

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**No. 29,243**

**O'BRIEN & ASSOCIATES, INC.,**

**COPY**

**Petitioner/Plaintiff/Appellee,**

**vs.**

**Sierra County Cause  
No. D-0721-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,**

**COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED**

**JUL 13 2009**

*Sean M. Martin*

**Respondents/Defendants/Appellees**

**and**

**LUBBOCK NATIONAL BANK, a Texas Banking  
Corporation,**

**Respondent/Defendant/Appellant.**

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**BRIEF IN CHIEF OF APPELLANT  
LUBBOCK NATIONAL BANK**

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**APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT,  
THE HONORABLE EDMUND KASE**

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**STATEMENT REGARDING TAPE RECORDED TRANSCRIPT**

In citing to the digitally recorded transcript of proceedings, counsel for Appellant is using the monitor's official log.

## **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 4,485 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Office Word 2003.

## **SUMMARY OF PROCEEDINGS**

### **I. NATURE OF THE PROCEEDING**

This appeal arises out of an action to determine the validity and priority of liens and claims against real estate. Lubbock National Bank appeals two rulings by the District Court involving competing claims by creditors and the debtor to funds held in the Court Registry.

Lubbock National Bank appeals the District Court's summary judgment ruling that its mortgage is void and it has no further standing in this case. Lubbock National Bank also appeals from the District Court's ruling that it is required to marshal assets before it is entitled to make a claim against the funds in the Court registry.

### **II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW**

This case was originally instituted on March 17, 2006, by O'Brien and Associates, Inc. ("O'Brien") as a proceeding to cancel a lien against real property and to assert a claim for slander of title against Carl Kelly Construction, Ltd. Co. ("Carl Kelly Construction"). (R.P. 1). Carl Kelly Construction filed an Answer and Counterclaim to foreclose the lien and for breach of contract on April 11, 2006. (R.P. 17).

On November 20, 2006, O'Brien filed an Amended Petition, joining additional parties defendant, Lubbock National Bank, Stephanie O'Brien,



J.D. Behles & Associates, and Ron Miller, CPA (“Behles & Miller”). The Amended Petition also requested a determination of the validity, priority, and extent of liens of all the named defendants. (R.P. 64-66).

Lubbock National Bank filed its Answer on January 8, 2007, and asserted a counterclaim against O’Brien and cross-claims against Carl Kelly construction, and Behles and Miller. (R.P. 89-91).

On March 12, 2007, on a Stipulated Motion by the parties, the Court entered an Amended Order allowing sale of the subject property free and clear of all liens. The Amended Order provided that all funds from the sale were to be deposited into the Court Registry pending final determination of the validity, priority and extent of the claims. (R.P. 203-206). Cash in the amount of \$664,384.92 was tendered into the Court Registry on May 14, 2007. (Docket Entry 5-14-2007).

The parties engaged in extensive discovery and motion practice. The District Court (Judge Sweazea) held a hearing on July 30, 2008 on various motions filed by the parties. (Tr. 7-30-08). At the hearing, the Judge ordered that Lubbock National Bank would be required to marshal assets before it could make a claim against the funds in the Court Registry. (Tr. 7-30-2008/ 2:24:12 PM; 3:27:48 PM). Lubbock National Bank sought reconsideration of that ruling on September 2, 2008. (R.P. 1331-1342).

At the hearing on July 30, the Judge also heard summary judgment arguments on a Motion filed by Behles and Miller. (R.P. 520-552, 588-598, 876-886, 959-1020). The Motion challenged whether there was consideration for Lubbock National Bank's mortgage and the standing of Lubbock National Bank to assert a claim to the sale proceeds in the Court registry. (R.P. 885; Tr. 7-30-2008/ 2:29:54 PM-2:38-47 PM).

Following the hearing, the parties submitted additional briefs on the issue of consideration for Lubbock National Bank's mortgage and the Bank's standing. (R.P. 1216-1223; 1326-1330). Behles and Miller also filed a Motion for an accounting by Lubbock National Bank after marshalling and the Bank filed a response to that Motion. (R.P. 1292-1301; 1343-1347).

