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

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 40034-2012

THE BANK OF COMMERCE,
an Idaho banking corporation

Respondent,

vs.

JEFFERSON ENTERPRISES, LLC,
an Idaho limited liability company,

Appellant.

APPELLANT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Robert C. Naftz, District Judge, Presiding.

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I. STATEMENT OF THE CASE.

A. Nature of the Case

This is a case brought by the Bank of Commerce (hereinafter referred to as "Bank"), to foreclose real estate mortgages against Appellant, Jefferson Enterprises, LLC, (hereinafter "Jefferson").[1] The case before this Court is an appeal from the decision of the District Court granting the Bank's Motion for Summary Judgment dismissing Jefferson's Counterclaims. Jefferson's counterclaim and affirmative defenses raise factual issues based upon breach of contract, interference with a prospective contract, fraud and misrepresentation, and promissory estoppel. Jefferson also 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.

B. Course of Proceedings

The Bank filed an action to foreclose two mortgages that were entered into by the Jefferson. 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 on the grounds that there were no genuine issue of material fact and it should be entitled to summary judgment as a matter of law.

The Jefferson responded to the Motion with affidavits, depositions and memoranda of law. Following oral argument, the District Court granted the Motion, dismissed the Jefferson's Counterclaim and entered judgment in favor of the Bank. Thereafter, the Jefferson timely moved the Court for an order vacating the judgment and for reconsideration. The motion after briefing

[1] *Designation of the parties used by the trial court* I.A.R. 35(d)

and argument was denied. As a result Jefferson has appealed from the January 17, 2012, Memorandum Decision and Order; the January 17, 2012, Judgment, the April 19, 2012, Memorandum Decision and Order on Motion to Reconsider; the April 19, 2012, Decree of Foreclosure and Order of Sale; the April 19, 2012, Memorandum Decision and Order on Attorney Fees and Costs; and the April 19, 2012, Judgment Re: Attorney Fees & Costs.

C. Statement of Facts.

Dustin Morrison is the owner and managing member of Jefferson. Dustin Morrison is also the owner and managing member of American Dream Home Builders, LLC, an Idaho Limited Liability Company n/k/a ADHD, LLC. The LLC is in the business of developing residential subdivisions and constructing residential homes. Dustin Morrison is also the sole shareholder and officer of American Dream Construction, Inc. The corporation is in the business of developing residential subdivisions and constructing residential homes in conjunction with American Dream. Jefferson Enterprises and the other described entities are interrelated to the extent that their common financial ability to succeed is influenced by the ongoing projects, monetary reserves and credit worthiness of all of the entities.[2] The bank relied upon the financial relationship of Jefferson, Dustin Morrison, and the other related entities in its decision to loan money to Jefferson.

In May of 2005, Jefferson became the sole owner and managing member of Southern Hills Development Co., LLC. Southern Hills was the owner of an option to purchase real

[2] Depo. Worton pp. 18; Clerk's Record p. 396. Depo. M. Morrison pp. 45; Clerk's Record p. 333. The bank relied upon the financial relationship of Jefferson, Dustin Morrison, and the other related entities in its decision to loan money to Jefferson.

property which is referred to as the "Wood" parcel. Southern Hills was also the owner of a substantial portion of the 80 Acres, Inc., a subdivision of the City of Pocatello, Idaho (referred to as the "80 Acre" parcel). All of the rights, title and interest in Southern Hills and in the Wood and 80 Acre parcels were transferred to Jefferson.

The 80 Acre parcel was subject to a financing arrangement with exceptionally favorable terms and conditions. The terms of the financing included a very low interest rate that was capitalized into the note together with low annual payments.[3] Jefferson assumed those favorable financial arrangements. According to Dustin Morrison "there was not one dollar incentive to pay that off one day early."[4]

