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Idaho First Bank v. Bridges Appellant's Brief Dckt. 44532

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO FIRST BANK,

Appellant,

vs.

MAJ-LE TATE BRIDGES, et al.,

Respondents.

Supreme Court No. 44532

Valley Co. Case No. CV-2015-00145-C

APPELLANT'S OPENING BRIEF

Appeal from the Fourth Judicial District, Valley County, Idaho
Hon. Jason D. Scott, District Judge presiding.

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A. Nature of the Case

This is a collection action against defaulted borrowers under a Promissory Note and Deed of Trust involving unique circumstances arising under the vagaries of Idaho Department of Lands state lease property. Appellant Idaho First appeals from the District Court's decision on summary judgment that it was required to follow the dictates of I.C. § 45-1503(1), as if Defendants had a real property interest in their leasehold improvements, which their lease defined as personal property and which Idaho First could not hold under Idaho law. After a sale of those improvements, the District Court granted Idaho First leave to file a Second Amended Complaint seeking the remaining deficiency, but erred in finding the time limitations of I.C. § 45-1512 applied and in not allowing relation back under I.R.C.P. 15(d) or 15(c) to the date of the original collection complaint.

B. Statement of Facts and Course of Proceedings

Defendants Maj-le Bridges and Harold Bridges are practicing attorneys in California with knowledge of real estate law. R., p. 70, ¶ 2; R., p. 80, ¶ 2. From October 3, 2005, through September 15, 2015, Defendants had a leasehold interest in property located at 2087 John Alden Road, McCall, Idaho ("the Property"). R., p. 72, ¶ 3; R., p. 81, ¶ 3. The Property has 72 feet of frontage on Payette Lake. *Id.* The Lessor was the Idaho Department of Lands, as agent for the owner, the State of Idaho. *Id.* Defendants originally obtained an assignment of an existing lease from October 3, 2005 through December 31, 2011 ("the Assigned Lease"). R., p. 89-90.

Defendants then entered into a two-year lease with the Idaho Department of Lands. R., p. 487, ¶ 15; R., p. 510, ¶ 3. They then entered into another lease beginning on January 1, 2014, and expiring on December 31, 2022 ("the 2014 Lease"). R., p. 396-419.

On September 21, 2006, Defendants obtained a loan from Plaintiff Idaho First Bank ("Idaho First") for $1,500,000.00 pursuant to a Promissory Note. R., p. 11-12; R., p. 73, ¶ 9; R., p. 82, ¶ 9. The Promissory Note was secured by a Construction Deed of Trust. R., p. 108-117. Defendants constructed an approximately 5,000 square foot structure constructed on the Property. R., p. 83, ¶ 13. This original Promissory Note and Construction Deed of Trust are referred to as the "First Loan Transaction."

To complete construction, on January 3, 2008, Defendants requested a second loan from Idaho First for $150,000.00. This second loan was made pursuant to a Credit Agreement and Disclosure (R., p. 871-876) and a second Deed of Trust encumbering different real property Defendants owned in Ada County, Idaho. R., p. 878-886. This indebtedness and documents are referred to as the "Second Loan Transaction."

On May 29, 2015, just before a lease payment was due to the Idaho Department of Lands, Defendants notified Idaho First through their counsel that Defendants were "unable to continue to service the [First] loan as presently structured." R., p. 58. Defendants wanted "to mitigate any adverse consequences to [Idaho First] and any potential for a claim for deficiency by the Bank against them." *Id.* Defendants stated they were "prepared to immediately assign all their respective rights and interest and two important elements associated with the cabin, namely the

lease with the Idaho Department of Lands" and an encroachment permit. R., p. 59. Defendants' counsel further explained:

> Formally assigning the rights to the Bank will require an assignment of the encroachment permit and an assignment of the IDOL lease for the cabin site. We will prepare the appropriate assignment documents for the encroachment permit and the cabin lease, at the Bridges' expense, and pay the associated assignment fees (but not the lease payments) as soon as the Bank advises me of the name of the entity the Bank wants to use for the assignment. The name of the assignee has been left open because it's been my experience that many banks do not want to take an assignment of a lease, encroachment or similar rights, or even foreclose on a property, in the name of the bank that's the actual creditor.

Id. (emphasis added).

Defendants' counsel advised Idaho First "that the Bridges [were] prepared to execute and deliver to the Bank the appropriate and suitable form of deed in lieu of foreclosure and waiver of deficiency." R., p. 59. On June 1, 2015, Idaho First's counsel received two keys and two garage door openers for the structure. R., p. 21, ¶ 3.

One difficulty with Defendants' proposed course of action, as Defendants' counsel's letter seems to acknowledge, was that, as a corporation, Idaho First could not take an assignment of Defendants' lease with the Idaho Department of Lands. R., p. 295, ¶ 3. Section E.1.1.f. of the 2014 Lease provides that "[a]n assignment of this Lease shall be limited to natural persons." R., p. 404. This Lease provision follows IDAPA 20.03.13.02:

> Assignments: A lease may only be assigned to an individual or to a husband or wife. The Board will not recognize assignments to corporations, partnerships, or companies. Leases may be assigned to and held by an estate only if one (1) individual or husband or wife are designated as the sole contact for all billing and correspondence. A lessee may only hold one (1) cottage site lease at a time.

Accordingly, Idaho First could not accept an assignment of Defendants' leasehold interest.

Further, the 2014 Lease defined Defendants' structure and improvements on the Property as "Personal Property." The 2014 Lease defines "Personal Property" in Section A.1.1.i. as "all buildings, structures, additions or developments belonging to LESSEE that have been erected upon, affixed or attached to, the Leased Premises. . . ." R., p. 400 (capitalization in original). Under Section E.1.3.a. of the 2014 Lease, a Leasehold Mortgage can "only encumber LESSEE's leasehold interest in this Lease and/or LESSEE's interest in any Personal Property owned by LESSEE . . . ." R., p. 404.

A complete section of the 2014 Lease, Section K, Personal Property, is devoted to defining Defendants' rights regarding what is specifically designated as Personal Property. R., p. 407-411. Section K.1.4.a. states that, upon default by the Lessee, Lessor may require Lessee to remove "all Personal Property" and require Lessee to "Restore the Leased Premises at Lessee's sole cost and expense." R., p. 408. Similarly, upon abandonment by Lessee under Section K.1.4.e., abandoned Personal Property may be removed by Lessor at Lessee's sole cost and expense." R., p. 410.

These 2014 Lease provisions were not brand new surprises. The Assigned Lease had declared at Section K.1.4.a that upon default by Lessee, "LESSOR may remove such approved...improvements and charge the cost of removal and restoration to the LESSEE" or require the Lessee to do so. R., p. 98. Similarly, upon abandonment under Section K.1.4.f., such abandoned improvements placed on the land by the lessee "shall be removed" by the Lessor at Lessee's cost and expense. *Id.* Upon expiration of a lease under Section K.1.4.e., Lessor has the

right to require Lessee to remove all approved improvements on the leased premises and to require Lessee to "restore the leased premises to as nearly as is reasonably practical to its natural condition, all at Lessee's sole cost and expense." *Id.*

Consistent with these provisions, in conversations with Idaho State Department of Land personnel Idaho First executives knew that, even though Defendants had abandoned the Property, Idaho First could not hold Defendants' leasehold rights. R., p. 789, ¶ 3-4. Further, just as the 2014 Lease mandated, the Department of Lands considered the improvements to be personal property that the Department would demolish in order to restore the site to its original condition, if a lease terminated. *Id.;* R., p. 790, ¶ 5. These requirements were fully consistent with the 2014 Lease's provisions concerning both default and abandonment.

