IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COA No. 29,243

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

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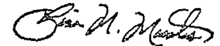

O'BRIEN & ASSOCIATES, INC.,
a New Mexico Corporation,

Petitioner/Plaintiff/Appellee,

vs.

Sierra County Cause
CV 2006-24

CARL KELLEY CONSTRUCTION, LTD., CO.,
a New Mexico Limited Liability Company,
J.D. BEHLES & ASSOCIATES, P.C., a New
Mexico Professional Corporation, RON MILLER,
CPA, a New Mexico Professional Corporation,

Respondents/Defendants/Appellees,

LUBBOCK NATIONAL BANK, a Texas Banking
Corporation, and STEPHANIE O'BRIEN,

Respondents/Defendants/Appellants.

DEFENDANT MILLER ET AL'S RESPONSE TO REPLY BRIEF OF APPELLANT LUBBOCK NATIONAL BANK

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT,
THE HONORABLE KEVIN SWEAZEA

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TABLE OF AUTHORITIES

N. M. Cases

Aktiengesellschaft der Harlander Baumwollspinnerei und Zwirn-Fabrik v. *Lawrence Walker Cotton Co.*, 60 N.M. 154, 162, 288 P.2d 691 (1955).

In re Estate of Keeney, 121 N.M. 58, 61, 908 P.2d 751 (Ct. App. 1995)

Griego v. Grieco, 90 N.M. 174 (Ct. App.1971)

GCM, Inc v. Kentucky Cent. Life Ins. Co., 124 N.M. 186, 947 P. 2d 143 (1991)

Royal Indemnity Co. vs. McClendon et al., 64 N.M. 46 (1958)

Seasons vs. Atwell, 86 N.M. 751, 796 (1974)

Springer Corp. vs. Kirkerby-Natus, 80 N.M. 206, 209 (1969)

Foreign Case

Continental Bank of Pennsylvania vs. Barker Riding Academy, 459 P.2d 1163, (Utah 1969)

Secondary Sources

24 Am. Jur.193, §35, *Fraudulent Conveyances.*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA, I hereby certify that the foregoing Brief complies with the applicable type-volume limitation in that the Body of the Brief contains 2,539 words as indicated by the word count total of the word processing system used to prepare the same, which is WordPerfect 12

STATEMENT OF FACTS

The Statement of Facts contained in Appellee, Miller et al's Response Brief and fully incorporated herein.

ARGUMENT SUMMARY

The only argument properly brought before this court is whether a mortgage can be given from one company on behalf of a debtor when that debtor has debt that has been fully collateralized and no extensions to the note are concurrently made.

Lubbock has attempted to allege that there were future extensions. This issue was not properly brought up at the July 30, 2008 hearing. However, if this court determines that such a contention is reviewable, the fact remains that this Court must consider the fact all debt up to the time this decision was made, was fully collateralized. "Future support is held to be invalid when the rights of existing creditors are thereby prejudiced." 24 Am. Jur.193, §35, *Fraudulent Conveyances*. Thus, in any event, as a matter of law, there was no consideration for the third party mortgage given to Lubbock.

If the Court so decides the Issue of Consideration, then the issue of Marshaling will be moot, as it was moot before the District Court when it refused to consider Lubbock's Motion to Reconsider. Lubbock's contentions are on the issue of marshaling almost exclusively contained in their Motion to Reconsider. No such arguments were contained in the original cross-summary judgment brief. Thus, they are improper in two ways. First, that they were not arguments that were ever ruled on by the District Court and second, should not appear in the Motion to Reconsider in the first place since they were not brought up in the cross-summary judgment brief.

The Doctrine of Marshaling, was nonetheless, correctly applied by the District Court when it was originally decided. Clearly, Ron Green is the common debtor as a Vendee of a real estate contract and Lubbock must be required to marshal against the O'Brien's stock. Questions of tax planning do not serve as prejudice and does not serve as a valid concern compared to the prejudice to the lien holders.

Finally, Miller et al., does not have to prove the validity of their claim before challenging Lubbock's position since no law exists that states such a contention and since Lubbock signed the a stipulated order allowing all parties to challenge the validity of each other's claims.

I. The mortgage is void for lack of consideration

The Appellant is attempting to create an issue of material fact when none exists, or was ever asserted at the time Summary Judgment was granted. In doing so, the Appellant is making arguments that were not properly before the District Court. Second, the Appellant merely tries to confuse the legal issue of consideration. Finally, the Appellants, Behles and Miller, have standing to challenge Lubbock's claim by virtue of stipulated order.

1. There are no material facts in dispute relevant to the legal status of the mortgage

The question of extensions to the mortgage was not properly brought before the District Court, and not supported in fact and are not legally relevant. In no brief before the District Court nor in oral argument was a question of material fact brought before the court. No facts support the claim that any nexus existed between the mortgage given by O'Brien and Associates and extensions on Michael O'Brien's personal loan. Any such argument is also irrelevant since all extensions on the personal loan was fully collateralized by O'Brien's blue chip stock under after the decision was made in this case.