In the early part of 2006, Jefferson negotiated with the Bank through one of its Vice Presidents, Steve Worton, for the purpose of the obtaining financing to exercise the option and to purchase the Wood property. Prior to the negotiations with the Bank, a "Master Plan" for development of the Southern Hills Project combining the Wood parcel and the 80 Acre parcel had been submitted and approved by the City of Pocatello. At the time, the plan was the largest single development in southeastern Idaho.[5] At the time the loan was being negotiated with the Bank, an Annexation Agreement was being negotiated between Morrison and the City of Pocatello. Among other things, the Annexation Agreement provided for utilities, sewer and the joint development of a water system that included at least two large water storage tanks. Compliance with the terms of the Master Plan and the Annexation Agreement obligated Jefferson to spend millions of dollars to comply and complete the development. Jefferson and the related entities spent large sums of money for the 80 Acre property acquisition, engineering,

[3] Depo. Worton Ex. 21; Clerk's Record p. 418
[4] Depo. D. Morrison pp. 28-29; Clerk's Record p. 459
[5] Depo. D. Morrison. p.25; Clerk's Record p. 458

surveying, preparation of plats and other actions necessary to obtain the Annexation Agreement and the approval of the City of Pocatello for the Southern Hills Master Plan.[6]

A loan proposal was submitted by the Morrisons and Jefferson to the Bank for the purpose of funding the purchase of the Wood property. The deadline to exercise the option to purchase the property was May 10, 2006. The owner of the property was not willing to extend the option past the deadline. In the event the option was not exercised and the Wood property not purchased, Jefferson would not be able to develop the Southern Hills Project and the expenditures described above would be lost. Wood had extended the option on two other occasions but refused any further extensions.[7]

The loan proposal included volumes of documents relating to the Southern Hills Project together with tax returns, financial analysis, appraisals, and projected profits. Interestingly the Bank accepted the Jefferson documents and treated the same as the loan application.[8]

The application provided that the Bank's position would be subject to the 80 Acre mortgage. Some time prior to May 8, 2006, Steve Worton, on behalf of the Bank, informed Jefferson that the loan pertaining to the Southern Hills Project had been approved by the Bank. The only variance from the written request made by Jefferson was that the amount of the loan would be reduced to approximately $2,200,000.00 and the term of the loan would be for one year. The Bank's communicated approval specifically recognized the written application made by Jefferson which provided, among other things, that the Bank would have a second mortgage on the 80 Acre parcel. The acceptance of the application on the stated basis preserved the favorable financing arrangement enjoyed by Jefferson as well as leaving intact other liquid assets of

[6] Depo. D. Morrison. p. 25. 26; Clerk's Record p. 458-159
[7] Depo. D. Morrison. pp. 32-33; Clerk's Record p. 492
[8] Depo. p. Worton p. 19; Clerk's Record p. 394

Jefferson, the related entities and the Morrisons. The liquid assets were needed for the completion of the Southern Hills project and to fund other ongoing real estate developments of the other related entities.[9]

The Bank recognized the financial interrelationship of Jefferson to the other business entities of the Morrisons combining the financial information to determine debt to asset ratios, capacity and working capital. Based upon the written application, the Bank, through Steve Worton, acknowledged acceptance. Jefferson had a clear understanding that the new loan from the Bank would be subordinate to the existing 1st mortgage on the 80 Acre parcel. Jefferson accepted the modified terms and discontinued the pursuit of other financing options with DL Evans Bank. Following the communication of acceptance from the Bank and less than 48 hours prior to the time the option on the Wood parcel was to expire, the Bank changed its position and demanded that it be placed in a first lien position on the 80 Acre parcel. Jefferson was facing the prospect of catastrophic loss if the Wood option was not exercised. Jefferson was compelled by the wrongful acts of the Bank at the last hour to use substantially all of its liquid assets and the liquid assets of the related entities to pay off the obligation on the 80 Acre parcel thereby placing the Bank's mortgage in a first lien position on the property.