Accordingly, in order to prevent threatened waste as to the collateral, Idaho First made Defendants' lease payment in June 2016. R., p. 511, ¶ 8. On June 19, 2015, Idaho First brought this action directly against Defendants for all amounts due under the Promissory Note (R., p. 363-64, ¶ 6-10). Defendants moved to dismiss. Defendants claimed that, despite the "personal property" language of the 2014 lease and the legal position taken by the Idaho Department of Lands, they were entitled to invoke I.C. § 45-1503, alleging Idaho First could and must first foreclose upon a real property interest before suing to collect the debt. R., p. 378-380. Ultimately, a sale of Defendants' leasehold interest and structure was consummated before the District Court ruled on Defendants' motion to dismiss.

On August 25, 2015, Defendants signed an "instrument assignment," which assigned Defendants' rights in the 2014 Lease to the purchasers of the structure. R., p. 512, ¶ 12. The

sale of the structure closed on September 15, 2015. *Id.* The sale price did not extinguish Defendants' entire indebtedness to Idaho First. Idaho First calculated that a $344,377.25 deficiency remained. R., p. 489, ¶ 31. Idaho First filed a Second Amended Complaint against Defendants seeking this deficiency. R., p. 38-45.

Defendants moved for summary judgment. On April 27, 2016, the District Court granted summary judgment to Defendants. R., p. 278-293. The District Court's main finding was that, despite the clear language of the 2014 Lease defining improvements as personal property, Idaho First was required to follow I.C. § 45-1503(1), as if Defendants had a real property interest in their improvements. Further, the District Court held that Idaho First's deficiency claim did not relate back to the date of its original filing because it "did not arise out of the conduct, transaction, or occurrence" set forth in its original complaint. R., p. 286. The District Court entered Judgment for Defendants and dismissed the Second Amended Complaint. R., p. 351. Idaho First moved the District Court to reconsider, but the District Court denied that motion. R., p. 325-328. Idaho First timely appealed to this Court.

Subsequently, Defendants sought the District Court's intervention in an arbitration filed by Idaho First regarding the Ada County real property related to the Second Loan Transaction. The District Court's refusal to stay the arbitration forms the subject of Defendants' cross-appeal and Idaho First will defer discussion until its responds as Cross-Respondent.

C. Summary of Argument on Appeal

Idaho First argues that the District Court erred as a matter of law by concluding that I.C. § 45-1503(1) applied to the Idaho Department of Lands 2014 Lease with Defendants. Idaho First

could not assume or be assigned Defendants' leasehold in the Property and Defendants' improvements were properly and legally characterized as personal property, rather than real property as defined by I.C. § 45-1502(5). Thus, the time limitations set forth as to real property interests in I.C. § 45-1512 did not apply.

Even if Defendants' interests in their improvements could be characterized as a real property interest under § 45-1502(5) and the time limitation for a deficiency action set forth in I.C. § 45-1512 applied, Idaho First's deficiency claim arose from the same "conduct, transaction, or occurrence" as its original complaint seeking payment pursuant to the Promissory Note. Accordingly, under I.R.C.P. 15(d) or alternatively 15(c), Idaho First's Second Amended Complaint should relate back to the date of its original filing.

II. ISSUES PRESENTED ON APPEAL

1. Did the District Court commit reversible error as a matter of law in its interpretation, construction and application of I.C. § 45-1503 and its conclusion that, despite unambiguous lease language to the contrary, Defendants' interest in their improvements on state lease land was a real property interest subject to the statute?
2. Did the District Court commit reversible error as a matter of law in its interpretation, construction and application of I.R.C.P. 15(d) and/or 15(c) and its conclusion that Idaho First's deficiency claim did not relate back to its original collection complaint?

III. STANDARD OF REVIEW

This Court recently stated the standard of review in cases involving summary judgment:

> In reviewing a grant of summary judgment, this Court's standard of review is the same as the district court's standard in ruling upon a motion. *Thomson v.*

> *Lewiston*, 137 Idaho 473, 475-76, 58 P.3d 488, 490-91 (2002). "The [district] court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). Courts will consider "pleadings, depositions, and admissions on file, together with the affidavits, if any." *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007) (internal citations omitted). In making that determination, all facts are construed in the light most favorable to 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. *Parks v. Safeco Ins. Co. of Illinois*, 160 Idaho 556, 561, 376 P.3d 760, 765 (2016). If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review. *Kiebert*, 144 Idaho at 227, 159 P.3d at 864.

Harmon v. State Farm Mut. Auto. Ins. Co., No. 43802, 2017 Ida. LEXIS 127, at *8 (May 11, 2017). Idaho First submits that this Court may exercise free review over the questions of law presented in this appeal.

IV. ARGUMENT

A. THE DISTRICT COURT ERRED IN OVERRIDING THE CLEAR LANGUAGE OF THE 2014 LEASE TO CHARACTERIZE DEFENDANTS' INTEREST IN THEIR IMPROVEMENTS AS REAL PROPERTY.

1. By contract or agreement, Parties may determine the nature of improvements.

As noted above, the plain language of the 2014 Lease defined "all buildings, structures, additions or developments belonging to LESSEE that have been erected upon, affixed or attached to, the Leased Premises" as "Personal Property." R., p. 400 (Section A.1.1.i.). The District Court ruled, however, that I.C. § 55-101(2) trumped the lease language, at least between Defendants and Idaho First, because Defendants' improvements were "affixed to land" and thus "real property." R., p. 347. The District Court also cited the three-part test for whether an article

is affixed to land as set forth in *Spencer v. Jameson*, 147 Idaho 497, 502, 211 P.3d 106, 111 (2009), namely "(1) Actual or constructive annexation to the realty; (2) Appropriation to the use of that part of the realty to which it is connected; [and] (3) Intention of the party so annexing to make the article a permanent accession to the realty." *Id.*

What the District Court failed to consider, however, is the language of the precedent upon which this Court relied in *Spencer v. Jameson*. *Spencer* cited *Prudente v. Nechanicky*, 84 Idaho 42, 367 P.2d 568 (1961) as authority for the three-part test. In turn, *Prudente* relied on *Boise-Payette Lumber Co. v. McCornick*, 32 Idaho 462, 186 P. 252 (1919). In describing the third "intent" prong of the test, the Court stated:

> Except in cases where, by contract or agreement, the intention of the party who made the annexation determines the character of the article or machine as to whether it is a chattel or a fixture, the inquiry is not strictly as to the intention of the person himself who annexed the chattel to the freehold. Thus, in the case at bar the contest is between an attaching creditor and a mortgagee. Neither party was bound by the intention existing in the mind of the owner. The inquiry is as to what intention must be imputed to him in the light of all the circumstances, when tested by the common understanding of those familiar with the subject.
> (emphasis added)

32 Idaho at 468, 186 P. at 253. Thus, one looks to the entirety of circumstances to divine intent, unless that intent has already been resolved by contract or agreement. Here, we have just such a situation. The multiple leases signed by Defendants already determined the nature of the structure annexed to the real property – as something that could not be a "permanent accession to the realty" given the State's reserved right to remove it upon default, abandonment or termination of the lease. The District Court erroneously focused solely on Defendants' current

expressions of subjective intent[1] rather than the lease language or the totality of circumstances, even deeming the express lease language to give rise to nothing more than a "mere theoretical possibility of removal." R., p. 348.