A. The issue of extensions to the loan was not raised at District Court

The Appellee readily concedes that pre-existing debt does indeed suffice as consideration. Were there only preexisting debt in this case, not already collateralized, there would be consideration. But the debt was collateralized by Michael O'Brien's blue chip stock, thus there was no consideration. The Appellant has attempted to raise an issue not properly raised at the District Court level. The contention is that future advances were made on the basis of the mortgage. This was not raised in the July 30, 2008 hearing. (R.P.1210-1215 2:05:00 pm-3:34:11:00 pm; July 30, 2008 Transcript 8:14-67:20). Nor was it presented in any brief preceding that hearing. The only point at which it was raised, was in Lubbock's Supplemental Brief following the hearing. Thus, judgment was not squarely before the court on that issue. As such, it should not be relied on at the appellate level.

Moreover, such a contention is entirely unsubstantiated. Issues of fact are not created by bald assertions *Aktiengesellschaft der Harlander Baumwollspinnerei und Zwirn-Fabrik v. Lawrence Walker Cotton Co.*, 60 N.M. 154, 162, 288 P.2d 691 (1955). In this case, no extensions to the loan occurred at the time of the mortgage. Moreover, Michael O'Brien was fully collateralized at the time of the mortgage and was fully collateralized up until the end of 2008. It was only when the bottom fell out of the stock market that the Bank became under secured. Therefore, at anytime prior to the District Court decision in this case, the mortgage was not necessary to secure the loan amount to O'Brien and Associates.

B. Any extensions to the note are legally irrelevant

The key point in the preexisting debt argument is that preexisting debt that is already collateralized cannot serve as consideration. Consideration is accomplished in two ways,

Continental Bank of Pennsylvania vs. Barker Riding Academy, 459 P.2d 1163, (Utah 1969) states that consideration may be acquired in the case of:

1. The creditor's forbearance in suing over due debt.

2. The renewal or extension on the debtor's original note. Neither elements were met in this case. There is simply no factual basis to conclude there was any nexus between extensions to the note and the relation to the mortgage; because of the fact that all extensions were fully collateralized by the stocks.

In *Royal Indemnity Co. vs. McClendon et al.,* 64 N.M. 46 (1958) the Supreme Court of New Mexico addressed the issue of collateralized preexisting debt. *Royal* considered the transfer of $1,100 for indebtedness of $4,750. *Id* at *49.* The transferor contended that the $1,100 served as consideration for payment for future support *Id.* "by the weight of authority a transfer of property in consideration of future support is held to be invalid when the rights of existing creditors are thereby prejudiced" *Id. (*citing 24 Am. Jur. 193,§35, *Fraudulent Conveyances).* The court found that $7,250 lacked consideration. *Id.*

In this case, the entirety of the debt was fully collateralized by the stock. Thus, all amounts secured by the mortgage is wholly gratuitous and lacks consideration. This court should find, like the court found in *Royal* that there is no consideration for collateralized debt. The argument that future extensions were made on the mortgage cannot be considered by the court. For, as the court in *Royal* stated, consideration for future support is invalid when the rights of existing creditors are prejudiced. They are so in this case. Behles and Miller hold a judgment, that with interest is over $600,000 and Carl Kelley Construction hold a material man's lien against the subject property for $240,000.

2. The Appellee had standing to challenge Lubbock's position

Lubbock National Bank stipulated to the standing of all parties included in the stipulated judgment to contest the validity, priority and extent of all liens attached to the subject property. Lubbock National Bank contends ipse dixit that junior lien holders have to prove their claims before the doctrine of the lack of consideration or marshaling can be invoked. They cite no law for the proposition, because there is none. Such a contention violates the agreement to which they stipulated. **(R.P. cite)**

II. The Doctrine of Marshaling was correctly applied but should not be considered

The question of marshaling was moot before the District Court and was thus not a final appealable order. The Appellant contends that the order is appealable as an interlocutory order. That would be the case if the appellant had made an interlocutory appeal, but Lubbock did not make an interlocutory appeal see *Griego v. Grieco,* 90 N.M. 174 (Ct. App.1971). Second, the interlocutory order on the issue of marshaling was correctly decided, because there is a common fund and because equity calls for such an order.

1. The Doctrine was correctly applied

The very purpose behind the doctrine of marshaling is to protect junior lien holders. *Seasons vs. Atwell,* 86 N.M. 751, 796 (1974). The rule of marshaling, is the doctrine 'by which the junior encumbrancer may require a senior mortgagee to exhaust his remedy against property other than that covered by the partial mortgage of the junior encumbrancer." *Springer Corp. vs. Kirkerby-Natus,* 80 N.M. 206, 209 (1969).

In this case a junior encumbrancer, Miller et al., holds a lien against both Ron Green and Riverside Properties Corp. either of whom may be vendees of the subject property. Michael

O'Brien is the vendor of the subject property and gave a mortgage to Lubbock on the subject property. If Lubbock is not required to marshal against the personal stock originally given to it from O'Brien securing its loan, then Miller et al., will be severely prejudiced and unable to fully satisfy its debt held against the subject property.

