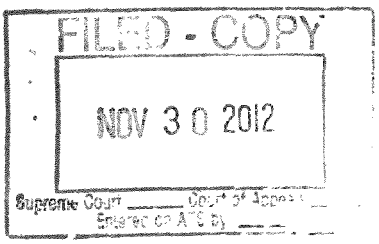
Honorable Robert C. Naftz, District Judge, Presiding.

Counsel for Appellants

A. Bruce Larson
ABLE LAW PC
Attorneys at Law
155 South 2nd Ave.
P.O. Box 6369
Pocatello, ID 83205-6369

Counsel for Respondents

Douglas R. Nelson, ISB # 1580
Brian T. Tucker, ISB # 5236
Wiley R. Dennert, ISB #6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630



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III. STATEMENT OF THE CASE

A. Nature of the Case

The Bank of Commerce (the "Bank") agrees that this is a case brought by the Bank to foreclose real estate mortgages against Appellant, Jefferson Enterprises, LLC, ("Jefferson").

B. Course of the Proceedings Below

Jefferson's Course of Proceedings in its Appellant's Brief is, for the most part, accurate.[1]

C. Statement of the Facts

Corrections, clarifications and additions to the Statement of Facts as set forth in the Appellants' Brief are set forth below. Some of these facts are disputed but are added to provide context. However, even the disputed facts are not material and would not prevent summary judgment.

Dustin Morrison ("Dustin")[2] began looking for financing for Jefferson's Southern Hills Development project (the "Project") in December 2005, or perhaps even earlier than that. R. at Vol. I, p. 242-44, D. Morrison Depo. Tr., p. 40, ll. 2-10, 17-19, p.45, l. 24 to p. 46, l. 2. At first, Dustin approached D.L. Evans Bank about getting a 2.8 million dollar loan for the Project. R. at Vol I, p. 244, D. Morrison Depo. Tr., p. 46, l. 3 to p. 48, l. 21. D.L. Evans Bank did not

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[1] However, Jefferson appears to make a typo in its Appellant's Brief in that it states: "The Bank filed a Motion for Summary Judgment requesting the District Court to enter judgment in its favor, or in the alternative, to grant *Jefferson* partial summary judgment..." (Italics added.) Rather, the Motion for Summary Judgment requested that in the alternative the *Bank* be granted partial summary judgment.

[2] Dustin Morrison will be referred to throughout this Brief by his first name in order to avoid confusion with Sonya Morrison and A. Michael Morrison. No disrespect is intended.

necessarily deny Dustin's request for a loan, but it did not approve it the way he wanted it. *Id.*

Thereafter, on April 21, 2006, Dustin met with Steve Worton ("Worton"), a loan officer at The Bank of Commerce, and Pam Wake at Pam Wake's office in the Key Bank building. Dustin presented the Project. Dustin gave Worton a binder of information that had tax returns, financial entities statements, an appraisal of the subject property[3] (referred to herein as the "Subject Property" or the "Southern Hills Development Property"), projected sales and other information Dustin believed was pertinent to the loan request. During this meeting, Worton asked Dustin about the Eighty Acres, Inc., mortgage which was on a portion of the Subject Property and whether the Bank would be able to obtain a first-position security interest in that portion of the property. Dustin represented at the meeting that he thought he could obtain a subordination from Eighty Acres, Inc., which would allow the Bank to be placed in first position on the entire Subject Property, including the Eighty Acres, Inc., portion of the property. After the meeting, Dustin took Worton out to the Southern Hills Development Property and they drove over the property. R. at Vol. I, p. 182-83, Aff. Worton, ¶¶ 3 & 5.

From as early as at least April 21, 2006, the Bank's position was that its mortgage would need to be in first position for all property securing the loan to Jefferson, including the Eighty Acre, Inc., property, before the Bank would loan money to Jefferson. R. at Vol. I, p. 185, Aff. Worton, ¶ 12.

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[3] The Subject Property is made up of several parcels of real property, including a parcel known as the Eighty Acre Parcel and three parcels known as the Wood Property.

On May 3, 2006, Worton met with Eric Polatis and Deena Green, who were officers at First American Title, to review the title commitment for the Project. Eric Polatis and Deena Green had some questions about the ability to put the Bank in first position on all of the land that Dustin had offered to secure the proposed loan from the Bank. Worton contacted Dustin by telephone and asked him to come to the First American Title office to clear up the liens on the property. When Dustin arrived he was shown the title commitment and prior lien holders. Dustin again indicated that the first lien holder would subordinate its lien position to the Bank's lien position. R. at Vol. I, p. 183, Aff. Worton, ¶ 6.

On May 8, 2006, the loan application package was submitted to the Bank's Loan Review Committee. R. at Vol. I, p. 184, Aff. Worton, ¶ 7.

Dustin knew that Worton did not have the authority to approve the loan that Jefferson was requesting. R. at Vol. I, p. 258-59, D. Morrison Depo. Tr. p. 105, l. 24 to p. 106, l. 1. In fact, any loan over $250,000.00 had to be approved by the officers and directors of the Bank in a formal meeting. R. at Vol. I, p. 175, Aff. Romrell, ¶ 7. The May 9, 2006, meeting of the officers and directors of the Bank was the only time Jefferson's loan request was presented to the officers and directors of the Bank. R. at Vol. I, p. 175, Aff. Romrell ¶ 6. It was never presented at any prior meeting of the officers and directors of the Bank. *Id.*

Prior to the evening of May 9, 2006, Dustin continued to represent that he believed he could get Eighty Acres, Inc., to subrogate its lien to the Bank's mortgage. R. at Vol. I, p. 186, Aff. Worton, ¶ 13.

On May 9, 2006, the Bank's Board of Trustees (the "Board") approved a loan to Jefferson for $2,200,000, rather than the requested $2,800,000. Worton called and visited with Morrison about the approval of this lesser amount. Again, Worton reiterated that the Bank's mortgage would need to be in first position for all acreage. Later that evening, Dustin called Worton and said he was unable to get Eighty Acres, Inc., to subordinate their lien position. Worton therefore informed Dustin that the Eighty Acres, Inc.'s lien obligation would need to be paid off before the Bank would be able to proceed with the loan. Dustin suggested a couple of ideas for how he could meet the Bank's requirement to be in first position. For example, Dustin suggested that the loan amount could be increased to cover the additional money needed to pay off the Eighty Acres, Inc., lien obligation. Dustin also stated that he could put cash into a certificate of deposit and hold it in the Bank as additional security until the Bank's loan committee had time to review his additional request for more money to pay off the Eighty Acres, Inc., lien. Dustin said he would go to work on getting money together to make all of this work out. Worton said he would have to talk to Tom Romrell ("Romrell"), the president of the Bank, to see if Dustin's suggestions would work. Worton told Dustin that he would call him the following morning after he had talked to Romrell. R. at Vol. I, p. 184, Aff. Worton, ¶ 8.

On May 10, 2006, Worton had an early morning telephone call with Romrell regarding Dustin's inability to place the Bank in first position on all of the secured property as the Board had required for the loan to be approved. Worton told Romrell about Dustin's idea to allow Dustin time the following week to get the Board's approval for an additional loan for funds to be

used to pay off the Eighty Acre, Inc., debt. Romrell was not in favor of paying off the Eighty Acre, Inc., lien with an additional loan from the Bank. Instead, Romrell suggested that Dustin figure out a way to pay off the Eighty Acres, Inc., lien without an additional loan from the Bank. Worton then called Dustin and informed him that his idea of obtaining another loan from the Bank to pay off the Eighty Acre, Inc., lien would not work as the Bank needed its mortgage to be in first position before it would make the $2,200,000 loan to Jefferson and that $2,200,000 was the limit that the Bank would loan on the Project. R. at Vol. I, p. 184-85, Aff. Worton, ¶ 9.

Later on May 10, 2006, Worton faxed a letter to the title company reiterating the Bank's position that its mortgage would need to be in first position. R. at Vol. I, p. 185, Aff. Worton, ¶ 10.