The freedom of contract to deem an improvement as real or personal property found in *McCornick, supra*, is recognized in other jurisdictions as well.[2] For instance, in *Bank of Valley v. United States Nat'l Bank,* 215 Neb. 912, 341 N.W.2d 592 (1983), a residence was built on leased land. Two banks had competing security interests in the home. A declaratory judgment action was brought to decide which bank had a priority security interest in the home. Priority depended on whether the home was a "fixture" or "personal property." A fixture filing had to be filed with the Register of Deeds. On the other hand, the proper place for filing financing statement granting a security interest in personal property was in the Office of the County Clerk. *Bank of Valley* filed with the County Clerk in February 1978. In February 1981, U.S. National Bank filed a financing statement with the county register. *Bank of Valley* argued that the house was personal property because the lease provided for the removal of improvements. The trial court ruled that the house was a fixture and that filing with the register of deeds was proper, which gave U.S. National Bank priority. 215 Neb. at 913-14, 341 N.W.2d. at 594 (1983).

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[1] Citing Defendants' self-serving affidavit testimony, the District Court stated "they intended the cottage to be a permanent part of the leased property." R., p. 347.

[2] For a detailed analysis, see ARTICLE: GROPING ALONG BETWEEN THINGS REAL AND THINGS PERSONAL: DEFINING FIXTURES IN LAW AND POLICY IN THE UCC, 78 U. Cin. L. Rev. 1437 (2010).

The Nebraska Supreme Court reversed and remanded, holding that the home was not a fixture. The Court analyzed the character of the collateral as follows:

> In determining whether a thing has become a fixture, the following factors are considered: 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.' [Citation omitted.] The third test, namely that of 'intention,' appears by the clear weight of modern authority to be the controlling consideration.'" [Citation omitted.]" T-V *Transmission v. County Bd. of Equal.*, 215 Neb. 363, 366, 338 N.W.2d 752, 754 (1983). "'Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others (the first and second statements) seem to derive their chief value as evidence of such intention.'" *Bemis v. First National Bank*, 63 Ark. 625, 629, 40 S.W. 127, 128 (1897).
>
> The intention of the parties may be made manifest by an agreement between the parties. "Even 'fixtures' are not real estate when understood by the parties involved to be personal property." *Gilman v. Northern States Power Co.*, 242 Wis. 130, 136, 7 N.W.2d 606, 609 (1943).
>
> "'Ordinarily a building placed upon land is a fixture, becomes part of the real estate and passes with it; but the buildings may be personal property under some circumstances. Parties are at liberty to make any agreement or arrangement with regard to their property, to dwelling houses or any other property that they see fit, and if the agreement is such a one as will make the property personal property, as between those parties it is personal property, and may be so treated.'
>
> ". . . 'The parties concerned may, by agreement in due form, give to fixtures the legal character of realty or personalty at their option, and the law will respect and enforce their understandings . . . .'" *Nathan Myrick v. Rose A. Bill, et al.*, 3 Dakota 284, 287-88, 17 N.W. 268, 269 (1883).

215 Neb. at 914-916, 341 N.W.2d at 594-595. *See also, Cone v. W. Trust & Sav. Bank*, 21 Cal. App. 2d 176, 179, 68 P.2d 981, 983 (1937) (". . .an agreement that property shall "retain its

personal character or be removable as personalty, even though affixed to the land, is valid".); *First Nat'l Bank v. Jacobs*, 273 N.W.2d 743, 746 (S.D. 1978) ("The controlling criterion in determining whether an article becomes a "fixture," and thus a part of the realty, is the intention of the party placing the article on the land. This intent is not the secret intent in the mind, but the intent that may be deduced from the relation of the parties and the circumstances of the particular case. . . . The parties may, however, agree that the article placed on the land is to remain a chattel or is to become a fixture." (Citations omitted.)); *Ky. Farm & Cattle Co. v. Williams,* 140 F. Supp. 449, 452 (E.D. Ky. 1956) ('Buildings and other improvements placed upon real estate may be treated as movable personal property where such was the intention of the contracting parties and where such intention is clearly expressed in the contract of the parties with reference thereto" (citations omitted.))

Under this authority, the District Court erred in invalidating the contractual determination of Defendants' improvements as personal property in the Idaho Department of Land leases. Duly determined as personal property, Idaho First was not obligated to follow the collateral-first dictate of I.C.§ 45-1503(1) nor the time limitation for a deficiency action set forth in I.C. § 45-1512.

2. Idaho First had no real property interest upon which it could foreclose under I.C. § 45-1503(1).

Aside from the contractual agreement that Defendants' improvements constituted personal property, the District Court did not recognize the legal and practical difficulties with its insistence that Idaho First was required to follow I.C. § 45-1503(1). As noted above, Idaho First

could not foreclose on Defendants' improvements and have any rights of access to the state lease land upon which Defendants' structure was placed. Nor could Idaho First transfer or assign any rights under the 2014 Lease. Nor could Idaho First itself cure any default, nor prevent Defendants' abandonment. When a sale took place in September, 2015, Defendants signed an "instrument assignment" assigning Defendants' rights in the 2014 Lease to the purchasers of the structure. R., p. 512, ¶ 12.

A similar dilemma faces lenders when they lend to businesses operating on land owned by a third party and leased to them. In that context, the dilemma is solved by obtaining a prior consent to assignment to the lender upon the tenant's default or similar waiver as a condition of lending.[3] Here, however, the Idaho Department of Lands could not provide such an instrument, because Idaho First is not a "natural person."

Faced with this quandary, Idaho First had no choice but to recognize the determination of the character of Defendants' improvements as set forth in the state leases. It could sue Defendants directly regardless of I.C. § 45-1503(1), as it did in the original and First Amended Complaint. It could also retain a security interest under Article 9 of the U.C.C. as to Defendants' structure as personal property under the Deed of Trust.

Idaho Code § 28-9-601 identifies the rights of a secured party after default

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[3] *See, e.g.*, LEASEHOLD FINANCING AND MORTGAGEE PROTECTIONS, 14 Probate & Property 47, 48 (ABA July/Aug 2000) ("In the case of a ground lease that has already been negotiated and executed, the tenant's lender typically requires a collateral agreement or collateral assignment of the ground lease providing for, among other things, the lender's right to cure any tenant default under the ground lease, appropriate notice provisions, exculpation of the lender from liability to the landlord and the exercise of lender's possessory rights").