The Bank admits that its actions impacted the financial ability of Jefferson and the other related businesses to continue their operations by consuming its liquid financial capacity to continue the project or obtain additional investment to complete the project. The Bank's procedures required that the financial ability of a borrower such as Jefferson be analyzed to determine if it would qualify for the loan. The Bank in its deposition explained the scope of the

[9] Depo. Wake pp.23-24; Clerk's Record p. 427

analysis.[10] Jefferson's combined financial information met the lending criteria of the Bank based upon the assumption that the capacity and working capital would not be reduced. However, when the Bank demanded that Jefferson use its working capital to pay off the 80 Acre mortgage the financial ability of Jefferson to service the loan was compromised. Under these circumstances the Bank would not have approved the loan. [11]

Jefferson's loss in liquidity capacity and working capital was caused by the Bank's breach of the agreement to lend leaving the favorable 80 Acre financing in place with its insistence on being in first position of 80 Acre parcel. The breach caused damages to Jefferson's credit worthiness and stifled Jefferson's ability to attract other investment in the property[12].
As a further inducement Worton represented that the Bank would not let Jefferson fail and would provide a means to replace the loss of working capital and financial ability. (D. Morrison Depo. pp. 70-73.)

The representation by the Bank through Worton was made prior to the time the loan was to close and the time the Wood parcel was to be purchased. Worton induced Jefferson to follow this course of action by misrepresenting that the Bank would not let Jefferson fail and would provide additional financing. The Bank refused to provide any additional financing to Jefferson for the completion of the Southern Hills Project. As a result of the Bank's blatant deviation from its own policies and procedures and commonly recognized lending standards and other wrongful conduct, Jefferson lost the ability to take advantage of foreseeable prospective economic opportunities related to the 80 Acre parcel, the Southern Hills Project and other real estate developments.

[10] Depo. M. Morrison pp.64-69; Clerk's Record p. 352-358
[11] Depo. Worton p. 73; Clerk's Record p. 409
[12] Depo. D. Morrison p. 77-78; Clerk's Record p 440-441

II. ISSUES PRESENTED ON APPEAL.

A. The District Court erred in granting the Motion for Summary Judgment dismissing the Counterclaim of Jefferson in that establish:

1. There are disputed material issues of fact and issues of law that show the Plaintiff breached its contract with Jefferson;

2. The Bank intentionally interfered with a prospective economic advantage of Jefferson;

3. The Bank's action was barred by the doctrine of promissory estoppel;

5. The Bank committed fraud and misrepresentation;

4. That Jefferson was damaged by the actions of the Bank;

5. The District Court's determinations dismissing the affirmative defenses raised by the Jefferson on the Bank's Motion for Summary judgment were erroneous and not based upon substantial evidence.

6. The District Court erred in determining that the Bank's Mortgage should be foreclosed in that there are disputed materials of fact that would have precluded the entry of summary judgment allowing the foreclosure.

B. Request for Attorney Fees as an Issue on Appeal.

1. Plaintiff requests an award of reasonable attorney fees pursuant to the provisions of I.C.§12-120(3) and I.A.R. Rule 41.

III. ARGUMENT.

A. Standard of Review.

On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). Summary judgment is proper "if the pleadings, depositions, and 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). Movant has the burden of showing that no genuine issues of material fact exist. *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010). This Court "liberally construe[s] the record in a light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." When ruling on a motion for summary judgment, disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Summary judgment is appropriate only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. When the record shows the existence of genuine and material issues of fact and the record contains conflicting inferences or if reasonable minds might reach different conclusions the moving party is not entitled to a judgment as a matter of law. *Fazzio v. Mason*, 150 Idaho 591, 249 P.3d 390 (Idaho,2011). Summary judgment is appropriate "if the pleadings, depositions, and 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). Disputed facts and reasonable inferences are construed in favor of the non-moving party. *Estate of Becker v. Callahan*, 140 Idaho 522, 525, 96 P.3d 623, 626 (2004).