Dustin was able to pay off the Eighty Acres, Inc., debt, and thus release its lien. Thereafter, Dustin and his wife Sonya Morrison ("Sonya") signed the Promissory Note and the Mortgage securing the note on May 10, 2006, as members of Jefferson.[4] The Mortgage placed the Bank in first position on all of the Subject Property, including the property that had previously been encumbered by Eighty Acres, Inc. Said Mortgage was recorded May 10, 2006, in the records of Bannock County, Idaho, under Instrument No. 20609793. The Bank, therefore, loaned Jefferson, $2,200,000 ($2,223,805.00 after including various charges) to purchase the Wood Property on May 10, 2006. R. at Vol. I, p. 185, Aff. Worton, ¶ 11; R. at Vol. I, p. 189-90,

[4] Although the Mortgage was prepared on May 9, 2006, it was not signed by Dustin and Sonya until May 10, 2012, the day of the closing.

Aff. A. Michael Morrison, ¶¶ 5-6.

At no time did Worton or any other employee of the Bank ever tell Morrison that the Bank would loan him additional money to pay off the Eighty Acres, Inc., lien. R. at Vol. I, p. 186, Aff. Worton, ¶ 14.

Neither Dustin nor Sonya ever indicated to the Bank that they were going to use all of their liquid assets to pay off the Eighty Acres, Inc., lien. Neither Dustin nor Sonya ever indicated to the Bank that by paying off the Eighty Acres, Inc., lien, they and Jefferson would lose their ability to obtain other financing for this Project or for other projects. R. at Vol. I, p. 186, Aff. Worton, ¶ 15.

More than a year later, on June 27, 2007, the Bank loaned to Jefferson the sum of Four Hundred Thousand Dollars ($400,000.00). As evidence of this second loan Jefferson made another Promissory Note in writing on June 27, 2007, in the principal sum of Four Hundred Thousand Dollars ($400,000.00). This second Promissory Note also sets forth interest to be paid by Jefferson. R. at Vol. I, p. 190, Aff. A. Michael Morrison, ¶ 7.

As security for the repayment of both the May 9, 2006 loan and the June 27, 2007 loan, together with interest, costs and attorney fees, Jefferson made, executed and delivered to the Bank another Mortgage dated the June 27, 2007. Said Mortgage was recorded June 27, 2007, in the records of Bannock County, Idaho under Instrument No. 20715644. R. at Vol. I, p. 190, Aff. A. Michael Morrison, ¶ 8.

On or about February 21, 2008, both of the above-described Promissory Notes and both

of the above-described Mortgages were modified by the Bank and Jefferson pursuant to two separate Corporate Notes and Deed of Trust/Mortgage Agreements to Amend Terms. As a result of the modifications, both Notes became due and payable in full on May 1, 2008. R. at Vol. I, p. 190, Aff. A. Michael Morrison, ¶ 9.

The Bank is the owner and holder of said Notes and Mortgages. On May 1, 2008, Jefferson was in default in that it failed to pay the balance of said Notes. On August 1, 2008, the Bank declared all sums owing under said Notes, Mortgages and related security documents due and payable in full. R. at Vol. I, p. 191, Aff. A. Michael Morrison, ¶ 10.

As of July 15, 2008, Jefferson owed to the Bank under the terms and provisions of said Notes and Mortgages the sum of Two Million Seven Hundred Twenty-three Thousand Four Hundred Ninety-seven Dollars and Forty Cents ($2,723,497.40) calculated as follows:

Principal balance due as of 7/15/08	$2,647,217.13
Interest through 7/15/08	$ 76,280.27
Total Principal and Interest due as of 7/15/08	$2,723,497.40

R. at Vol. I, p. 191, Aff. A. Michael Morrison, ¶ 13.

Said Notes accrue interest at the combined per diem of $507.68548. R. at Vol. I, p. 191, Aff. A. Michael Morrison, ¶ 14.

IV. ATTORNEY FEES ON APPEAL

The Bank is entitled to attorney fees on appeal pursuant to contract and/or Idaho Code § 12-120(3) and Rule 41, I.A.R. Furthermore, the Bank asks for costs on appeal pursuant to Rule

40, I.A.R.

A. Attorney Fees Based on Contract

The Bank is entitled to attorney fees and costs based on the Promissory Note dated May 9, 2006 (and executed on May 10, 2006); the Mortgage dated on May 9, 2006 (and executed on May 10, 2006); the Promissory Note dated June 27, 2007; and the Mortgage dated June 27, 2007 (and executed on June 29, 2007).

Both Notes provide:

> **Collection Costs and Attorney's Fees** - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs...

R. at Vol. I, p. 195 & 209.

Both Mortgages provide:

> **19. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of Lender's expenses incurred in collecting ... in respect to the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses....

R. at Vol. I, p. 199 & 213.

The Bank was required to hire attorneys to enforce the Notes and the Mortgages. The Subject Property secures all amounts owed to the Bank pursuant to these documents, including

all attorney fees and costs incurred in this action. Therefore, this Court should award the Bank all of its attorney fees and costs on appeal.

B. Attorney Fees Based on Statute

Idaho Code § 12-120(3), authorizes a court to award reasonable attorney fees to the prevailing party on appeal in any civil action to recover on a note and in any commercial transaction.

As this is an action to recover on the two Notes and because the underlying claim is based on a commercial transaction, the Court should award the Bank all of its attorney fees and costs on appeal.

V. ARGUMENT

A. Standard of Adjudication and Review

In *Finholt v. Cresto,* 143 Idaho 894, 896, 155 P.3d 695, 697 (2007), the Idaho Supreme Court stated:

> This Court's review of the district court's ruling on a motion for summary judgment is the same as that required of the district court when ruling on the motion.... Summary judgment is appropriate when the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).

(citations omitted.)

"A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.*

The moving party is entitled to a judgment as a matter of law when the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *See Dunnick v. Elder,* 126 Idaho 308, 312, 882 P.2d 475, 479 (Ct. App. 1994) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

B. Breach of Contract

1. Mortgage

In its Appellant's Brief, Jefferson now argues that the Mortgage, which was prepared by the Bank on May 9, 2006, was a written agreement that provided that encumbrances of record, such as the Eighty Acre encumbrance, would have priority over the lien of the Bank's Mortgage.

This argument fails for several reasons. First, it was not raised below, but is being raised for the first time on appeal.

> "To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal." *McPheters v. Maile,* 138 Idaho 391, 397, 64 P.3d 317, 323 (2003) (citation omitted). Since this issue was not raised below, this Court will not consider this issue on appeal.

Garner v. Bartschi, 139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003).

Second, although the Mortgage was prepared by the Bank on May 9, 2006, it was not signed by Dustin and his wife, Sonya, until closing on May 10, 2006, by which time Dustin had already paid off the Eighty Acre encumbrance. R. at Vol I, p. 240, D. Morrison Depo. Tr., p. 33, ll. 2-7; Vol I, p. 185, Aff. Worton, ¶ 11. Therefore, at the time the Mortgage was signed on May

10, 2012, the Eighty Acre encumbrance was no longer an encumbrance of record.

Third, Dustin testified that he had not received any precommitment in writing that the Bank would take a second position in the Eighty Acre Parcel. R. at Vol I, p. 248-49, D. Morrison Depo. Tr., p. 64, ll. 1-13 and p. 67, ll. 9-13. Ultimately, Dustin decided that he would accept the terms that the Bank offered and close the loan by paying off the Eighty Acre loan and placing the Bank in first position on the Eighty Acres. R. at Vol I, p. 250 & 256, D. Morrison Depo. Tr., p. 73, ll. 20-22, p.95, ll. 6-8. Therefore, the Mortgage cannot be construed as any precommitment, but was rather part of the ultimate loan agreement, under which the Bank received a first lien position on the Eighty Acre Parcel.

Fourth, the Mortgage cannot be an agreement to loan money on the terms that Jefferson is claiming, in particular that the Bank would take a second lien position on the Eighty Acre Parcel, because the Mortgage was not subscribed by the Bank. *See* the Statute of Frauds (I.C. § 9-505).

This new argument that the Mortgage, signed by Dustin and Sonya on May 10, 2006, could somehow be an agreement that the Bank would take a second lien position in the Eighty Acre Parcel is not only raised for the first time on appeal, but it is not supported by any of the facts in the record.

2. Statute of Frauds

Jefferson claims that the Bank agreed to loan money to Jefferson in accordance with the terms and conditions of the loan application, including the condition that the Bank would be secured on the Eighty Acre Parcel by taking a second lien position. Even when construing the

evidence in favor of Jefferson, the evidence does not support the breach of contract claim.