The Appellee agrees that the court should consider the rights of all who an interest in the property. The Appellant, however, contends that O'Brien will be prejudiced because he will incur capital gains tax if he liquidates his stock.

Once again, this issue was never raised at the District Court level. The Doctrine of Marshaling was lost by Lubbock with their only arguments before the court contained in their Response to Defendant Behles et al's Motion for Summary Judgment and Cross Motion. This Response did not raise prejudice or tax implications.

If prejudice equals losing money this is factual untrue and does not tell the entire story. Michael O'Brien is a real estate developer and because sales of land are considered ordinary income to a real estate developer, the proceeds from the sale of subject property, if used to pay Lubbock, will be taxed at Michael O'Brien's highest marginal tax rate for the year of the sale, which will likely be 28-35%. The capital gains on his personal stock were held long-term and will therefore be only 15%.

Taxes are unavoidable. One can certainly put off paying taxes, but ultimately one must pay taxes. In fact, under the current administration and given the United States' rising deficit couple with its liabilities associated with Social Security, Health care and an aging population, and if campaign promises mean anything capital gains will only go up. But the Doctrine of

Marshaling is not a tax planning doctrine, and the Appellant's reliance tax planning as an issue only demonstrates the desperation in the Appellant's legal position.

Finally, the court would have to weigh the supposed harm caused by having Michael O'Brien pay taxes against the harm done to the property's valid lien holders and other creditors who stand to lose from $240,000 in CKC's case on their materialman's lien to over $600,000 in Miller et al's case. The stock has already been partially liquidated, but even if the total amount of the debt were paid by the stock and even if capital gains could be considered prejudice, the prejudice to O'Brien would be approximately $42,252.41 if one can call capital gains prejudice See Brief-In-Chief pg. 6, while the prejudice to the property's other creditors would be in the amount of $840,000. Clearly this is a non-argument.

2. <u>A common debtor is not an issue</u>

First, Lubbock cannot challenge whether there is a common debtor. At the District Court level the only time the issue of the common debtor was raised was in Lubbock's Motion for Reconsideration which was never decided. This court cannot consider this issue for two reasons. One, it was only raised in reconsideration, not on Lubbock's Response Motion for Summary Judgment. Thus, it was improperly raised in reconsideration since new issued cannot be raised in reconsideration. Two, the Motion for Reconsideration was rendered moot and never actually decided by the District Court. The Court of Appeals only review motions to reconsider if their content has been considered by the trial court. *In re Estate of Keeney*, 121 N.M. 58, 61, 908 P.2d 751 (Ct. App. 1995). If it is considered, since it was only brought up in a motion to reconsider, this court must review for abuse of discretion. *GCM, Inc v. Kentucky Cent. Life Ins. Co.*, 124 N.M. 186, 947 P.2d 143 (1997).

Second, there is a common debtor. The Appellants rely heavily on *Seasons Inc. vs. Atwell* 86 N.M. 751 (1974) to make their claim. In *Seasons* appellant attempted to foreclose against certain properties owned by Atwell *Id* at 752. The Atwells' owned a sizeable tract of land which they conveyed to their co-owners for cash, a note and three lots which are the subject property. The land was conveyed to Lincoln Hills who executed a promissory note to Ruidoso State Bank. *Id.* That promissory note encumbered, "all unsold parcels in Lincoln Hills subdivision," and the Atwell's lots were not excepted from that description. *Id.* Eventually, the note was passed to seasons who attempted to foreclose on the Atwells'. *Id.* Among many other arguments, the Atwells argued that the Doctrine of Marshaling should apply to prevent the foreclosure of their property, but the court found that there were no other competing creditors. Thus, the doctrine did not apply. *Id.* In this case there are clearly competing creditors. In the case of the Atwells' only one creditor, namely Seasons, was interested in the property. It so happened that the note Seasons held attached more than one property. The court in the Atwells' ultimately held that Seasons could foreclose all of its properties under the note. The facts in that case are entirely dissimilar and inapplicable to the case at bar.

In this case the subject property was owned by Michael O'Brien. O'Brien then sold the property to Ron Green who was acting as manager for a corporation to be formed. The District Court, in its July 30, 2008 hearing ruled that Ron Green was joint and severally liable on the contract. Ron Green eventually formed Riverside Corp. which O'Brien represented to Lubbock National Bank to be the purchaser under the real estate contract. Riverside, however, never released Ron Green from liability or formally adopted or benefitted under the contract. Miller et al., has a lien against Ron Green personally as well Riverside and filed its lien against both

entities in Sierra Court, where the subject property is located. Since Ron Green purchased the subject property from Michael O'Brien, Ron Green is the common debtor. Alternatively, if the trial court decides that Riverside has taken on ownership under the real estate contract, Riverside is the common debtor. In either event there is a common debtor and the doctrine of marshaling should be applied in this case.

CONCLUSION

The District Court correctly decided that there was no consideration to support the Mortgage given by O'Brien and Associates to Lubbock National Bank and correctly decided that Marshaling is appropriate in these circumstances though that order is not a final appealable order.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed via U.S. mail, first class, postage prepaid, to:

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