"a secured party has the rights provided in this part and, except as otherwise provided in section 28-9-602[, Idaho Code], those provided by agreement of the parties. A secured party:(1) May reduce a claim to judgment, foreclose or otherwise enforce the claim, security interest or agricultural lien by any available judicial procedure. . . .

***

(c) The rights under subsections (a) and (b) of this section are cumulative and may be exercised simultaneously.

The Idaho Uniform Commercial Code also addresses a secured party's rights when the collateral consists of both real and personal property. Under I.C. § 28-9-604:

(a) If a security agreement covers both personal and real property, a secured party may proceed:

(1) Under this part as to the personal property without prejudicing any rights with respect to the real property; or

(2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

The official comment, comment 2, to section 9-604 explains the rationale behind that section:

2. *Real-Property-Related Collateral.* The collateral in many transactions consists of both real and personal property. In the interest of simplicity, speed, and economy, subsection (a), like former Section 9-501(4), permits (but does not require) the secured party to proceed as to both real and personal property in accordance with its rights and remedies with respect to the real property. Subsection (a) also makes clear that a secured party who exercises rights under Part 6 with respect to personal property does not prejudice any rights under real-property law.

Idaho First brought its original action against the Defendants by exercising its rights as a secured lender holding a security interest in Defendants' Personal Property under the UCC. Idaho First had no obligation to bring an action to foreclose its interest in the leasehold estate before suing them. Idaho Code § 45-1503, only concerns "estates in real property as defined in

§45-1502(5), Idaho Code." Section 45-1502(5) defines "Real Property" as "any right, title, interest and claim in and to real property owned by the grantor at the date of execution of the deed of trust..." Here, Defendants' only interest in real property was their interest in the leasehold estate. And that interest was "substantially valueless."

3. Defendants' Leasehold Interest was "Substantially Valueless."

Even if Idaho First somehow could have foreclosed upon the leasehold interest, the foreclosure would have put it in the position of holding worthless property. Defendants' own appraisal values only the improvements and not the value of the underlying land. R, p. 422. ("The valuation is based on the improvements only, with no valuation on the underlying land. (Emphasis added.)). There is no value in Defendants' interest in the land secured by the Deed of Trust. That fact gave rise to Idaho First's right, under I.C. § 45-1503(c), to sue the Defendants directly without foreclosing on its Deed of Trust.

Idaho Code § 45-1503(c) prohibits a trust deed beneficiary from "institut(ing) a judicial action against the grantor . . . to enforce an obligation owed by the grantor . . . unless: (c) The beneficiary's interest in the property covered by the trust deed is substantially valueless." "Substantially valueless is defined in I.C. § 45-1503(2) as

> (2) As used in this section, "substantially valueless" means that the beneficiary's interest in the property covered by the trust deed has become valueless through no fault of the beneficiary, or that the beneficiary's interest in such property has little or no practical value to the beneficiary after taking into account factors such as the nature and extent of the estate in real property which was transferred in trust; the existence of senior liens against the property; the cost to the beneficiary of satisfying or making current payments on senior liens; the time and expense of marketing the property covered by the deed of trust; the existence of liabilities in connection with the property for cleanup of hazardous substances, pollutants or contaminants; and such other factors as the court may deem

relevant in determining the practical value to the beneficiary of the beneficiary's interest in the real property covered by the trust deed.

Since Defendants' appraiser had not placed a valuation on the leasehold interest, the value of the leasehold interest was, by definition, "substantially valueless." Further, as noted above, Idaho First would have no rights as a non-natural person under Defendants' leasehold interest. Thus, Idaho First was not required to resort to collateral first before seeking collection from Defendants.

B. IDAHO FIRST'S SECOND AMENDED COMPLAINT RELATED BACK TO ITS ORIGINAL COLLECTION FILING BECAUSE IT SET FORTH A TRANSACTION, OCCURRENCE, OR EVENT THAT HAPPENED AFTER THE ORIGINAL COMPLAINT UNDER I.R.C.P. 15(d) AND AROSE FROM THE SAME CONDUCT, TRANSACTION, OR OCCURRENCE UNDER I.R.C.P. 15(c).

1. Rule 15(d)

a. The very existence of Rule 15(d) suggests the District Court's analysis was incorrect

Rule 15(d) provides in relevant part:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief.

Plaintiff filed its Second Amended Complaint in response to transactions or occurrences and events which happened after the date of the earlier versions of its complaint, namely the sale of the relevant structure on state lease land. As a result of the sale, Idaho First's damages caused by Defendants' default were reduced from the total amount owing under the applicable Note to the

difference between that figure and the sales price. Either way, the obligation remained defined by reference to the Note and Defendants' default.

According to the District Court's reasoning in granting summary judgment, under these circumstances a supplemental pleading based on the subsequent transaction, occurrence or event would not relate back under Rule 15(d). Yet, courts routinely find that such supplemental pleadings do relate back just as with Rule 15(c). *See, e.g., Farb v. Fed. Kemper Life Assur. Co.*, 213 F.R.D. 264, 267 (D. Md. 2003) (although filed as a Rule 15(a) motion, motion properly considered under Rule 15(d) and relates back if there is a factual nexus between the amendment and the original complaint and, if there is some factual nexus, an amended claim is "liberally construed to relate back to the original complaint if the defendant had notice of the claim and will not be prejudiced by the amendment," *quoting, Grattan v. Burnett*, 710 F.2d 160, 163 (4th Cir. 1983)); *Astra Aktiebolag v. Andrx Pharms., Inc.*, 695 F. Supp. 2d 21, 27 (S.D.N.Y. 2010) (supplemental claims related back and were not time barred where party sought an additional remedy for previously pled infringement claim); *Fed. Deposit Ins. Corp. v. Knostman*, 966 F.2d 1133, 1138 (7th Cir. 1992) (In Rule 15(d) context, "[i]f the original pleading gave defendant notice that the conduct, transaction, or occurrence is of a continuing nature, he should be prepared to defend against all claims arising out of it, whether they arose before or after the original complaint was filed."); *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 347 (4th Cir. 2014) ("[e]ven when the District Court lacks jurisdiction over a claim at the time of its original filing, a supplemental complaint may cure the defect by alleging the subsequent fact which eliminates the jurisdictional bar," *quoting, Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286,

290 (8th Cir. 1988) (internal citations omitted)). *see, generally, Wright, Miller & Kane, 6A Fed. Prac. & Proc. Civ.2d §1508* (1990) ("to date, no court has suggested that the statute of limitations would bar a supplemental complaint that merely seeks additional damages because of the aggravation of injuries originally recited or otherwise brings the earlier pleading up to date. This is consistent with the long-standing notion that a statute of limitations is tolled by the institution of an action on a claim and is not affected by subsequent events"); *ISC v. Altech, Inc.*, 765 F. Supp. 1308, 1309 (N.D. Ill. 1990) (under Rule 15(d), "the relation back doctrine, which exists to preserve claims, should not be applied hypertechnically to defeat them.").