Idaho Code § 9-505, which is referred to as the Statute of Frauds, requires that a promise or commitment to loan $50,000 or more must not only be in writing, but must also be subscribed by the alleged lender. There is no evidence that either requirement was met in the present case.

Section 9-505 provides, in part, as follows:

> In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> ...
>
> 5. A promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit.

In *Lettunich v. Key Bank Nat. Ass'n,* 141 Idaho 362, 109 P.3d 1104 (2005), Lettunich brought a claim against Key Bank for breach of an alleged oral agreement to loan him money. Lettunich had approached Key Bank to negotiate a loan package to purchase real property, cattle and an operating loan. Lettunich met with Key Bank's relationship manager, Brian Faulks, to explain the nature of his cattle operations and the type of financing he needed. The proposed financing package included three separate loans, each in excess of $50,000. Faulks sent Lettunich three written loan commitments. Lettunich signed the three loan commitments, but Key Bank never signed them. Lettunich bought cattle at a court-ordered sale on April 26, 2000, as he believed he was going to receive the three loans from Key Bank. On the evening of the

first day of the sale of cattle, Lettunich asked Faulks if he should continue to purchase cattle when the sale resumed the following day. Faulks encouraged Lettunich to keep buying the cattle and assured Lettunich that Key Bank would fund a term loan and operating line. Based on that representation, Lettunich continued buying cattle, ultimately purchasing over $400,000 in Angus cows. Thereafter, Key Bank refused to fund the cattle term loan and operating line of credit. Lettunich sued Key Bank for breach of an oral agreement, breach of the covenant of good faith and fair dealing and fraud. The district court granted Key Bank summary judgment on the grounds that Lettunich's claims were barred by the statute of frauds. The Idaho Supreme Court affirmed the summary judgment. The Supreme Court recognized that each of the three loans negotiated by Lettunich exceeded $50,000. The Supreme Court stated:

> Lettunich argues there was an oral agreement between the parties. Viewing the evidence in a light most favorable to Lettunich, even if we infer there was an oral agreement between the parties at least as far as loaning money to purchase cattle, the oral agreement is invalid because it clearly violates I.C. § 9–505(5)....

Id. at 367, 109 P.3d at 1109.

In the present case, Dustin testified:

> Q. Now, back to this idea of, as you called it, kind of a precommitment given to you in writing?
>
> A. There was nothing given to me in writing.
>
> Q. So this precommitment idea that you are referring to again related to what you claim Steve Worton told you?
>
> A. Everything was related to what Steve Worton told me because there wasn't one think in writing, nothing. There wasn't an approval in writing,

there wasn't a list of conditions in writing, contingencies in writing. There wasn't a formal request in writing. Nothing was in writing.

R. at Vol. I, p. 248, D. Morrison Depo. Tr., p. 64, ll. 1-13.

Q. Nothing in writing that said that the bank would take a second position in that property.

A. No.

R. at Vol. I, p. 249, D. Morrison Depo. Tr., p. 67, ll. 11-13.

Jefferson requested a $2.8 million loan and ultimately received a $2.2 million loan. Because the alleged promise to lend money involved a loan much greater than $50,000, the Statute of Frauds governs Jefferson's breach of contract claim. In his deposition, Dustin admitted there was no written precommitment to loan Jefferson the money nor to take a second position in the Eighty Acre Parcel. As there was no such written precommitment, there logically was no such writing that was subscribed by the Bank or any of its agents. Because there was no such written and signed agreement, there can be no breach.

3. No Consideration Paid for the Alleged Oral Precommitment to Loan

Not only did the alleged commitment not comply with the Statute of Frauds, there was no consideration (commitment fee) to support a loan commitment, and therefore, no breach of any loan commitment.

In *D & M Dev. Co., Inc., v. Sherwood and Roberts, Inc.,* 93 Idaho 200, 457 P.2d 439 (1969), the Idaho Supreme Court discussed the use of a commitment fee to secure the right to later borrow money. In that case, the Idaho Supreme Court held that a commitment fee was not

interest and therefore did not violate the then-applicable usury statute. D & M Development Company had paid $56,250 as consideration for receiving three written loan commitments. The Court noted that "By the issuance of the three commitment letters, respondent was guaranteed the ability to borrow the rather large sum of money involved at a later date at a specific interest rate for a specific term." *Id.* at 206, 457 P.2d at 445. Additionally, the Court quoted *Prather, Mortgage Loans and the Usuary Laws,* 16 Bus. Lawyer 181 (Nov., 1960), which states: "The commitment fee buys a commitment; the fee paid is not 'for the use of money,' but for the privilege later of actually borrowing the money. It is an option, not a loan."

In *Lowe v. Massachusetts Mutual Life Ins. Co.,* 54 Cal.App.3d 718 (1976), the California Court of Appeal affirmed the trial court's finding that a commitment agreement constituted an option. The "trial court expressly found that under the terms of the commitment letter defendant was contractually obligated to lend $4,700,000 upon the applicant-assignor's compliance with the conditions stated in the letter of commitment". *Id.* at 724. The California Court of Appeals stated:

> 'An option, when supported by consideration, ... is a Right acquired by contract to accept or reject a present offer within a limited time in the future....' 'It is universally accepted that an option agreement is a contract distinct from the contract to which the option relates, since it does not bind the optionee to perform or enter into the contract upon the terms specified in the option."...

Id. at 725.

In *Justad v. Ward,* 147 Idaho 509, 512, 211 P.3d 118, 121 (2009), the Idaho Supreme Court discussed the particular characteristics of an option contract, as follows:

Formation of a valid contract requires a meeting of the minds as evidenced by a manifestation of mutual intent to contract. *Inland Title Co. v. Comstock,* 116 Idaho 701, 703, 779 P.2d 15, 17 (1989). This manifestation takes the form of an offer followed by an acceptance. *Id.* An option contract is an offer that, upon sufficient consideration, may not be revoked for an agreed upon amount of time. *See* 17A Am.Jur.2d *Contracts* § 53 (2d ed.2008). An acceptance of an option is an expression by the offeree that accepts the offer in accordance with the terms of the offer. *See* IDJI 6.05.2. The acceptance is not complete until it has been communicated to the offeror. *Id.* Acceptance of an offer must be unequivocal. *Huyett v. Idaho State Univ.,* 140 Idaho 904, 909, 104 P.3d 946, 951 (2004). Generally, silence and inaction does not constitute acceptance. 17A Am.Jur.2d *Contracts* § 98 (2d ed.2008). More specifically:

> Because assent to an offer that is required for the formation of a contract is an act of the mind, it may either be expressed by words or evidenced by circumstances from which such assent may be inferred, such as the making of payments or the acceptance of benefits. Anything that amounts to a manifestation of a formed determination to accept, and is communicated or put in the proper way to be communicated to the party making the offer, completes a contract.
>
> A response to an offer amounts to an acceptance if an objective, reasonable person is justified in understanding that a fully enforceable contract has been made, even if the offeree subjectively does not intend to be legally bound. This objective standard takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.

17A Am.Jur.2d *Contracts* § 91 (2d ed.2008).

In its Amended Counterclaim, Jefferson claims that the Bank initially committed to lend it money pursuant to Jefferson's loan application, including the taking of a second lien position on the Eighty Acre Parcel, but that the Bank later breached that commitment when it insisted on receiving a first lien position on the Eighty Acre Parcel. *See* Amended Counterclaim, ¶¶ 10, 11,

17 and 19.

However, these allegations are not supported by the facts. In his deposition, Dustin testified as follows:

> Q. Whenever it was, were you at that point committed to accept that loan from the Bank of Commerce?
>
> A. Yes.
>
> Q. So you had to accept the loan?
>
> A. In a practical sense, yes, because I had to perform by a certain date, and I hadn't been pursing a loan with anybody else.
>
> Q. But I am saying legally were you obligated –
>
> A. No.
>
> Q. You weren't obligated to accept the loan that the bank gave you.
>
> A. Not legally; ...

R. at Vol. I, p. 249, D. Morrison Depo. Tr., p. 67, l. 18 to p. 68, l. 4

> Q. But you understand that the decision, whether the bank agrees to loan money or not, that's a decision they have; correct?
>
> A. Yes.
>
> Q. They are not obligated to accept your proposal just because it's your proposal, are they?
>
> A. No,...