The court is not permitted to make conclusive findings with regard to issues upon which the parties submit conflicting evidence. See *Williams v. Computer Res., Inc.*, 123 Idaho 671, 673, 851 P.2d 967, 969 (1993) (holding that the trial court was not permitted to draw inferences regarding the parties' intent when the parties submitted conflicting evidence on the issue); *Ashby v. Hubbard*, 100 Idaho 67, 70, 593 P.2d 402, 405 (1979) (holding that a question involving the "intention expressed by the acts and statements of the parties" was a factual question for the jury); *Argyle v. Slemaker*, 107 Idaho 668, 670-71, 691 P.2d 1283, 1285-86 (Ct. App. 1984) (holding that findings based on conflicting evidence may only be made on summary judgment when "the evidence is entirely confined to a written record, there is no additional, in-court testimony to be obtained, and the trial judge alone will be responsible for choosing the evidentiary facts he deems most probable"). [W]hen a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994) ("The burden of proving the absence of a material fact rests at all times upon the moving party."); See also *Harris v. State, Dep't. of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992); *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Thus, it follows that if the moving party fails to challenge an element of the nonmovant's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant.

The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed by the court before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial. *Gem State Ins. Co. v. Hutchison*, 145

Idaho 10, 13, 175 P.3d 172, 175 (2007) (citing *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002)). "This Court applies an abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony offered in connection with a motion for summary judgment." Id. at 15, 175 P.3d at 177 (citing *McDaniel v. Inland Northwest Renal Care Group–Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)). "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008) (citing *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005)); *Gerdon v. Rydalch*, 153 Idaho 237, 280 P.3d 740, (2012).

B. Breach of Contract.

The District Court determined that Jefferson's claim for breach of contract was barred by operation of the "Statute of Frauds"[13] The District Court in its Memorandum Decision and order specifically found as follows: ***"This Court has also accepted as true that the conditions of the loan agreement provided, among other things, that the Bank would be secured on the 80 Acre parcel in a second priority position. In addition, this Court accepted as true that Jefferson had made application for a loan in the amount of $2,800,000 from the Bank."***[14] The Bank agreed to loan money to Jefferson in accordance with the terms and conditions of the Board's approval of Jefferson's loan application. The conditions of the loan agreement provided, among other things, that the Bank would be secured on the 80 Acre parcel in a second lien priority position

[13] I. C. § 5-905

[14] Memorandum Decision and Order on Motion to Reconsider p. 5; Clerk's Record p. 722

subject to the existing advantageous financing on the parcel. The Mortgage prepared by the Bank with and effective date of May 9, 2006 specifically provided that:

> *"6. WARRANTY OF TITLE. Mortgagor covenants that Mortgager is lawfully seized of the estate conveyed by this Mortgage and has the right to grant, bargain, convey, sell and mortgage this Property and warrants that the Property is unencumbered except for encumbrances of record.*
>
> * * *
>
> *8. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a security interest on encumbrance on the Property and that may have priority over this Mortgage, Mortgagor agrees:*
>
> *A. To make all payments when due and to perform or comply with all covenants.*
>
> *B. To promptly deliver to Lender any notices that the Mortgagor receives from the holder.*
>
> *C. Not make or permit any modification or extension of, and not request or accept any future advances under any note or agreement secured by, the other mortgage,deed of trust or security agreement unless Lender consents in writing".*[15]

Jefferson accepted the Bank's Mortgage and the material terms, including the second priority position, became binding on the Bank. Therefore, based upon the factual findings of the District Court, a written agreement (the Mortgage) existed and was effective on May 9, 2006. The Mortgage provided that encumbrances of record, such as the 80 Acre encumbrance, would have priority over the lien of the Bank's Mortgage. The District Court, even though there was substantial evidence in the record to the contrary, disposed of the breach of contract count based upon the Statute of Frauds. The District Courts determination that the statute of frauds barred recovery, taking into account the factual finding referred to in this brief, is clearly erroneous and unsupported.