On November 20, 2008, Judge Sweazea continued the July 30 hearing. (Tr. 11-20-2008). Following the hearing, on December 10, 2008, Judge Sweazea held that there was no consideration for the execution of Lubbock National Bank's mortgage and, therefore, Lubbock National Bank had no standing to continue in the proceeding. (R.P. 1511-1514). Following entry of the December 10, 2008 Order granting summary judgment against the Bank, Judge Sweazea then recused himself. (R.P. 1519). The Honorable Edmund Kase was assigned and, on December 19, 2008, reentered the same

Order as the December 10, 2008 Order. (R.P. 1520, 1562-1565). This appeal by Lubbock National Bank timely followed. (R.P. 1573-1583).

### **III. STATEMENT OF FACTS**

Plaintiff, O'Brien and Associates, Inc., purchased a tract of land in Truth or Consequences, New Mexico, from non-party Molly Doolittle on October 23, 1998 under a real estate contract. On June 15, 1999, Mr. O'Brien borrowed money from Lubbock National Bank to finance the purchase. (R.P. 963, 1004-1007, 1298). O'Brien pledged personal stock to guaranty the loan from Lubbock National Bank. At the time of the purchase, Lubbock National Bank was adequately secured by the personal stock. (R.P. 415-416, 595-596, 896). The original loan was made to "O'Brien d/b/a O'Brien & Associates. (R.P. 963, 1004-1007).

Subsequent to the purchase, Mr. O'Brien became very ill. Due to a decrease in stock values and real estate prices, Lubbock National Bank was no longer adequately secured. In October, 2001, then, O'Brien's corporation, O'Brien & Associates, Inc., provided a mortgage to Lubbock National Bank. (R.P. 597, 905-906). Bank documents relating to the mortgage state:

"Loan is secured by 9,600 shares of GE stock, 4224 shares or Exxon/Mobile stock, filed real estate mortgage in Sierra County, New Mexico and the assignment of the real estate contract. When the market

dropped and Mike became ill, he agreed to give us a mortgage on the real estate he was developing. Our lien was taken as an abundance of caution.”

(R.P. 925).

The mortgage was recorded on October 12, 2001. There was no corresponding promissory note. However, Mr. O'Brien was indebted to Lubbock National Bank at the time in an amount in excess of \$300,000. (R.P. 888-895, 964). The loan was extended numerous times after the date of the Mortgage by Lubbock National Bank. (R.P. 597, 897-925).

Defendant-Appellee, Carl Kelley Construction, Ltd. Co. is claiming a mechanic's lien against the property for an amount in excess of \$240,000. The mechanic's lien was filed on May 16, 2005. (R.P. 419-20). Carl Kelley Construction takes the position that the work was done by Carl Kelley on the property prior to 2002 and, therefore, Kelley claims the lien predates the Lubbock National Bank Mortgage. (R.P. 421).

Testimony has been introduced indicating that Mr. Kelley did not provide more than \$50,000 worth of work on the property. There is also evidence that the mechanics lien is invalid due to deficiencies in the lien and, therefore, the lien may not relate back. (R.P. R.P. 775-776, 788-789).

The Defendants, Behles Law Firm and Ron Miller CPA obtained a judgment against non-parties, Riverside Corporation and Ron Green, for attorney and accounting fees. Behles and Miller then recorded a transcript

of judgment on October 13, 2004 against the property in Truth or Consequences. Green and Riverside purported to assign security interests to Behles and Miller. However, Lubbock National Bank contests the validity of the assignments. (R.P. 424-432; 961, 980-987; Tr. 7-30-2008/2:50:01 PM-3:14:18 PM). Green has been discharged in Bankruptcy and Riverside has not asserted any interest in the fund held in the Court Registry.

The fund held in the District Court Registry from the sale of the property exceeds \$600,000. (Docket Entry 5-14-2007). The Behles and Miller claim exceeds \$350,000. (R.P. 880-881).

The stock securing the indebtedness of Michael O'Brien to Lubbock National Bank was, as of August 2008, valued at 331,415.07. If O'Brien were required to sell the stock to pay off the Note, he would incur long-term capital gains taxes at the rate of 15% or \$42,252.41. (R.P. 1341-1342).

## ARGUMENT

The District Court granted summary judgment, holding that there was a lack of consideration for Lubbock National Bank's mortgage given by O'Brien & Associates, and, therefore, the Bank lacks standing to assert any further claim in this case. There are genuine issues of material fact as to whether the Bank's loan was a personal loan to Michael O'Brien. However, even if the loan was a personal loan, there was clearly consideration for the mortgage. Therefore, the Court erred in granting summary judgment both as a matter of the existence of issues of material fact and as a matter of law.