R. at Vol. I, p. 250, D. Morrison Depo. Tr., p. 70, ll. 7 to 13.

> Q. But you wanted 2.8 million as well; right?

A. Yes.

Q. And you realize that what you want and what a lender may eventually approve are not always the same thing?

A. Absolutely....

R. at Vol. I, p. 249, D. Morrison Depo. Tr., p. 70, l. 24 to p. 71, l. 2.

Q. I'm saying did Jefferson Enterprises pay the bank any loan fee prior to closing?

A. Not that I'm aware of.

R. at Vol. I, p. 253, D. Morrison Depo. Tr., p. 83, ll. 7-9

Q. At that time you had this preapproval. Did you pay something to the Bank of Commerce to hold that preapproval open?

A. You have asked that four times. No money was paid prior to the loan fee. Nobody ever paid for a preapproval to a bank.

Q. What was your understanding of the point in time that Jefferson Enterprises became obligated to the terms of the loan as offered by the Bank of Commerce?

A. Legally the day we signed papers.

R. at Vol. I, p. 253, D. Morrison Depo. Tr., p. 85, ll. 13-22.

From Dustin's own testimony, it is clear that there was no consideration paid for any loan preapproval or for any loan commitment. Dustin also testified that no such loan preapproval or loan commitment was in writing. The Bank had not given Jefferson any kind of option contract prior to closing and the loan agreement did not become binding on the parties until it was entered into by both parties at the closing on May 10, 2006.

4. No Evidence that the Bank Ever Agreed to a Second Lien Position on the Eighty Acres

Furthermore, there is no evidence the Bank entered into any kind of commitment to loan money based on Jefferson's application for the loan. More specifically, there is no evidence the Bank agreed to only take a second position on the Eighty Acre Parcel.

Dustin knew that Worton did not have the authority to approve the loan that Jefferson was requesting. R. at Vol. I, p. 258-59, D. Morrison Depo. Tr. p. 105, l. 24 to p. 106, l. 1. In fact, any loan over $250,000.00 had to be approved by the officers and directors of the Bank in a formal meeting. R. at Vol. I, p. 175, Aff. Romrell, ¶ 7. The May 9, 2006, meeting of the officers and directors of the Bank was the only time Jefferson's loan request was presented to the officers and directors of the Bank. R. at Vol. I, p. 175, Aff. Romrell ¶ 6. It was never presented at any prior meeting of the officers and directors of the Bank. *Id.* Therefore, despite Dustin's belief that the Bank had given him a precommitment to loan him the money while agreeing to take a second position in the Eighty Acre Parcel, there is no evidence that the Bank ever offered or approved any such precommitment.

Because the evidence does not support any loan commitment prior to closing, there cannot be any breach of such a loan commitment. Therefore, this Court should affirm the District Court's summary judgment dismissing Jefferson's breach of contract claim.

C. Intentional Interference with a Prospective Economic Advantage

Jefferson claims the Bank's position requiring Jefferson to use existing liquid cash reserves to place the Bank in a first position on the Eighty Acre Parcel materially interfered with

Jefferson's foreseeable prospective economic advantage. *See* Amended Counterclaim, ¶ 24. Specifically, Jefferson claims that the alleged interference "materially interfered with Jefferson's foreseeable prospective economic advantages stemming from the favorable existing financing on the property, the business opportunities of the related entities owned by the Morrisons and its ability to complete the Southern Hills project." Appellant's Brief, p. 13. However, the evidence simply does not support Jefferson's allegation of interference with a prospective economic advantage.

Regarding the tort of intentional interference with a prospective economic advantage, the Idaho Supreme Court has stated:

> To establish a claim for intentional interference with a prospective economic advantage, Cantwell must show (1) the existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure beyond the fact of the interference itself, and (5) resulting damage to the plaintiff whose expectancy has been disrupted. *Highland Enter., Inc. v. Barker,* 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999). The trial court granted summary judgment on this claim because Cantwell failed to raise a genuine issue of material fact concerning whether or not the defendants engaged in a wrongful interference. The district court did not err. In a recent case, this Court denied a claim for tortious interference with contract because the plaintiff failed to establish the alleged interferer was a third party to the contractual relationship. *See BECO Constr. Co. v. J–U–B Eng'rs,* 145 Idaho 719, 724–26, 184 P.3d 844, 849–51. The same result obtains here. Cantwell does not allege the defendants here acted outside the scope of their duties as Cantwell's supervisors. The actions of an agent are the actions of the corporation. *Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho,* 123 Idaho 650, 654, 851 P.2d 946,

> 950 (1993). An agent is only liable for actions which are outside its scope of duty to the corporation. *Id.* Since Cantwell fails to establish that the defendants acted outside the scope of their authority, he fails to show any wrongful interference. Since there is no third party to the relationship, Cantwell cannot state a claim for tortious interference. *See Ostrander,* 123 Idaho at 654, 851 P.2d at 950; *BECO,* 145 Idaho at 725–26, 184 P.3d at 850–51.

Cantwell v. City of Boise, 146 Idaho 127, 137-38, 191 P.3d 205, 215-16 (2005).

To prevail on the third element, Jefferson must not only show that the Bank interfered with its economic expectancy, but that such interference was intentional. Jefferson attempts to shift the focus by claiming that the Bank interfered with its economic expectancy because the Bank knew Dustin used much of his cash to pay off the Eighty Acre encumbrance, thus reducing his working capital. However, this is not evidence of intentional interference. Even when viewing the evidence in a light most favorable to Jefferson, the District Court determined that Jefferson had a valid economic expectancy (element #1) and that the Bank was aware of it (element #2). However, there is no evidence that the Bank intentionally interfered in that expectancy or that the Bank's actions induced termination of the expectancy (element #3). Jefferson also failed to provide admissible evidence that the Bank's actions were wrongful (element #4) or that Jefferson suffered resulting damages (element #5).

1. No Interference

As part of the third element, Jefferson must show that the Bank interfered with the economic expectancy. However, as the District Court noted, it was Dustin who ultimately chose to use his working capital to pay off the Eighty Acre mortgage and to enter into the loan

agreement with the Bank.

Dustin testified:

> Q. Ultimately you decided that you would accept the terms that the bank offered and close the loan.
>
> A. Yes....

R. at Vol. I, p. 250, D. Morrison Depo. Tr., p. 73, ll.20-22.

> Q. ...but legally you could have walked away from that loan up until the minute you signed the documents.
>
> A. Certainly....

R. at Vol. I, p. 254, D. Morrison Depo. Tr., p. 86, ll. 4-6.

> A. ...
>
> So, no, my failure wasn't inevitable, it was absolutely unknown, and I didn't know what the right thing to do was. And I begged Steve for counsel, I begged Tom for counsel.
>
> Q. Ultimately, though, the decision was yours.
>
> A. It was,....

R. at Vol. I, p. 252, D. Morrison Depo. Tr., p. 81, ll. 7-12.

> Q. Ultimately you had to decide what was best for you?
>
> A. I did, I did.
>
> Q. And you made a decision.
>
> A. I did.
>
> Q. And that decision as you said was not based on some promise of

future financing.

A. No,...

R. at Vol. I, p. 252-53, D. Morrison Depo. Tr., p. 81, l. 24 to p. 82, l. 6.

The Bank did not interfere with Jefferson's economic expectancy. Rather, Dustin chose to accept the loan offered by the Bank.

2. Not Intentional

Also, as part of the third element, Jefferson must show that any interference by the Bank was intentional. However, Dustin's own testimony is that the Bank did not intentionally interfere. He testified as follows:

> Q. Do you have some basis to believe that the bank legally couldn't make this loan to you or –
>
> A. No, it just seems completely unsound. It seems like you are loan sharking at that time. You are lending money anticipating failure and anticipating getting the land back.
>
> Q. Is that what you think the bank did?
>
> A. *I don't think the bank thought....*

R. at Vol. I, p. 252, D. Morrison Depo Tr., p. 79, ll. 9-16 (emphasis added).

It is impossible for the Bank's alleged interference to be intentional, if the Bank did not think.

In addition, Dustin testified:

> Q. But do you believe that that was the motive that drove this supposed change as you call it?

A. I don't know for sure, but no, my gut and my instinct is that it was just *simple negligence*, the left hand didn't know what the right hand was doing,...