The agreement found to exist by the District Court, by operation of law, contains the implied covenant of good faith and fair dealing together with the requirements, established

[15] Mortgage Clerk's Transcript p. 14

policies and procedures of the Bank and its Board and recognized commercial lending standards and practices. The implied covenant of good faith and fair dealing is "... implied by law in the parties' contract." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 750, 9 P.3d 1204, 1216 (2000). The covenant "arises only regarding terms agreed to by the parties." *Taylor v. Browning*, 129 Idaho 483, 490, 927 P.2d 873, 880 (1996) (citing *Idaho First Nat'l. Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991)). "The covenant requires that the parties perform, in good faith, the obligations imposed by their agreement". Idaho Power Co., 134 Idaho 738, 750, 9 p.3d 1204, 1216. The determination of whether the covenant has been breached is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions. *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 243 P.3d 1069 (2010). The Bank breached the terms and conditions of the lending agreement by changing its position and requiring Jefferson to pay off the existing loan on the 80 Acre parcel. The change of position of the Bank was timed in such a manner that Jefferson was unable to seek alternate financing to exercise the option to purchase the Wood property. Based upon the documentation contained in the loan application, confirmed by the terms of the Mortgage and other information provided to the Bank by Morrisons and Jefferson, it was reasonably foreseeable that the breach would cause damages to Jefferson.

The Bank attempts to use the Statute of Frauds argument to shield itself from what it claims are oral agreements about the issue of priority. However, the statements of the Bank about the Bank's requirement of priority of the Mortgage are in fact barred by the Statute of Limitation. The Bank did not provide a writing to Jefferson at any time prior to the day of the closing that informed Jefferson that the Bank would require the subordination of the 80 Acre mortgage or that it would have to be in a first security position on the property. The oral

demands of the Bank forcing Jefferson to pay off the 80 Acre encumbrance did not exist in writing prior to the effective date of the Mortgage.

C. Interference with a Prospective Economic Advantage.

The District Court found that: ***"The Court finds that there was a valid economic expectancy by Jefferson and that the Bank was aware of that expectancy."*** The Bank, acting contrary to its established policies and procedures and recognized commercial lending standards, wrongfully breached the terms and conditions of the loan agreement based upon the acceptance of Jefferson's documentation. The change in the Bank's position, requiring Jefferson to use existing liquid cash reserves to place the Bank in a first position on the 80 Acre parcel, materially interfered with Jefferson's foreseeable prospective economic advantage 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.

Interference with a prospective economic advantage can be demonstrated by showing (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, (5) resulting damage to the plaintiff whose expectancy has been disrupted. *Cantwell v. City of Boise*, 146 Idaho 127, at 138, 191 P.3d 205, at 216, Idaho.

The decision of the District Court found that Jefferson had a valid the economic expectancy." The expectancy resulted from the favorable financial conditions of the 80 Acre financing agreement and the preservation of Jefferson financial capacity to service the loan with the Bank and to continue to operate the businesses of the related entities. The District Court also found that the Bank had knowledge of the expectancy in that, by its own calculations, it knew of

the advantage enjoyed by Jefferson and knew that Jefferson's financial capacity would be negatively impacted by its actions to change its position on the loan just before it was to close. The Bank had knowledge that the financial basis for extending the loan was thwarted by the demand that the 80 Acre encumbrance be paid off from the working capital of Jefferson and the related entities which was relied upon by the Bank to approve the loan. The Bank's intentional actions to require the 80 Acre parcel loan to be paid off with full knowledge of the economic consequences was intentional interference inducing termination of the economic expectancy. The Bank's intentional breach of the terms of the loan agreement found to exist by the District Court and the specific terms of the Mortgage was wrongful. The Bank followed a course of action that crippled the financial capacity of Jefferson. Finally, the Bank's actions in reducing Jefferson's ability to service the Bank's loan and either market or develop the Southern Hills project disrupted the economic expectancy and caused obvious damage to Jefferson. Jefferson had no operating capital. The favorable financing terms on the 80 Acre parcel were lost. Jefferson's ability to obtain credit or other sources of capital were lost, the financial ability of Jefferson's related entities was lost. Jefferson was unable to meet the obligation to the Bank, was required to borrow more money to pay the interest on the loan. All of these consequences of the Banks actions caused catastrophic loss to Jefferson.