Prior to the granting of summary judgment, the District Court had also held that Lubbock National Bank would be required to marshal assets before it could claim against the monies held in the Court Registry. The Court indicated that the marshalling ruling was moot when it granted summary judgment. However, in the event this Court rules that the summary judgment should be reversed, Lubbock National Bank also requests that the Court review and reverse the ruling that the Bank is required to marshal assets.

### **I. Standard of Review**

The District Court granted summary judgment based on lack of consideration. The Court reviews summary judgment rulings de novo, applying the same standard as the District Court in determining the existence

of genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Headley v. Morgan Management Corp.*, 2005-NMCA- 45, 137 N.M. 339, 110 P.3d 1076, 1078.

This Court reviews the issue of whether there is a lack of consideration to support a contract de novo based on the language of the contract. See, e.g., *Piano v. Premier Dist. Co.*, 2005-NMCA-018, ¶ 17, 137 N.M. 57, 63, 102 P.3d 11, 17. The Court also reviews the related question of standing using a de novo standard of review. *Protection and Advocacy v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1, 8.

Lubbock National Bank is aware of no New Mexico authority setting out the standard of review for rulings on marshaling of assets. However, the question of whether a District Judge is permitted to exercise equitable powers is a question of law reviewed de novo by this Court. See, *United Properties, Ltd. v. Walgreen Properties, Inc.*, 2003-NMCA-140, ¶ 7, 134 N.M. 725, 82 P.3d 535.

## **II. The District Court Erred in Holding that Lubbock National Bank's Mortgage is Void for Lack of Consideration**

Defendants, Behles and Miller and Carl Kelley Construction, argue that there is insufficient consideration to support Lubbock National Bank's mortgage because the original antecedent promissory note was in the name of Michael O'Brien, while the mortgage was given by O'Brien and

Associates, Inc., his closely held corporation. Behles, Miller, and Carl Kelly Construction contended that the pre-existing debt to Lubbock National Bank could not be sufficient consideration for the later-created mortgage. The District Court ruled that Lubbock National Bank's mortgage was void for lack of consideration and, consequently, that the Bank had no further standing to assert a claim in the case.

The District Court's ruling that the mortgage is void for lack of consideration is erroneous, however, based on the existence of genuine issues of material fact and as a matter of law. First, the law is clear that a pre-existing debt will serve as sufficient consideration for the transfer of an interest in property, including by a mortgage. Second, although Lubbock National Bank disputes that the loan to Michael O'Brien was a personal loan, even if it was, a closely held corporation may create a mortgage as security for personal indebtedness. Last, failure of consideration is, as a matter of law, a defense to the contract by a party to the contract. Non-parties to the contract, such as Behles, Miller, and Carl Kelley Construction, have no standing to assert failure of consideration in order to void Lubbock National Bank's mortgage.



**A. A Pre-Existing Debt is Sufficient Consideration for a Mortgage.**

Contrary to the District Court's ruling, New Mexico law is clear that a pre-existing debt is sufficient consideration for a mortgage to secure the debt. A pre-existing debt will support the transfer of an interest in property by way of a mortgage. *McAllister v. Farmer's Development Co.*, 40 N.M. 101, 55 P.2d 657 (1936); *Royal Indemnity Co. v. McLendon*, 64 N.M. 46, 323 P.2d 1090 (1958); *Consolidated Placers v. Grant*, 48 N.M. 340, 151 P.2d 48 (1944). At common law, a pre-existing indebtedness is unquestionably sufficient consideration to uphold either a conveyance or mortgage. *Lehrenkrauss v. Bonnell*, 199 N.Y. 240, 92 N.E. 637 (Ct. App. NY 1910).

In *Clovis National Bank v. Harmon*, 102 N.M. 166, 692 P.2d 1315 (1984), the Supreme Court recognized that a pre-existing debt can be collateralized by a later mortgage. The Court in *Harmon* stated that:

“The 1976 real estate mortgage, created *after* the endorsed note states: This mortgage secures the performance of the following obligations:  
'All indebtedness of mortgagors *now existing* or hereafter incurred, whether individual, joint, several, contingent, or as principal, guarantor or surety . . .’

This mortgage also expresses the intent that it secures all Harmon's existing or future debts. The endorsed note is thus also secured by the 1976 real estate mortgage

since the endorsed note was in existence at the time the 1976 real estate mortgage was created.”