The sale of the improvements and the resulting deficiency arose as a subsequent transaction, occurrence or event traced directly to Defendants' original default under Rule 15(d). The Parties obviously knew of the existence of the Deed of Trust, as that formed the basis of Defendants' motion to dismiss. They cannot claim "surprise." Unfortunately, the District Court applied the relation back doctrine in just such a hypertechnical way the caselaw warns against.

b. Under the very case law relied on by the Court, relation-back should apply when a claim is brought prematurely

The second reason the District Court cited in finding relation-back inappropriate was that "a claim usually should not be related back to a pleading filed before the claim accrued." In support of this proposition the Court cited to *United States use of Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989). In *Wulff*, the Ninth Circuit considered whether an assignment of a Miller

Act claim should relate back under Rule 15(d).[4] The Court found no relation-back where the original complaint arose out of a contract without any connection to the federal construction project which was the subject of the Miller Act claim. 890 F.2d at 1074.

In so doing, however, the Court distinguished a case much closer to that presented in this case:

> In *Security Insurance Co. v. United States ex rel. Haydis*, 338 F.2d 444 (9th Cir. 1964), a Miller Act suit, we allowed a supplemental pleading filed after the expiration of the one-year statute of limitations to relate back to a previously filed complaint. There, the plaintiff, a supplier of materials to the contractor, had filed his complaint prematurely: the Miller Act, 40 U.S.C. § 270b(a), provides that a person must wait ninety days after the last day in which labor or materials were supplied before that person can sue on the payment bond; the plaintiff had filed his complaint before the ninety-day period had expired. Over one year later, on the day set for trial, the defendant moved to dismiss the complaint because of its premature filing. In response, the plaintiff filed a supplemental pleading alleging that by then the required ninety-day period had elapsed. The defendant argued that the case should be dismissed anyway because (1) the original complaint was premature; (2) the supplemental pleading was filed after the statute of limitations had expired and should not relate back; and (3) even if the supplemental pleading did relate back, it had to relate back to the time the original complaint was filed -- a time when the plaintiff could not have filed his complaint under section 270b(a).
>
> We refused to dismiss the case. Instead, citing both Rule 15(c) and 15(d), we held that the supplemental pleading could relate back to the original complaint. *Id.* at 449. Given the facts of Security Insurance, this was a just and relatively simple matter. Both of the complaints arose out of the same transaction, the supply of materials to the contractor for the federal project. The supplemental complaint was a copy of the original complaint except for the allegation that the ninety-day waiting period had elapsed. The defendant had notice of the case and was aware

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[4] Since the assignment occurred after the original action was commenced, the Court concluded that Rule 15(d), rather than Rule 15(c) applied. As in this case, the erroneous characterization of the corrected pleading as an "amended complaint" rather than as a supplemental pleadings was considered "immaterial." 890 F.2d at 1073.

that the original complaint was filed prematurely yet he waited over a year to object.

(emphasis added)

890 F.2d at 1073. Thus, a premature filing does not eliminate the relation-back doctrine under Rule 15(d). *See also, Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 290 (8th Cir. 1988) ("[e]ven when the District Court lacks jurisdiction over a claim at the time of its original filing, a supplemental complaint may cure the defect by alleging the subsequent fact which eliminates the jurisdictional bar").

Moreover, the District Court's conclusion that the deficiency claim is a "new claim, not a continuation of the original claims" is inconsistent with Rule 15(d) jurisprudence. Defendants had a loan in the form of a Note secured by a Deed of Trust. Upon default, they owed a certain amount of money. That amount changed upon the successful sale of the improvements,[5] whether it is considered personal property, as characterized by the State of Idaho,[6] real property, or something else. The sale still left a deficiency, which only changed the amount still owed under the Note. To suggest that the resulting deficiency claim for the lower amount owing is a wholly new and unrelated claim is a rigid legal formalism divorced from practical reality. *See, ISC v.*

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[5] The successful sale was a happy fact that no one could predict with certainty upon the Defendants' default.

[6] *See*, R., p. 304 - 324. As noted throughout this discussion, the State of Idaho continuously refers to structures as "Personal Property" and forbids "any mortgage, deed of trust, or other lien or encumbrance which, in IDL's sole discretion adversely affects title to the Personal Property..." Auction Administration Agreement, R., p. 306, ¶ 3.

Altech, Inc., 765 F.Supp. 1308, 1309 (N.D. Ill. 1990) (under Rule 15(d), "the relation back doctrine, which exists to preserve claims, should not be applied hypertechnically to defeat them."

c. For similar reasons, relation-back is not defeated because Idaho First's original action was filed prematurely under I.C. § 45-1503(1)

The Court underscored its observation that Idaho First's "prior complaints did not mention the deed-of-trust collateral" (emphasis in original). R. p. 343. To the extent this observation implied that Idaho First thought it could hide or ignore the existence of the Deed of Trust, that implication is incorrect. As anticipated, Defendants asserted its existence in their first filing. Based on the state lease language and the position adopted by the Idaho Department of Lands, Idaho First did not believe it could proceed under the Deed of Trust as it could in the garden-variety non-judicial foreclosure proceeding.

If the District Court were correct and, despite the language of the state lease, Idaho First was successfully granted a real property interest upon which to foreclose, its original and first amended filings were simply premature under I.C. § 45-1503(1). As noted above, premature filings do not defeat the doctrine of relation-back. Idaho First submits that if anything is inequitable, it is for Defendants to enjoy a windfall and not be required to pay back the money they borrowed because of a refusal to allow relation-back when a supplemental pleading relates to the exact same indebtedness. The District Court may have disagreed with the procedural route Idaho First believed it was required to undertake, but that disagreement should not bar it from pursuing an undisputed obligation on the part of Defendants.

d. The Nevada authority cited by the District Court is inapposite

In its Order denying Idaho First's motion to reconsider, the District Court relied heavily on *Badger v. Eighth Judicial Dist. Court*, 373 P.3d 89 (Nev. 2016). R. p. 325-329. There, the Petitioner was a guarantor of a borrower. As the District Court noted, borrower defaulted on its obligation and before foreclosing on its loan collateral, the lender sued the guarantor for the loan balance before foreclosing on the collateral. While that lawsuit was pending, the creditor foreclosed, leaving a deficiency. Within Nevada's six-month period for suing for deficiencies, the creditor filed a separate lawsuit against the borrower on the deficiency. Long after the six-month period expired, the lawsuits were consolidated. The lender amended its complaint to seek a deficiency judgment against the guarantor, arguing that it should relate back. 373 P.3d at 92.