R. at Vol. I, p. 257, D. Morrison Depo. Tr., p. 100, ll. 16-20 (emphasis added).

Again, the Bank's conduct cannot be intentional if it was simply negligent. Negligence does not include an element of intentional conduct.[5]

Dustin also testified:

Q. But you don't have any facts that would support a belief that you can point to that cause you to say this was purposeful because of this?

A. That's right.

R. at Vol. I, p. 257, D. Morrison Depo. Tr., p. 101, p. 16-19.

"Intentionally" is defined as follows: "To do something purposely, and not accidentally or involuntarily...." Black's Law Dictionary 560 (Abr. 6th ed. 1991). Since Dustin does not have any evidence that the Bank's conduct was purposeful, there is of course no evidence that its conduct was intentional.

Jefferson's claim for intentional interference with an economic expectancy fails because there is no evidence that the Bank's alleged interference was intentional.

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[5] "The elements of negligence are well established: (1) duty; (2) breach; (3) causation; and (4) damages." *McPheters v. Maile,* 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). Intention is not an element of negligence. For this reason, there are differences between negligent and intentional torts, such as *negligent* infliction of emotional distress and *intentional* infliction of emotional distress. Relevant to the present case, Idaho has not recognized the tort of *negligent* interference with a prospective economic advantage.

3. The Bank's Actions Did Not Induce Termination of the Expectancy

For argument's sake, even if the Bank did intentionally interfere with Jefferson's economic expectancy, the evidence does not support the requirement that such interference induced the termination of the expectancy.

Dustin testified:

> Q. I think you referred to it as this beast. What did you mean by this beast?
>
> A. It's the biggest subdivision, it's the biggest master plan subdivision I believe at the time in Idaho, still by far in Southeast Idaho, in this market, in this world. I mean nothing originally nationally but extremely original for the community, for the area, for the state.
>
> Q. So it was kind of a cutting edge thing here –
>
> A. For us, yes.

R. at Vol. I, p. 238-39, D. Morrison Depo. Tr., p.25, l. 21 to p. 26, l. 4.

> Q. Those were all unknowns going into it.
>
> A. Yes.
>
> Q. And that's kind of what development is all about, you get an idea, you see a project, you dump some money in, and you hope it turns out.
>
> A. Yes.

R. at Vol. I, p. 241, D. Morrison Depo. Tr., p. 35, l. 25 to p. 36, l. 5.

> Q. So you are saying that when you closed on this loan on May 10, that you knew that you wouldn't be able to keep the property, you didn't think you had any chance in the world of being able to come up with some plan to salvage this property?

A. No, that's not fair....

...

So, no, my failure wasn't inevitable, it was just absolutely unknown, and I didn't know what the right thing to do was....

R. at Vol. I, p. 252, D. Morrison Depo. Tr., p. 80, l. 11 to p. 81, l. 9.

Q. ... In Paragraph 15 you allege that Jefferson and other related entities lost the ability to take advantage of the foreseeable prospective economic opportunities related to the 80 Acres parcel, the Southern Hills projects, and other real estate developments.

A. And this one wasn't truly foreseen, like to the extent that it impacted us, it wasn't foreseen or foreseeable with my set of knowledge. It was truly after we went out courting investors, them asking for financial statements and them seeing our weaknesses and defining our weaknesses as exactly what had just changed.

Q. So you at the time, you didn't realize the impact it potentially could have, you said you later discovered --

A. I knew it would have an impact on my appeal to investors. I didn't fully appreciate how to the extent.

R. at Vol. I, p. 256, D. Morrison Depo. Tr., p. 95, l. 15 to p. 96, l. 1.

In fact, Dustin admitted that there are lots reasons why Jefferson ultimately failed. Regarding his decision to agree to the $2.2 million loan with the Bank, including giving the Bank a first lien position on the Eighty Acre Parcel, Dustin testified:

A. ...

I don't know if I made the best choice or not, I regret it some days and some days I think – you guys were horrible. I don't know, it's definitely wrecked

my life, it definitely has had an impact. I don't think it's solely due to the Bank of Commerce either, I think the market itself, the downturn in the market. Bank policy on spec construction and lending. Our own construction practices. A million things have played into it.

...

R. at Vol. I, p. 258, D. Morrison Depo. Tr., p. 104, ll. 8-16.

4. The Bank's Action Were Not Wrongful

The fourth required element is that the alleged interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the defendant interfered for an improper purpose or improper means). *See Cantwell, supra.* Throughout his deposition Dustin testified that he didn't "think the bank thought", that he had not taken the position that the Bank purposely misled him, that he believed it was a case of simple negligence as the Bank's "left hand didn't know what the right hand was doing", that "Steve Worton never misled [him]" and that "Steve was forthright". R. at Vol. I, p. 252 & 257, D. Morrison Depo. Tr., p. 79, ll. 15-16; p. 99, ll. 17-22; p. 100, ll. 16-20; p. 100, l. 24 to p. 101, l. 1; p. 101, ll. 7-8. Dustin also testified as follows:

Q. ... But is it your belief that when they supposedly gave you this precommitment that they knew at that time that they were going to change their position?

A. No, I don't think. And you keep saying "they," understand the only contact was with Steve until the day before the loan and then that was with Steve and Tom. So "they" being Steve, no, I don't think that he had any intention of changing the game at the last minute.

R. at Vol. I, p. 260, D. Morrison Depo. Tr., p. 110, l. 18 to p. 111, l. 2.

Dustin testified:

Q. Anything other than your experience in borrowing money that you rely on to make that statement that the bank deviated from recognized lending standards?

A. No, I guess not....

R. at Vol. I, p. 255, D. Morrison Depo. Tr., p. 91, l. 25 to p. 92, l. 4.

Q. In Paragraph 15 you also allege that the bank committed other wrongful conduct. What other wrongful conduct do you believe the bank committed?

A. I think that they should have considered one of the other options in order to mitigate the loss of the financing that was established and keep my balance sheet more sound....

Q. Other than [not] follow one of your recommendations, what other wrongful conduct did the bank engage in?

A. I think they changed the terms at the last minute. I think they went through and closed a loan they had no business closing, none whatsoever. I think the whole process was wrong, there was nothing in writing, there was nothing stipulating to anything, there was nothing stipulating my request to the board. It was just my request, my binder. It's my binder.

Q. Is there something in your mind legally, can you point me to something that says you can't do that?

A. No,...

R. at Vol. I, p. 255, D. Morrison Depo. Tr., p. 92, l. 18 to p. 93, l. 16.

Q. And, to your knowledge, does the bank's insistence that it have a first lien on the 80 Acres, is that somehow a violation of any statute that you are aware of?

A. No.

Q. Is it a violation of any regulation or rule that you are aware of?

A. I think like you said, they can ask for whatever they want. They can ask for my first born, I guess, if they want.

R. at Vol. I, p. 259, D. Morrison Depo. Tr., p. 106, ll. 2-11.

Ultimately, Dustin decided he would accept the terms the Bank offered and close the loan. R. at Vol. I, p. 250, D. Morrison Depo. Tr., p. 73, ll. 20-22.

Even when construing the facts in favor of Jefferson, there is no evidence to support the fourth element that the Bank's insistence upon receiving a first priority lien position in the Eighty Acre Parcel was wrongful.

Furthermore, although a lender can be liable for failure to loan money pursuant to a valid written agreement to loan money, the Bank can find no authority to support the proposition that, in the absence of a valid contract, a lender can be liable for damages for failure to loan money on the terms and conditions applied for by a potential borrower. Dustin acknowledged that it was the Bank's decision whether or not it would agree to loan money, the Bank was not obligated to accept his proposal just because it was his proposal, and what he wanted and what a lender might eventually approve are not the same thing D. Morrison, Depo Tr., p. 70, l. 7-13; p. 70, l. 24 to p. 71, l. 2.

Just as the Bank cannot be liable for refusal to loan money under the terms that Dustin had requested, the Bank cannot be liable for damages that may have resulted when it loaned money to Jefferson under different terms because Dustin agreed to those different terms. It is

impossible for the Bank to be liable for damages for having fulfilled its side of the contract to loan money as agreed upon by the parties. The Bank's actions of loaning the $2.2 million under the agreed upon terms of the loan cannot be construed as wrongful for purposes of Jefferson's claim of intentional interference with a prospective economic advantage.