102 N.M. at 169, 692 P.2d at 1318) (emphasis in the original).

**B. A Closely Held Corporation May Create a Mortgage to Secure Personal Indebtedness of the Corporate Principal.**

It is Lubbock National Bank’s position that the loan to Michael O’Brien was not a personal loan. At a minimum, genuine issues of material fact exist as to whether the loan was personal. See, R.P. 963, 1004-1007. However, even if it was a personal loan, the fact that the mortgage was given by his closely held corporation, O’Brien & Associates, as security for the debt does not render the mortgage void for lack of consideration.

New Mexico has not addressed the issue in a published opinion. However, other jurisdictions have held that a majority shareholder’s personal, pre-existing, debt may be secured by a mortgage on corporate property. A third party may properly execute a mortgage for purposes of securing a loan to another. See, e.g., *Continental Bank of Pennsylvania v. Barclay Riding Academy*, 93 N.J. 153, 459 A.2d 1163, 1172 (N.J. 1983); *Arkansas Iron and Metal Co. v. First National Bank of Rogers*, 16 Ark. App. 245, 701 S.W. 2d 380 (Ct. App. Ark. 1985) (plaintiff’s corporation could properly give a mortgage as consideration for a loan to plaintiff’s brother). See, also, *U.S. v. Quaintance*, 665 NYS 2d 191, 244 A.D.2d 915 (N.Y.A.D.

1997) (wife may properly execute a mortgage to secure a debt of husband's corporation); *In re Janis*, 151 B.R. 936, 938 (Bankr. Ariz. 1992) (wife may sign a mortgage as security for husband's debt).

Further, the fact that the mortgage is given to secure a loan to another person does not mean that there is a failure of consideration. The consideration for a mortgage may consist of a loan to another party.

*Patterson Bank v. Langendorf*, 483 N.E.2d 279 (Ct. App. Ill. 1985); *Carlisle v. Commodore Corp.*, 190 S.E.2d 703 (Ct. App. N.C. 1972).

In *Continental Bank of Pennsylvania v. Barclay Riding Academy*, 93 N.J. 153, 459 A.2d 1163 (1983), the court addressed standard banking loan practices. The court considered the same argument made in this case that there is a failure of consideration for a corporate mortgage where the mortgage is given to secure another's debt. In finding adequate consideration, the court noted that "[o]nly a minimal, often intangible, benefit need pass to satisfy the consideration requirement for third-party mortgages of existing debts." The court further recognized that the most common forms of such consideration are (1) the creditor's forbearance in suing on an overdue debt, and (2) renewal or extension of the debtor's original note. 459 A.2d at 1173.

Similarly, in *Arkansas Iron and Metal Co. v. First National Bank of Rogers*, 16 Ark. App. 245, 701 S.W. 2d 380 (Ct. App. Ark. 1985), the Arkansas court held that, in order for a note or mortgage to be valid, the consideration does not have to move to the party giving the mortgage but may, instead, consist of a loan to a third person. It is not necessary to the validity of the mortgage that the party executing the mortgage derive any benefit from the transaction. Instead, it is sufficient that a valuable consideration moves to another party, such as the making, renewal, or extension of a loan. 701 S.W.2d at 384.

The Bank's requirement of additional security for the loan to O'Brien due to the drop in stock market and O'Brien's health issues is exactly the type of standard banking practice involved in the *Continental Bank* case. After the giving of the mortgage by the corporation, the Lubbock National Bank voluntarily extended the Note numerous times. (R.P. 597, 897-925). The Bank's actions, in extending O'Brien's original note, constitute consideration for the giving of the mortgage even though the original note was personal to O'Brien. At a minimum, there are genuine issues of material fact, and it was error for the District Court to conclude the mortgage was void for lack of consideration as a matter of law.

### **C. Non-Parties to the Mortgage Cannot Claim Failure of Consideration to Void the Mortgage.**

In New Mexico, consideration is a necessary element for the existence of an enforceable contract as between the parties to the contract. See, UJI 13-801 and 13-814 NMRA. Failure of consideration, however, may not, alone, be used by an outsider to the contract in order to void the contract.