The Nevada Supreme Court's opening paragraph demonstrates the key difference in the situation it confronted and the one posed by this case:

> In this opinion, we consider whether a creditor's amended complaint seeking a deficiency judgment against petitioner [the guarantor] may relate back to a timely complaint against a different party [the borrower] pursuant to NRCP 15(c), so as to satisfy NRS 40.455(1)'s six-month deadline for an application for a deficiency judgment against petitioner. We conclude that the district court erred in permitting real party in interest's [the lender's] amended complaint to relate back to the timely original complaint pursuant to NRCP 15(c), so as to satisfy the six-month deadline for an application for a deficiency judgment against petitioner [the guarantor], as required by NRS 40.455(1). Additionally, we conclude that the timely complaint against the borrowers does not constitute a valid application for deficiency judgment against the unnamed petitioner [the guarantor].
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> (emphasis added)

373 P.3d at 92. In so holding, the Nevada Court emphasized its earlier precedent that relation back would not apply after a limitations period had run "where the plaintiff elected not to name

the proposed defendant as a party in the original action." 373 P.3d at 94, *quoting, Garvey v. Clark County,* 532 P.2d. 269, 270-71 (1975). The situation described by the Nevada court is a far cry from this case involving only the borrowers themselves, who had full notice of the claims they would face.

2. The main difference between the Second Amended Complaint and the original was the amount owed; it therefore arose from the same "conduct, transaction, or occurrence" under I.R.C.P. 15(c)

a. Idaho Rules of Civil Procedure, Rule 15(c) allows an amended complaint that adds a new claim to relate back to the date of the original complaint for statute of limitations purposes

Similarly, Idaho First's Second Amended Complaint was timely pursuant to Rule 15(c), which states in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits...

In *Suitts v. First Sec. Bank, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985)[7], plaintiff's original complaint sought damages for breach of contract. Following a remand, plaintiffs moved to amend their complaint to add a tort action and punitive damages. That motion was denied by the lower court because plaintiffs were "attempting to amend their complaint to recover on a tort

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[7] The underlying facts of the case are set out in *Suitts v. First Sec. Bank, N. A.*, 100 Idaho 555, 556, 602 P.2d 53, 54 (1979) referred to as *Suitts I.* The *Suitts* case cited above is the second appeal to the Idaho Supreme Court.

theory more than five and a half years after the original complaint was filed for breach of contract. . . ." 110 Idaho at 23. On appeal, the Idaho Supreme Court reversed and remanded, finding that the court should have permitted the amended pleadings. The Court reasoned:

> In the present case, as noted, *supra*, the district court specifically stated that the tort theory with regard to which the Suitts sought to amend their complaint "relied upon the same conduct as being tortious as is asserted for the breach of contract claim." It is thus clear that it was the underlying conduct, transaction, or occurrence of refusing to deliver the escrow documents which comprised the gravamen of both the contract claim and the asserted tort claim. Therefore, the statute of limitations standing alone was not an adequate reason for denying the Suitts' motion to amend as the amended cause of action would have related back and would thus not have violated the statute.

110 Idaho at 23, 713 P.2d at 1382.

In *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075, (Ct. App. 1986) the Idaho Court of Appeals discussed the application of Rule 15(c)'s "aris[ing] out of the conduct, transaction, or occurrence" standard for relation back. There, plaintiff brought a civil rights claim against governmental entities relating to his arrest and incarceration. Plaintiff filed his lawsuit in February, 1983, and in January, 1985, moved to amend his complaint. The District Court denied the motion on the grounds the statute of limitations had run.

On appeal, the Court of Appeals reviewed Rule 15(c) to determine whether the statute of limitations would bar the amended pleading; "if an amended complaint meets the requirements of Rule 15(c), the date of the original complaint controls and the statute of limitation would not be a bar to amendment of the complaint." 111 Idaho at 1016, 729 P.2d at 1079. The Court

followed four factors identified by United States Supreme Court[8] to determine whether a claim related back to the original filing. First the Court noted that since no new parties were being added in the amended pleading, the only factor to be considered was that "(1) the basic claim must have arisen out of the conduct set forth in the original pleading." *Id.,* citing *Schiavone v. Fortune.* The Court of Appeals disagreed with the District Court's conclusion that the amended complaint stated a new cause of action which did not arise out of the conduct alleged and therefore did not relate back.

To determine whether new claims arose, the Court applied this analysis:

> We believe the district court took a hypertechnical view of the rule when it concluded that the amended complaint was not sufficiently related to the original complaint. Underlying Rule 15(c) and its relation-back provisions is the concept that a party should be given notice of the allegations against him. Therefore, if a party is put on notice by the original complaint, an amendment to cure a defective pleading should not be prohibited unless the noticed party would be unduly prejudiced in maintaining its defense. One of the purposes of Rule 15 is to allow amendments to expand or cure defective pleadings. It is well settled that, in the interest of justice, courts should favor liberal grants of leave to amend.

111 Idaho at 1017, 729 P.2d 1080.

The Court then addressed the factors a district court should apply to a Rule 15(c) analysis. The application of Rule 15(c) "should not be governed solely by whether the amendment avoids the statute of limitations problems. Rather the focus should be upon whether

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[8] *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986) "Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

the non-amending party has notice of a claim against it within the limitation period and whether the non-amending party would be prejudiced by any changes in the pleadings." *Id.* The Court reasoned that the district court erred in refusing to permit the amendments because of: (1) the liberal policy regarding amendments to pleadings under Rule 15 – "the amended complaint did not attempt to add a new cause of action . . . [it] modifie[d], by providing more detail . . .. Therefore, the claims . . . arose from the 'conduct, transactions, or occurrences set forth in the original pleading . . .."; (2) plaintiff had filed a tort claim notice and claim for damages which were pleaded in the original complaint placing defendants on notice of the claims against them; and, (3) there was no indication the motion to amend came at some unfair juncture in the proceedings, "for example, immediately prior to trial" thereby prejudicing defendants. 111 Idaho at 1018, 729 P.2d 1081. *See also, Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 347, 33 P.3d 816, 821 (2001) (reversing the District Court's and finding: "The allegations in both the original complaint and the amended complaint were based on the same factual allegations arising out of the same conduct, transaction or occurrence").

This caselaw indicates the District Court committed error in not allowing relation back under Rule 15(c).

b. Idaho Courts interpret its Rules of Civil Procedure in conformance with the interpretation of the same Federal Court Rule

Although its structure differs slightly from the Idaho Rule 15(c), the language of Federal Rules of Civil Procedure, Rule 15(c)(1)(A) and (B) is nearly identical:

(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading;

This Court has applied the Federal Courts' interpretation of Rule 15(c) to Idaho's I.R.C.P. 15(c). In *Wait v. Leavell Cattle*, 136 Idaho 792, 795-96, 41 P.3d 220, 223-24 (2001) said:

> When construing the phrase "within the period provided by law for commencing the action," the Court in *Hoopes* relied upon the decision of the United States Supreme Court in *Schiavone v. Fortune*, 477 U.S. 21, 91 L. Ed. 2d 18, 106 S. Ct. 2379 (1986), which construed the then identical language in Rule 15(c) of the Federal Rules of Civil Procedure. The Hoopes Court also quoted from *Chacon v. Sperry Corporation*, 111 Idaho 270, 275, 723 P.2d 814, 819 (1986), as follows:
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> Part of the reason for adopting the Federal Rules of Civil Procedure in Idaho, and interpreting our own rules adopted from the federal courts as uniformly as possible with the federal cases, was to establish a uniform practice and procedure in both the federal and state courts in the State of Idaho.