5. No Evidence of Resulting Damages

Finally, the fifth element necessary to prove a claim of intentional interference with a prospective economic advantage is resulting damages. *See Highland Enterprises, supra.* Again, Jefferson has failed to provide any evidence to support its alleged damages.

Dustin has testified that at the time of the loan, "[his] failure wasn't inevitable, it was just absolutely unknown,..." R. at Vol. I, p. 252, D. Morrison Depo. Tr., p. 81., ll. 7-8. Furthermore, the ultimate decision whether or not to take the loan from the Bank to pay off the Eighty Acre mortgage and to place the Bank into first position on the Eighty Acre Parcel was made by Dustin. R. at Vol. I, p. 250-51 & 256, D. Morrison Depo. Tr., p. 73, ll. 20-22; p. 81, l. 24 to p. 82, l. 3; p. 95, ll. 6-8. Up until he signed the loan documents, Dustin admitted that he could have walked away from the loan. R. at Vol. I, p. 254, D. Morrison Depo. Tr., p. 86, ll. 4-6. Dustin testified that he doesn't know if he made the best choice or not. R. at Vol. I, p. 258, D. Morrison Depo. Tr., p. 104, l. 8. He admits that the impact his decision has had on his life is not solely due to the Bank of Commerce, but "[a] million things have played into it." R. at Vol. I, p. 258, D. Morrison Depo. Tr., p. 104, ll. 11-16. Therefore, there is no evidence that Jefferson's alleged damages were caused by the Bank.

> "A district court's award of damages will be upheld on appeal where there is sufficient evidence supporting the award." *Griffith I,* 143 Idaho 733, 740, 152 P.3d 604, 611 (2007) (*quoting Sells v. Robinson,* 141 Idaho 767, 774, 118 P.3d 99, 106 (2005)). This Court has held that evidence is sufficient if it proves the damages with reasonable certainty. *Griffith I,* 143 Idaho at 740, 152 P.3d at 611. "Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation." *Id.*

Griffith v. Clear Lakes Trout Co., Inc., 146 Idaho 613, 618, 200 P.3d 1162, 1167 (2009).

Dustin testified:

> Q. How did you calculate the damages that you think that you suffered as a result of the bank's conduct?
>
> A. I don't know. This got me in trouble on the last one, too, I don't know what my damages are. I don't know what my damages are. I don't know the amounts of them yet because I am not that comfortable with the reconciliation.

R. at Vol. I, p. 256, D. Morrison Depo. Tr., p. 97, ll. 16-24.

There is no evidence upon which a trier of fact could fix the amount of Jefferson's claimed damages. The only way damages could be calculated in the present case is by conjecture and speculation. Dustin does not know what his damages are. Dustin admitted that he was not competent to determine the amount of damages when he testified that "you would need somebody a little bit smarter than me to define that number". R. at Vol. I, p. 257, D. Morrison Depo. Tr., p. 98, ll. 8-9. Therefore, by his own admission, he is not competent to testify as to the amount of damages. Jefferson did not support its objection to the Bank's Motion for Summary Judgment with any affidavit from any expert witness. There is no evidence in the record supporting the amount of damages allegedly suffered by Jefferson. Therefore, Jefferson has

failed to provide any evidence to support the fifth required element of its claim for intentional interference with an economic advantage.

D. Fraud and Misrepresentation

Jefferson claims that the Bank fraudulently misrepresented that it would accept a second lien position on the Eighty Acre Parcel and then allegedly changed its position less than 48 hours before the loan closing and the expiration of the option to purchase the Wood Property by insisting on a first lien position. In addition, Jefferson claims that the Bank fraudulently misrepresented that it would provide additional financing in the future, but that the Bank subsequently refused to provide that additional financing.

The Bank should be granted summary judgment on this fraud and misrepresentation issue for two reasons. First, Jefferson has failed to plead fraud and misrepresentation with particularity as is required. *See* Rule 9(b), I.R.C.P. Second, Jefferson has failed to establish all of the elements required to establish a claim for fraud or misrepresentation.

The Idaho Supreme Court has set forth the requirements for fraud, as follows:

> A claim of fraud requires the plaintiff to establish nine elements with particularity: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Chavez v. Barrus, 146 Idaho 212, 223, 192 P.3d 1036, 1047 (2008).

1. No Fraudulent Misrepresentation Regarding the Bank's Request to Be in First Priority Lien Position on the Eighty Acre Parcel

In order to establish fraud or misrepresentation, Jefferson would need to set forth evidence that when Worton allegedly told Dustin that the Bank initially had approved the loan by agreeing to take a second priority lien position in the Eighty Acre Parcel, that the Bank and/or Worton knew that such a statement was false and that the Bank would really only agree to a first priority lien position in the Eighty Acres Parcel. However, there is no evidence to support Jefferson's claim that the Bank's alleged original representation that it would take a second priority lien position was false at the time it was allegedly made. Nor is there any evidence that the Bank knew such alleged representation was false at the time it was allegedly made.

In regards to what Jefferson claims was the precommitment, Dustin testified as follows:

> A. ... I meet with Steve Worton, Steve Worton says I think we can get you what you want....

R. at Vol. I, p. 246, D. Morrison Depo. Tr., p. 56, ll. 22-24.

> Q. I want to go back, I don't want to spend a lot of time on this April 25, I know it's not the exact date, but this precommitment. That was just we think we might be able to get something approved, I mean it was –
>
> A. No, it was more than that.
>
> Q. Not in writing but –
>
> A. I believe there was an interest rate expressed. I believe that there was a condition or a change from my application that was spelled out in the amount, the loan amount, not 2.8, we will do 2.2. No other conditions. And the term, one year. That's it, that's it. 2.2 for one year.

The words weren't saying everything else in your application or loan request are acceptable or approved, but there was certainly the effort to clarify the changes to my loan request and application.

Q. So they were telling you what they thought the changes would have to be.

A. Yes.

Q. In order to even have the board approve that loan.

A. It was more than that, it was somebody had said we could do this. *If everything checks out, after due diligence, if everything checks out as you implied, we could do this*, it was that far.

R. at Vol. I, p. 253, D. Morrison Depo. Tr., p. 83, l. 10 to p. 84, l. 14 (emphasis added).

Regarding the issue of whether the Bank purposefully misled Jefferson, Dustin testified as follows:

Q. In Paragraph 19 of your counterclaim you state that the change of position of the bank, and this is talking about the change in 80 Acres financing, was timed in such a manner that Jefferson was unable to seek alternate financing to exercise the option to purchase the Wood property.

Is it your position that the bank purposely misled you, kind of led you along to that point and then kind of hit you below the belt?

A. I haven't said that and you didn't read that in that Paragraph 19, that is a presumption you just jumped on.

Q. No, I am just asking –

A. I would say minimum negligently and I don't know, I don't know, you know...

R. at Vol. I, p. 257, D. Morrison Depo. Tr., p. 99, ll. 17-25.

A. ... Like you said, I am not saying that I have any evidence, there is nothing in writing, I'm not – I am just saying that, yeah, there could be some motivation for the bank getting this piece of property back under those terms.

Q. But do you believe that that was the motive that drove this supposed change as you call it?

A. I don't know for sure, but, no, my gut and my instinct is that it was simple negligence, the left hand didn't know what the right hand was doing, and that Tom's arrogance wouldn't consider something that would mitigate its impact on me. It was absolute negligence at least.

Q. You don't feel like Steve Worton was purposely trying to mislead you –

A. I don't think Steve Worton misled me.... I think Steve was forthright, I think Steve was as frantic as I was those two days before to clarify with Tom the board's intention.

Q. You are saying it wasn't purposeful, you don't think it was –

A. I'm not saying it wasn't purposeful. I am saying I don't think that it was but I don't know. I want that answer to be enough.

Q. But you don't have any facts that would support a belief that you can point to that caused you to say this was purposeful because of this?

A. That's right.

R. at Vol. I, p. 257, D. Morrison Depo. Tr., p. 100, l. 11 to p. 101, l. 19.

Dustin did not believe that when the Bank, through Worton, supposedly gave him the precommitment that the Bank had any intention of changing the game at the last minute. R. at Vol. I, p. 260, D. Morrison Depo. Tr., p. 110, l. 17 to p. 111, l.1.

In addition, Dustin knew that Worton did not have the authority to approve the loan.