A party claiming intentional interference resulting in wrongful injury, may offer proof that either "(1) the defendant had an improper objective or purpose to harm the plaintiff; or (2) the defendant used a wrongful means to cause injury to the prospective business relationship." *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 286, 824 P.2d 841, 861 (1991). However, an enforceable contract need not be shown to exist, just a valid economic expectancy. *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 217, 177 P.3d

955, 964 (2008). *In Highland Enters., Inc. v. Barker*, the Idaho Supreme Court stated that the proper standard for the "knowledge of the expectancy" element necessary to make a claim of intentional interference with a prospective economic advantage is not actual knowledge. 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999). Instead, the knowledge element may be "'satisfied by actual knowledge of the prospective [economic advantage] or by knowledge "of facts which would lead a reasonable person to believe that such interest exists." ' Id. at 338–39, 986 P.2d at 1004–05 (alteration and emphasis in the original) (quoting Kutcher v. Zimmerman, 87 Hawaii 394, 957 P.2d 1076, 1088 n. 16 (Haw.Ct.App.1998)). Intent may be demonstrated if it is shown that the actor desires to bring about the interference, or "knows that the interference is certain or substantially certain to occur as a result of his action." Id. at 340, 986 P.2d at 1006 (quoting Restatement (Second) of Torts § 766 cmt. d (1977)) "Intent can be shown even if the interference is incidental to the actor's intended purpose and desire 'but known to him to be a necessary consequence of his action.' ". Id. (quoting Restatement (Second) of Torts § 766 cmt. j. (1977)); *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 243 P.3d 1069 (2010). Based upon the facts and circumstances of this case, the Bank possessed knowledge that the success of the Southern Hills project depended upon the purchase of the Wood property and the ability of Jefferson and the other Morrison entities to financially succeed. The actions of the Bank intentionally, with full knowledge of the facts and contrary to its lending policies, caused the abrupt and devastating loss of financial viability to Jefferson.

D. Fraud and Misrepresentation.

The disputed material issues of fact in this case show that the Bank and its authorized representatives owed a duty to Jefferson to speak the whole truth and to not intentionally mislead them or conceal material facts in communications regarding the terms and conditions of the loan

or the Bank's ability and intention to further finance the Southern Hills project. The Bank and its officers made the materially false representation that the Bank had agreed to accept a second lien position on the 80 Acre parcel allowing Jefferson to profit benefit from the existing favorable financing arrangement and to preserve its ability to use its liquid assets. The Bank intentionally or negligently concealed the fact that it would or could change its position on the 80 Acre parcel until Jefferson was out of time to exercise the Wood option stating to Jefferson, to Pam Wake, to the mortgage broker, and to others that the Board of Directors had approved the loan and agreed to accept the second priority position on the 80 Acre parcel. The Bank repudiated the agreement less than 48 hours prior to the loan closing and the expiration of the option to purchase the Wood property.

The Bank, as part of the loan application, had been provided comprehensive financial statements concerning Morrison, Jefferson and the other related entities. The liquid assets shown in the financial statements were necessary for the approval of the loan and critical to the ability of Jefferson to perform its obligations to the Bank. With full knowledge of Jefferson's financial position, the Bank acted to cause the removal of the underlying liquid assets (used to pay off the prior lien holder on the 80 Acre parcel) and caused Jefferson and the other related parties to lose the ability to proceed with Southern Hills Development and other projects. The timing of the change of position prevented Jefferson from seeking other financing to fund the purchase of the Wood property. Steve Worton had represented that the liquid cash available to Jefferson would remain intact and not be affected by the new loan. After the Bank's sudden change in position, Steve Worton represented that the Bank would provide additional financing to alleviate the financial burden caused by its last minute change in position which required Jefferson to practically exhaust its reserve of liquid assets. Based upon the Bank's representation through its

officer and Vice President, Jefferson materially changed its position and used the liquid cash assets of Morrison and the related entities to pay off the first lien holder on the 80 Acre parcel. The Bank subsequently refused to provide financing to alleviate Jefferson's loss of working capital caused by the Bank's change of position just prior to the closing of the loan. All of the representations, acts of concealment and other acts of wrongful conduct were made by authorized representatives of the Bank, including but not limited to Steve Worton, with the intent or the reasonable expectation that Jefferson would rely thereon. In fact, Jefferson did rely upon such false information to its damage, loss and detriment. The Bank, its officers and its Board, based upon the above allegations, lacked reasonable grounds to believe that the representations to Jefferson and the facts it concealed contained true and accurate information and therefore acted with reckless disregard for Jefferson's rights knowing with reasonable probability that Jefferson and its related entities would be financially crippled by the Bank's actions.