See also, State v. Stanfield, 347 P.3d 175, 178 n.10 (2015) (Thus, we seek to interpret identical rules "in conformance with the interpretation placed upon the same rules by the federal courts." Citing *Chacon v. Sperry,* 111 Idaho 270, 275, 723 P.2d 814, 819 (1986)); *Rohr v. Rohr*, 118 Idaho 689, 692, 800 P.2d 85, 88 (1990) ("It is well established that our adoption of the Idaho Rules of Civil Procedure is presumably with the interpretation placed upon similar language in the Federal Rules of Civil Procedure by the federal courts." (Citation omitted)); and *Durrant v. Christensen*, 117 Idaho 70, 73-74, 785 P.2d 634, 637-38 (1990) ("Our adoption of amended Rule

11, containing language identical to the Federal Rule, presumably carries with it the interpretation placed upon that language by the federal courts." (Citation omitted).

c. The Ninth Circuit allows relation back even though an amended complaint adopted facts expressly inconsistent with the original complaint

A recent federal case that analyzes the Rule 15(c) relation back rule is *Asarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999 (9th Cir. 2014). The *Asarco* case was initially brought in U.S. District Court, District of Idaho.[9] Asarco and Union Pacific conducted mining and railroad operations in Idaho's Coeur d'Alene river basin. Asarco's and Union Pacific's prolonged use of the land required the Environmental Protection Agency (EPA) to take action when it listed the region as a National Priority Superfund Site and declared the region ripe for hazardous waste cleanup. The United States pursued *Asarco* for related cleanup costs and related environmental damage. After a seventy-eight day trial and judgment against Asarco for at least twenty-two percent of the alleged damages, Asarco declared bankruptcy. Union Pacific and the United States both filed claims against Asarco in the bankruptcy court; Union Pacific settled its claim in 2008 and the United States settled on June 5, 2009.

On June 5, 2012, three years after its settlement with the United States, *Asarco* sued Union Pacific, seeking contribution from Union Pacific for its share of the settlement with the U.S. In Asarco's complaint, Asarco explicitly "excluded the drainage [area] of the North Fork of the Coeur d'Alene River" from the region at issue. Further Asarco filed a first amended

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[9] *Asarco v. Union Pac. R.R. Co.*, 936 F. Supp. 2d 1197 (D. Idaho 2013).

complaint nearly two months after the limitations period expired, changing the definition of Coeur d'Alene to include the exact region it initially said was not part of its claim for contribution. Union Pacific moved to dismiss the amended complaint on statute of limitation grounds, arguing the amended complaint could not relate back to the filing date of the original. The district court held the amended complaint satisfied Rule 15(c)(1)(B)'s relation back requirements because the two pleadings "shared a common core of operative facts." Union Pacific appealed to the Ninth Circuit, which agreed with the district court's ruling that Asarco's amended complaint satisfied the relation back requirements of Rule 15(c).

The Ninth Circuit framed the issue as one of first impression: "[c]an an amended pleading relate back if it includes allegations that were expressly disclaimed in the original pleading?" The Court held "it can." *Asarco* at 1005. The Ninth Circuit addressed two competing concerns; the liberal application of the relation back doctrine and the purpose of the statute of limitations. The Court summarized each legal principle:

> On the one hand, the relation back doctrine is to be liberally applied. *See id.; see also Rural Fire*, 366 F.2d at 362 (noting that Rule 15(c) "is liberally applied especially if no disadvantage will accrue to the opposing party"). Indeed, Rule 15's purpose "is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." 6 Wright et al., *supra*, § 1471. Gone are the code pleading days when a party was "irrevocably bound to the legal or factual theory of the party's first pleading." *Id.*
>
> On the other hand, the purpose of the statute of limitations — protecting defendants from stale claims — is also to be respected. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420, 182 L. Ed. 2d 446 (2012); see also *FDIC v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994). Amendments that significantly alter the pleadings could require the opposing party to start over and prepare the case a second time. 6A Wright et al., *supra*, § 1497. Consistent with the protective purpose of the statute of limitations, "[f]airness to

> the defendant demands that the defendant be able to anticipate claims that might follow from the facts alleged by the plaintiff." *Percy*, 841 F.2d at 979.
>
> Rule 15(c) strikes a balance between these competing concerns by providing that once litigation has been commenced, an opposing party is on notice that the pleading party may subsequently raise any claims or defenses that form part of the same conduct, transaction, or occurrence as the original pleading. Thus, we have said, "[i]t is the 'conduct, transaction, or occurrence' test of Rule 15(c) which assures that the relation back doctrine does not deprive the defendant of the protections of the statute of limitations." *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982); *see also Conner*, 20 F.3d at 1386 ("In the end . . . , the best touchstone for determining when an amended pleading relates back to the original pleading is the language of Rule 15(c) . . . ."); 6A Wright et al., *supra*, § 1497 (explaining that even where "[a]mendments . . . go beyond the mere correction or factual modification of the original pleading and significantly alter the claim or defense alleged in that pleading[,] . . . the search under Rule 15(c) is for a common core of operative facts in the two pleadings").

Asarco at 1005. *See also, Brightwell v. McMillan Law Firm*, No. 16-CV-1696 W (NLS), 2017 U.S. Dist. LEXIS 66889, at *8 (S.D. Cal. May 2, 2017) (Relation back allowed where "[t]he original Complaint did not contain as much detail as the FAC, but the two pleadings share a common core of operative fact."); *Deputee v. Lodge Grass Pub. Sch., Dists. 2 & 27*, No. CV 15-82-BLG-SPW, 2016 U.S. Dist. LEXIS 19841, at *16 (D. Mont. Feb. 18, 2016) (Factually identical new claims in the Amended Complaint related back to the date of the original Complaint and were not barred by the Title VII 90-day deadline.); *Alvarado v. HOVG, LLC*, No. 14-cv-02549-HSG, 2015 U.S. Dist. LEXIS 109764, at *4-5 (N.D. Cal. Aug. 19, 2015) ("Although the conduct underlying the new FDCPA claim occurred more than one year before Plaintiff sought to amend her complaint, the Federal Rules provide that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be

set out—in the original pleading[.]" Fed. R. Civ. P. 15(c)(1)(B)".); *Knox v. City of Fresno,* No. 1:14-cv-00799-GSA, 2015 U.S. Dist. LEXIS 46080, at *7 (E.D. Cal. Apr. 7, 2015) (allowing addition of state law claims in an amended complaint even though they were beyond the time for filing under California's tort claim act).

In *Asarco* the Ninth Circuit also addressed the notice which an amended pleading must give to a defendant. The Court identified the notice:

> Rule 15 does not require that a pleading give notice of the exact scope of relief sought. Rather, it must give "fair notice of the transaction, occurrence, or conduct called into question." Martell, 872 F.2d at 325. So long as a party is notified of litigation concerning a particular transaction or occurrence, that party has been given all the notice that Rule 15(c) requires. When a defendant is so notified, "the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement." *Id.* at 326 (quoting *Barthel v. Stamm*, 145 F.2d 487, 491 (5th Cir. 1944)).
>
> Accordingly, we hold that even where an amendment trenches on factual ground that the original pleading said would be off limits, the standard is the same. In such cases, the standard to be applied is Rule 15(c)'s liberal "conduct, transaction, or occurrence" test.