Therefore, Dustin knew that any representation by Worton regarding the Bank's priority of the Bank's lien position would ultimately have to be approved by the Bank's board of directors. Therefore, it was not reasonable to rely on any alleged statement from Worton that the Bank would agree to a second lien position on the Eighty Acre Parcel prior to the Board of Directors' actual approval of such. Dustin testified:

> Q. During your discussions with Steve Worton, did you understand that Steve Worton didn't have authority by himself to approve this loan?
>
> A. I felt that he did.
>
> Q. What was it that led you to believe that he –
>
> A. I'm sorry, strike that, that's not right. I felt he had the authority to represent the bank. In fact I somewhat knew that. Whether that was right or wrong, I don't know, but I knew at that point that Steve had authority to represent the bank.
>
> Q. But you knew he had to go get approval from the board of directors on a loan of this size.
>
> A. Yes.

R. at Vol. I, p. 258-59, D. Morrison Depo. Tr., p. 105, l. 14 to p. 106, l. 1.

Based on Dustin's own testimony, Worton did not know that his alleged false statement concerning the Eighty Acre Parcel was false. There is no evidence that anyone at the Bank, besides Worton, made any such representation. There is no evidence that the Bank knew that Worton's alleged statement was false. Moreover, Dustin knew that Worton did not have the authority to approve the loan, but that the Bank's board of directors would have to approve it.

Therefore, Jefferson's claim of fraud and misrepresentation regarding the lien position in the Eighty Acre Parcel is not supported by the evidence.

2. No Fraudulent Misrepresentation Regarding Additional Future Loans

Additionally, the Amended Counterclaim alleges that the Bank fraudulently misrepresented that it would subsequently provide additional financing. Again, the admissible evidence does not support such a claim. Dustin testified as follows:

> A. ... Steve says there is no way the bank wants you to fail, there is no way that the Bank wants this as an asset. So do whatever you think is the right thing for you to do, but if you do this, my hunch is that you will be able to come back into this bank and they will consider whatever your loss was.
>
> So we did that, and we did come back into the bank several months later with applications for construction money to continue our operation in Stone Creek Estates and were denied that. And we brought that in at the encouragement of Steve.
>
> So we moved forward understanding that it would be the bank's effort to mitigate this impact of this new requirement on our business.
>
> Q. And that's based on what you claim Steve Worton told you?
>
> A. He didn't say those words, but yes.
>
> Q. And did he give you something in writing to that effect?
>
> A. He didn't give me anything in writing for anything.
>
> Q. So as I understand what you said, these are operating funds you think he was promising you?
>
> A. No. The ability to operate without those funds. I don't think he was promising it, I think he was using some common sense argument that there is no way that the bank won't do this.

Q. So you didn't view that as a loan commitment from the bank?

A. No, I didn't....

R. at Vol. I, p. 250, D. Morrison Depo. Tr., p. 72, l. 12 to p. 73, l. 17.

Q. Now, you say you thought there would be. Are you saying there was a commitment on the part of the bank?

A. No.

Q. That's just what you thought would happen.

A. Yes....

R. at Vol. I, p. 251, D. Morrison Depo. Tr., p. 74, ll. 6-11.

Q. That wasn't a commitment of Steve Worton or anybody else at the bank, that's just what you thought.

A. That's right....

R. at Vol. I, p. 251, D. Morrison Depo. Tr., p. 74, ll. 19-21.

Q. And you made a decision.

A. I did.

Q. And that decision as you said was not based on some promise of future financing.

A. No, but it was a consideration of those things.

Q. Those are factors you considered.

A. Yes, consideration.

Q. But not a legal commitment on the part of the bank to provide financing.

A. Sure, that's right....

R. at Vol. I, p. 253, D. Morrison Depo. Tr., p. 82, ll. 2-12.

Based on Dustin's testimony, the only inference can be that the Bank did not make any false statement to Jefferson regarding a commitment for future financing.

In *Kruse v. Bank of America,* 202 Cal.App.3d 38, 248 Cal.Rptr. 217 (1988), the California Court of Appeal reviewed a similar case in which various persons sued a bank because the bank had allegedly promised to provide future long-term loans, but subsequently refused to extend those loans. One of the plaintiffs, Irene Kruse, sued the bank claiming fraud. The appellate court stated:

> The theory advanced at trial was that the Bank fraudulently induced Mrs. Kruse to execute the transfer of stock by misrepresenting to Mrs. Kruse that long-term financing would then be provided....
>
> ...
>
> It seems obvious that Mrs. Kruse's central complaint is not the Bank's fraudulent inducement but rather the Bank's refusal to provide long-term financing for the O'Connell Company....
>
> Yet, contrary to her assertions, the record contains no evidence of a "commitment" or "promise" to make such long-term loan. Unlike the Jewells, at trial Mrs. Kruse conceded there was no contract to lend money, since no terms had been negotiated. The thrust of her argument is directed to the Bank's conduct in 1977 and 1978 as the basis of an implied representation that the Bank would fund a long-term loan when in fact it had no intention to do so. The argument fails under its own weight, the record reflecting an absence of any substantial evidence supporting either an implied promise to lend money or the essential requirement of justifiable reliance.

> At most, Sullivan [the bank's loan officer] expressed interest in securing the desired financing. As previously discussed, he and George M. Jewell engaged in ongoing discussions and negotiations for the purpose of obtaining the necessary loan approval from Sullivan's superiors, a prospect long incubating within George M. Jewell's hopeful expectation, an optimism he quickly shared with Mrs. Kruse and her son. Yet, George M. Jewell's optimism was unfounded. He knew that Sullivan lacked authority to approve the sizable loan necessary to fund the dehydration plant. The very premise of their frequent discussions was the need to obtain the approval of the regional office. In fact, the stock transfer in response to Sullivan's request was purportedly a step towards facilitating the needed approval. It is indisputable that the regional office's approval was recognized by both the Jewells and the O'Connells as a condition precedent to the Bank's expected commitment to extend long-term financing. The evidence of such contingent expectations and negotiations is far removed from a binding promise to lend money and also negates any reasonable reliance upon the Bank's alleged misrepresentations.

Id. at 62-64, 248 Cal. Rptr. at 231-33.

Similarly, Jefferson is claiming that the Bank fraudulently induced it to enter into the $2.2 million loan on May 10, 2006, by misrepresenting to Dustin that long-term financing would later be provided. However, the evidence does not support fraud or misrepresentation. Jefferson knew that any future loans from the Bank would have to be negotiated to determine the terms of any such loans. Jefferson also knew that the Bank's board of directors would have to approve of any such loans. Dustin testified:

> Q. What was the commitment?
>
> A. I think the commitment was a little bit ambiguous versus how you are trying to package it. And I am aware of what that sounds like. The commitment was the bank will do whatever it can to facilitate your success.
>
> Q. And this commitment was, again, verbally from Mr. Worton?

A. Yes. And it was assuming the bank's logic –

Q. So the bank would have to approve it.

A. Yes. And probably define terms and all of those things, you know.

Q. So none of that was decided or discussed.

A. That's right. The commitment was broad and more in principle, you know, the bank will do what it can to facilitate your success with this project and continued income.

Q. I mean there wasn't this discussion, where you said, okay it would be this much money for this long, for this interest rate or –

A. That's right, you are right.

R. at Vol. I, p. 254, D. Morrison Depo. Tr., p. 88, ll. 4-24.

The evidence of such contingent expectations and negotiations is far removed from a binding promise to lend money and also negates any reasonable reliance upon the Bank's alleged misrepresentations. *See Kruse, supra.* Therefore, Jefferson's fraud and misrepresentation claim fails.

E. Promissory Estoppel

Jefferson alleges promissory estoppel and now claims the District Court erred when it did not consider the specific terms and conditions of the Mortgage that allowed prior encumbrances of record, including the Eighty Acre encumbrance.

As discussed above, Jefferson's argument that the Mortgage allowed for the security to have prior encumbrances of record, including the Eighty Acre encumbrance, was raised for the

first time on appeal, and therefore should not be considered. *See Garner, supra.*

Also, as set forth in detail above, there was no valid loan commitment prior to the closing on May 10, 2006. As such the Bank should not be estopped from denying a nonexistent agreement which would have violated the Statute of Frauds and to which the Bank's board of directors never consented.