E. Promissory Estoppel.

The District Court based its decision to deny relief on the basis of its determination that the Statute of Frauds barred the affirmative defense. The District Court stated that: "***The Court has previously determined that Idaho Code §9-505 is the controlling law when it relates to any agreement regarding a promise or commitment to loan money. The Statute of Frauds requires a writing in order to enforce reliance*** upon agreed terms. ***The Court has determined that no such pre-commitment writing existed and that only the loan agreement entered into by the Bank and Jefferson can be considered for purposes of reliance and enforceability.***"[16]

The District Court determined that no pre-commitment writing existed and that only the loan agreement entered into by the Bank and Jefferson can be considered for purposes of reliance

[16] Memorandum Decision and Order, Clerk's Record p.648

and enforceability. However, the District Court erred when it did not consider the specific terms and conditions of the Mortgage that allows for the security to have prior encumbrances of record. The 80 Acre encumbrance was of record on May 9, 2006.[17]

In order to demonstrate promissory estoppel, three elements must be met: "'(1) the detriment suffered in reliance was substantial in an economic sense; (2) substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made.' *Brown v. City of Pocatello*, 148 Idaho 802, 229 P.3d 1164, (2010). The undisputed facts in this case clearly establish that the Bank knew that Jefferson would rely on the Bank's representations relating to the financing of the original loan, the terms were incorporated into the Mortgage. Under the circumstances of this case and the facts presented, Jefferson's reliance was reasonable and justified.

F. Damages.

Jefferson suffered damages which were foreseeable and known to the Bank. Those damages include:

1. The loss of the favorable terms of the 80 Acre financing agreement.

2. The complete expenditure of Jefferson' operating capital and the financial impact the expenditure of the capital had on Jefferson's related entities.

3. Jefferson's inability to muster the financial resources to complete the development of the Southern Hills subdivision.

4. The destruction of Jefferson's and Jefferson's credit worthiness.

Dustin Morrison established these damages in his deposition stating that:

[17] AFf. E. Polatis p.3, Clerk's Record p.552

3 One is I can't have my cash that's been spent
4 reimbursed. The other thing is that they have approved
5 this loan based on, No. 1, my income and my capacity to
6 earn. No. 2, my liquidity and ability to debt service
7 over time because we knew this project wouldn't generate
8 a dime based on these numbers that I provided the bank
9 as a break even point of year four or year seven. So it
10 was going to require debt service for a period of time.
11 Keep in mind the reimbursement wasn't to come
12 to my pocket, it was to go to a CD to debt service the
13 darn loan at Bank of Commerce. That's one issue, I can
14 live without that issue.
15 The problem was we have approved you based on
16 your capacity to earn and your capacity to debt service
17 this loan and now you fully acknowledge, Steve,
18 everybody acknowledges there is not an option for
19 subordination, guys. They are not going to just for
20 free give up first position, we have to pay this off if
21 we want first position. In order to pay that off we are
22 going to liquidate our working capital, which will
23 substantially affect our ability to earn because we are
24 a spec home construction company, $700,000 borrows $3
25 million; right? 20 percent, you know, so whatever, $3.5

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1 million, I guess.
2 Q. But you continued to operate after that,
3 didn't you?
4 A. No, we suffered, we bled, desperately. So
5 when I told Steve this, you understand there is no way I
6 can maintain my business without my working capital.
7 That working capital will disappear if I do what you are
8 asking me to do. If I don't do what you are asking me
9 to do, I lose this project and every dime that I have
10 spent on this project to date.[18]

The undisputed facts clearly establish that the Bank and its officers knew that the loan that they made to Jefferson would not have been approved without the reserve of working capital that was held by Jefferson and its related entities.[19] The Bank's vice president Steve Worton stated decisively that the Bank would not have approved the loan would not have been approved

[18] Depo. D. Morrison pp. 71-72, Clerk's Record p. 470
[19] Depo M. Morrison pp. 95-97 Clerks Record p. 83-385

by the Bank's Board of Directors knowing that the working capital of the Jefferson had been dismissed by over $700,000.00.[20] The Bank's unlawful breach of its agreements with Jefferson financially crippled Jefferson and directly caused the loss and damages described.