Id. at 1006.

Even though *Asarco's* amended complaint pleaded a position contrary to the one it took in the original complaint, the Court held that because of the "factual overlaps" between the original complaint and the amended complaint, the amended complaint "will doubtless be proved by the 'same kind of evidence'" that would have been offered to support its original complaint. *Percy*, 841 F.2d at 978 (quoting *Rural Fire*, 366 F.2d at 362)[10]. *Id.* at 1007.

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[10] *Percy v. S.F. Gen. Hosp.*, 841 F.2d 975, 978 (9th Cir. 1988) (quoting *Rural Fire Prot. Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir. 1966))

The United States Supreme Court in *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 550, 130 S. Ct. 2485, 2494 (2010) similarly explained the purpose of relation back is ". . . to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits (citation omitted)."

d. Idaho First's deficiency claim arose out of the same "conduct, transaction, or occurrence" set forth in its original and first amended complaints

Idaho First's claims in this action were based on one transaction: the $1,500,000.00 loan it made to Defendants. Defendants have identified the facts and documents underlying this transaction in their Declarations. There is only one leasehold and structure involved: that situated at 2087 John Alden Road, McCall Idaho. R., p. 81, ¶ 3. Defendants were assigned the Lease in 2005. R., p. 81, ¶ 4. Defendants knew of the terms of the Lease between 2001-2010. R., p. 81, ¶ 6. Defendants obtained the loan from Idaho First in 2006. R., p.82, ¶ 9. The Construction Deed of Trust was recorded in September, 2006. R., p.82, ¶ 10; R., p. 108 - 117. Defendants knew of Idaho's deficiency statute and that their debt would be reduced by the fair market value of the collateral. R., p. 83, ¶ 12. Defendants built the structure with the loan proceeds. R., p. 83, ¶ 13. The renewed 2014-2022 Lease with IDOL defined the cabin as "personal property. R., p. 84-85, ¶ 17. Finally, Defendants admit they "defaulted on the Note." R., p. 85, ¶ 19. By Defendants testimony these are the only relevant facts describing the conduct or occurrence involved in the entire course of dealing between the parties that affect the case. It was Defendants' default and their abandonment of the McCall property to Idaho First out of which Idaho First's claims arose.

Idaho First satisfies the first sentence of I.R.C.P. Rule 15(c), and meets the liberal application standards for relation back followed in *Herra, supra,* and *Asarco, supra.* The original complaint and the Second Amended Complaint share a common core of operative facts.

e. Defendants had actual notice that Idaho First would pursue all remedies available to collect what Defendants owed to the bank, including a deficiency judgment

As of June 19, 2015, Defendants knew that Idaho First intended to pursue legal action against them to collect the debt they owed. From the date Defendants notified Idaho First they were abandoning their interests, leaving Idaho First to pay the remainder of the 2015 lease payment, maintain the property and deal with the risk of not selling, Defendants were consistently on notice that under Idaho law they faced the prospect of being liable for a deficiency judgment. Their Counsel raised that issue in his May 29, 2015, letter to Idaho First. He advised Idaho First that the abandonment was an effort to "mitigate" "any potential claim for deficiency by the Bank." Defendant "Drew" Bridges admitted in his Second Declaration that as a "practicing attorney" he "long understood legal terms like real property, leasehold, collateral, personal property, deed of trust, Idaho's security first rule and deficiency statutes, and real property improvements" R., p. 80, ¶ 2 (emphasis added). Mr. Bridges also admitted that he knew of Idaho's security-first statute that required IFB to sell the collateral first to pay off any remaining debt obligation: "I was also aware of Idaho's deficiency statute that ensured our debt secured by a deed of trust would be reduced by the fair market value of the collateral and any deficiency claim would have to be raised within a specific, short period." R., p. 83, ¶12.

Ms. Bridges, also an attorney, knew of the deficiency laws in Idaho since she testified identically to Mr. Bridges in her Declaration. R., p. 70, ¶ 2; R., p. 74, ¶ 12. Not only were the Bridges put on notice by Idaho First's first complaint, as lawyers they had particular knowledge of the Idaho statute allowing Idaho First to make a claim for a deficiency judgment. This knowledge coupled with Idaho First's pleading of the underlying transaction invokes the relation back doctrine of I.R.C.P. Rule 15(c). The Bridges not only had notice of the deficiency claim, they actually knew real estate law.

When Idaho First filed its original complaint on June 19, 2015, seeking repayment of the defaulted loan, Defendants' Counsel underscored the difficulties Idaho First faced in being forced to take the McCall property back following the Bridges' default. He knew the Bank could not take the lease in its own name by way of assignment or "even foreclose on the property." R., p. 140. Counsel's opening request was that Idaho First provide the name of a "straw man" as assignee because Idaho First, as a corporation, could not hold an interest in the IDOL lease, assignments are limited to natural persons. R., p. 140; R., p. 295, ¶ 3-4. Further, Defendants' Counsel carefully distinguished between Defendants as "lessees" and "owners" of the cabin. R., p. 139. In other words, Defendants knew from at least the date of their default, that Idaho First's collection efforts were significantly more complicated and problematic than a simple non-judicial foreclosure action. The May 29, 2015 letter, explicitly anticipated that Idaho First would pursue its legal remedies. R., p. 23-24. Defendants were setting up their defenses from the date of their default.

Based on Idaho First's original complaint filed within 21 days of Defendants' default, Defendants had actual notice of the core facts Idaho First relied on to bring its lawsuit. Defendants also had actual notice that Idaho First intended to collect whatever amount Defendants owed on the loan. The original complaint not only provided actual notice, but Defendants knew the consequences of their default. Through their own testimony they anticipated and strategically timed their default to "mitigate" the amount they would have to pay either to the State of Idaho or Idaho First. R., p. 139-140; R., p. 85, ¶ 19. They defaulted just before the second payment on the Lease was due. As indicated above, both Defendants testified that as experienced lawyers they were well grounded in real estate law. R., p. 80, ¶ 2; R., p. 83, ¶ 12; R., p. 70, ¶ 2; R., p. 74, ¶ 12.

The Second Amended Complaint does not add an entirely new cause of action. It relates to the exact same indebtedness as the first, only the amount changed because of the sale. The Second Amended Complaint is not barred by any limitations period because it relates back under I.R.C.P. Rule 15(c) to the original filing. Defendants had notice that Idaho First would make every effort within the law to collect whatever amount of money was owing to it.

Accordingly, the District Court erred in refusing to allow relation back under Rule 15(c) under the circumstances of this action.

V. CONCLUSION

For all the foregoing reasons, Idaho First respectfully requests that this Court reverse the District Court's entry of summary judgment and remand for further proceedings under the Second Amended Complaint.

Dated this 22nd day of May, 2017

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Attorneys for Appellant, Idaho First Bank

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that two bound copies were served on Defendants via hand delivery.

DATED AND CERTIFIED this 22nd day of May, 2017.

Daniel E. Williams