Apparently a similar argument was made in *Lettunich, supra.* In that case, the Idaho Supreme Court addressed promissory estoppel in a similar context as the present case. The Court stated:

> Lettunich argues promissory estoppel should be used in this case to prevent KeyBank from denying the enforceability of an oral promise. Again, there was no complete promise here to be enforced. Promissory estoppel is simply a substitute for consideration, not a substitute for an agreement between parties. *Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 68, 625 P.2d 417, 422 (1981). Consideration includes "action by the promisee which is bargained for and given in exchange for the promise." *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526 (1967). It may also consist of a "detriment to the promisee or a benefit to the promisor." *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599, 603, 514 P.2d 594, 598 (1973) (citations omitted). In this case, Lettunich clearly suffered a detriment when he purchased cattle without a way to pay for them. The doctrine of promissory estoppel is of no consequence in this case because there is evidence of adequate consideration. What is lacking is a sufficiently definite agreement. *Black Canyon Racquetball v. First Nat'l,* 119 Idaho 171, 178, 804 P.2d 900, 907 (1991).

Lettunich, 141 Idaho at 367-68, 109 P.3d at 1109-10.

Similarly, the doctrine of promissory estoppel is not applicable to Jefferson's claims. The issue is not whether there was adequate consideration for the alleged oral loan commitment. Even if there were adequate consideration for the alleged oral loan commitment, such a commitment

would still not have been valid or definite because it was not in writing and because it was not subscribed by the Bank. As argued above, any such oral loan commitment would have violated the Statute of Frauds.

Therefore, this Court should grant the Bank summary judgment by dismissing Jefferson's promissory estoppel claim.

F. Damages

Jefferson has not provided any foundation upon which its claimed damages can be calculated. The Bank's arguments, set forth above, regarding the speculative nature of Jefferson's alleged damages, apply not only to the intentional interference with a prospective economic advantage claim, but to all of Jefferson's theories of liability.

G. Novation

Even if there were a valid oral pre-loan commitment that would place the Bank in a second lien position on the Eighty Acre Parcel, as alleged by Jefferson, such a pre-loan commitment would have been superceded by the actual written loan documents that were executed by the parties on May 10, 2006. Therefore, the actual loan would be a novation of any alleged oral preapproval agreement. Additionally, in conjunction with the subsequent $400,000 loan by the Bank to Jefferson, another Promissory Note and another Mortgage were executed by Jefferson more than a year later on or about June 27, 2007, which again placed the Bank in a first priority lien position. Moreover, the Promissory Notes and Mortgages were modified by the Bank and Jefferson pursuant to the two Corporate Notes and Deed of Trust/Mortgage

Agreements to Amend Terms that were executed on or about February 21, 2008. As a result of the modifications, both Notes became due and payable in full on May 1, 2008. Again, these modifications acted as a novation of the original loan documents which were executed by the parties on May 10, 2006.

The Idaho Supreme Court has explained the concept of a novation as follows:

> A novation results when an accord and satisfaction is reached by substitution of a new agreement or performance in place of the performance or compromise of the original obligation. Thus, novation is a species of accord and satisfaction. 1 C.J.S. *Accord and Satisfaction* § 5, p. 465; *Wheeler v. Wardell,* 173 Va. 168, 3 S.E.2d 377 (1939). It is stated in *Wheeler v. Wardell, supra,* that novation is a contract consisting of two stipulations; first, to extinguish an existing obligation and, secondly, to substitute a new one in place of the original. The court stated:
>
> > "Every novation embraces, necessarily, an accord and satisfaction; the principle distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereto and its transition into a new existence between the same or different parties, whereas an 'accord and satisfaction' relates solely to the extinguishment of the debt or obligation."
>
> To establish an accord and satisfaction the parties accepting a new or different obligation must do so knowingly and intentionally. *Heckman v. Boise Valley Livestock Comm'n Co.,* 92 Idaho 862, 452 P.2d 359 (1969); *Fairchild v. Mathews,* 91 Idaho 1, 415 P.2d 43 (1966); *Allan Steel Supply Co. v. Bradley,* 89 Idaho 29, 402 P.2d 394 (1943). An accord and satisfaction may be implied from the attendant circumstances. *Independent School Dist. Class A, Number One v. Porter,* 39 Idaho 340, 228 P. 253 (1924); *Fairchild v. Mathews, supra; Winn v. Rudy-Patrick Seed Co.,* 249 Iowa 431, 86 N.W.2d 678 (1957); *Scott v. Imperiol Hotel Co.,* 75 Ga.App. 91, 42 S.E.2d 179 (1947).

Harris v. Wildcat Corp., 97 Idaho 884, 886, 556 P.2d 67, 69 (1976).

To the extent there was a pre-loan representation as alleged by Jefferson, it was

subsequently modified by a series of novations. Therefore, Jefferson's claim that the Bank breached the oral pre-loan commitment should be dismissed as any such agreement was subsequently extinguished and substituted by the written $2.2 million loan agreement entered into on May 10, 2006, as well as the other subsequent novations.

H. Affirmative Defense

Jefferson also states that it "raised an affirmative defense in its Amended Answer and Counterclaim (the illegality of the Bank's actions) that was not addressed by the Bank in its motion for summary judgment or the District Court in its decision dismissing Jefferson's counterclaim". *See* App. Brief, at 1.

Jefferson did not raise the illegality of the Bank's *actions* in its Amended Answer and Counterclaims. Rather, Jefferson claimed as an affirmative defense that "[t]he Defendants are entitled to declare the note and mortgage null and void due to its illegality." R. at Vol. I, p. 121.

In its Memorandum in Support of Motion for Summary Judgment, the Bank argued it was entitled to foreclose both of its Mortgages and that it held the highest priority on the Subject Property. R. at Vol. I, p. 150. The Bank set forth the background and foundation for the Promissory Notes and Mortgages that are the subject of this case in the Affidavit of A. Michael Morrison. R. at Vol. I, pp. 188-228. Dustin, the owner, manager and currently only member of Jefferson, testified that he understood that Jefferson became legally obligated to the terms of the loan which was offered by the Bank on the day he and Sonya signed the papers. R. at Vol. I, p. 252, D. Morrison Depo. p. 85, ll. 19-23.

Jefferson did not argue in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment nor in any of its briefs supporting its Motion to Reconsider that the Mortgages were illegal. Neither did Jefferson provide any evidence that the Mortgages were illegal.

The District Court stated: "The Court further finds that the Plaintiff holds two mortgages that encumber the Wood property and the 80 Acre parcel respectively. That Defendant Jefferson did not present any evidence or objection to the Bank's request to foreclose on the mortgages." R. at Vol III, p. 651, Memorandum Decision and Order, p. 19.

In *Butters v. Valdez,* 149 Idaho 764, 770, 241 P.3d 7, 13 (Ct. App. 2010), the Idaho Court of Appeals stated:

> If a motion for summary judgment is supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings. The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment-he must set forth, by affidavit or deposition, "specific facts" showing a genuine issue. A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. If a party does not so respond, summary judgment, if appropriate, shall be granted.

(Internal citations omitted.)

Therefore, because Jefferson only raised the issue of illegality in its Amended Answer, but did not address or support that issue in its subsequent briefs or affidavits, and because the Bank did set forth a foundation for the Promissory Notes and Mortgages in its affidavits, the District Court did not err in granting summary judgment to the Bank and allowing it to foreclose

on its Mortgages.

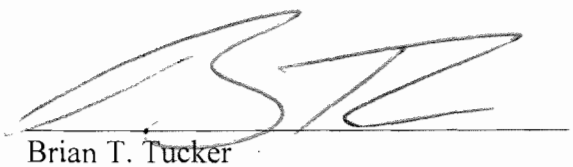
VI. CONCLUSION

Even when construing the evidence in Jefferson's favor, Jefferson has failed to make a sufficient showing on the essential elements of its claims of breach of contract, intentional interference with a prospective economic advantage, fraud and misrepresentation, promissory estoppel, and damages as well as its affirmative defense of illegality. The Bank did support its foreclosure claims with uncontroverted evidence. There is no genuine issue as to any material fact and the Bank is entitled to a judgment as a matter of law.

Therefore, this Court should affirm the District Court's grant of summary judgment in favor of the Bank.

The Bank should be granted its attorney fees and costs on appeal.

DATED this 29 day of November, 2012.



Brian T. Tucker

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