G. Novation.

The Bank's Mortgage effective May 9, 2006 is not a change of the agreement to subordinate. The Mortgage allows for a subordination. The District Courts finding that a novation occurred in the transactions forming the basis of this action is erroneous. The District Court found that: ***"Viewing these facts most favorably for Jefferson there were a series of novations that occurred which changed the terms of the original loan application by Jefferson, but ultimately Jefferson entered into a loan agreement with the Bank which extinguished all other pre-loan agreements that may have been contemplated by the parties."***[21]

The making of a new contract does not necessarily abrogate a former contract unless it explicitly rescinds it, deals with the subject matter so comprehensively as to be complete in itself, or is so inconsistent with the first contract that the two cannot stand together. Moreover, when a subsequently executed agreement specifically references and relies on a former agreement, the two are to be interpreted together, if possible. *Opportunity, L.L.C. v. Ossewarde, 136 Idaho* 602, 38 P.3d 1258, (2002). 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

[20] Depo. S. Worton p. 73, Clerk's Record p. 73
[21] Memorandum Decision and Order p. 18 Clerk's Record p. 650

(1943). Harris v. Wildcat Corp., 97 Idaho 884, 556 P.2d 67, (1976). Issues of fact arising from the circumstances of this case raise the issue of whether or not the elements necessary to find novation are present from the execution of the subsequent mortgages. The agreements were entered into with the understanding that the financial loss to Jefferson would be alleviated by the future acts of the Bank. The modification from the original agreement to loan money to Jefferson was not intentionally waived but was conditioned on the Bank's representations.

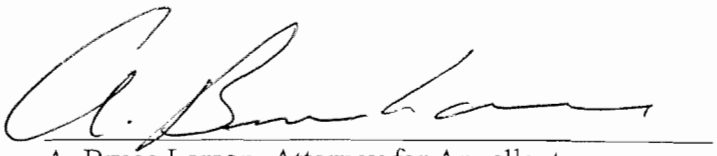
IV. CONCLUSION.

The District Court's decision is not based on substantial evidence and incorrectly applies the law. The District Court's rulings and judgments should be reversed and this matter remanded for trial. The disputed facts establish that Jefferson's loan application which was adopted by the Bank clearly communicated that the very favorable terms and conditions of the 80 Acre financing would remain in a priority position and that the Bank would take a subordinate position. Jefferson's loan application was in writing and provided specific information about the 80 Acre obligation. The Bank accepted the proposal without the condition of having a first mortgage on the 80 Acre parcel and the Mortgage prepared by the Bank recognizes that as of May 9, 2006 that the Bank would be subordinate to existing encumbrances of record such as the 80 Acre obligation. The Bank did not communicate in writing at any time prior the effective date of the Mortgage that it would require the 80 Acre loan to be subordinated to the Bank's mortgage. The Bank knew that the option to purchase the Wood property would expire on May 10, 2006. Under the circumstances of this transaction, the Bank knew that if the Wood option was not timely exercised that Jefferson's ability to complete the Southern Hills development would be impossible. The Bank knew that the 80 Acre lender would not have had any reason to subordinate its mortgage to the Bank on new financing. The Bank knew that by requiring the

payoff of the 80 Acre parcel that Jefferson's financial capacity and the financial capacity of the related entities would be severely and negatively impacted. In fact the Bank would not have approved the loan under circumstances that required Jefferson to deplete its working capital and the working capital of the related entities to close the loan.

Based upon the foregoing, Appellant respectfully requests that the Orders and Judgments that are the subject of this appeal be reversed and the matter be remanded for trial.

Dated this 2nd day of November, 2012.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of November, 2012, two true and correct copies of the within and foregoing Appellant's Brief on Appeal was served upon:

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