In order to void a mortgage or other conveyance, a non-party to the contract is required to prove more than a failure of consideration. Instead, a third-party creditor must establish that the transfer was fraudulent as to present or future creditors. New Mexico's Uniform Fraudulent Transfer Act, NMSA 1978, §§ 56-10-1, et seq., provides:

“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay or defraud any creditor of the debtor, or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(a) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transactions; or

(b) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.”

NMSA 1978, § 56-10-18(A).

As set out, above, it is Lubbock National Bank's position that there is clearly sufficient consideration for the mortgage. However, even if there were a failure of consideration, that failure, alone, is not sufficient for the Court to have voided the mortgage.

Instead, in order to void the mortgage given to the Bank, Behles, Miller, and Carl Kelley Construction, as putative creditors claiming an interest to the funds from sale of the property, must prove that the mortgage was a fraudulent conveyance under New Mexico's law. Behles, Miller, and Carl Kelley Construction, however, have failed to adduce any evidence showing that the giving of the mortgage to Lubbock National Bank by O'Brien & Associates was fraudulent as to creditors.

The District Court erred in holding that there was a failure of consideration and, therefore, the Lubbock National Bank mortgage was void. This Court should reverse the ruling of the District Court and remand the case for a determination as to the validity and priority of all competing claims to the funds held in the Court Registry.

### **III. The Court Should also Reverse the Ruling Requiring Lubbock National Bank to Marshal Assets**

At the July 30, 2008 hearing, the District Judge ruled that, before Lubbock National Bank could make a claim to the funds in the Court

Registry, it would be required to marshal assets. In the event this Court reverses the District Court's order voiding the mortgage and dismissing the Bank for lack of standing, the Court should also reverse the ruling requiring Lubbock National Bank to marshal assets.

The doctrine of marshalling of assets is an equitable doctrine designed for the protection of competing creditors, and should not be applied to the prejudice of the debtor, O'Brien. Further, even if the doctrine should be invoked in this case, it should not be applied until Behles, Miller, and Carl Kelley Construction prove the validity and priority of their claims.

Under New Mexico law, the doctrine of marshalling is an equitable principle under which the assets of the debtor are arranged to protect the rights of two or more competing creditors. The doctrine is often called the "two funds" doctrine, and is applied in situations where one creditor has a claim to two or more funds and another has a claim upon one of the funds, only, the one having a claim upon two funds being required to look first to the fund to which it has the exclusive right. *Seasons, Inc. v. Atwell*, 86 N.M. 751, 527 P.2d 702 (1974).

The doctrine of marshalling of assets, however, is not to be applied to bring about an unjust or inequitable result or to work substantial injustice or injury to any party in interest. Courts traditionally require that the doctrine

be applied only when it can be equitably employed as to all parties with an interest in the property, including the debtor. *Meyer v. United States*, 375 U.S. 233, 237 (1963); *In re United Retail Corp.*, 33 B.R. 150 (Bankr. D. Haw. 1983).

Marshalling is not to be applied against the debtor or to the prejudice of the debtor. In applying marshalling, the court must consider the rights of all who have an interest in the property, including the debtor, and the doctrine should be applied only when it can be equitably fashioned as to all of the parties. *In re United Retail Corp.* 33 B.R. 150, 153 (Bankr. D. Haw 1983); *In re Carson*, 174 B.R. 247 (10<sup>th</sup> Cir. BAP (Kan)2007); *In re Bame*, 279 B.R. 833 (8<sup>th</sup> Cir. BAP (Minn.) 2002); *Herzog v. NBD Bank of Highland Park*, 203 B.R. 80 (N.D. Ill. 1996).

In this case, if Lubbock National Bank is required to marshal assets, O'Brien's personal stock would need to be liquidated, resulting in significant capital gains taxes to O'Brien. (R.P. 1341-1342). The marshalling of assets, then, would result in inequitable prejudice to Mr. O'Brien. The Court should not require marshalling of assets where it will be prejudicial to O'Brien.

The marshalling doctrine also should not be applied in this case because Michael O'Brien is not a common debtor as between Lubbock



National Bank and Behles and Miller. The prerequisite for application of the doctrine of marshaling of assets is the presence of a common debtor between the two creditors. *Janke v. Chace*, 487 N.W.2d 301 (Ct. App. Neb. 1992).

Although Lubbock National Bank, on the one hand, and Behles and Miller on the other hand, assert claims against the proceeds from sale of a parcel of land, O'Brien is not a common debtor between them. To the contrary, O'Brien is indebted to Lubbock National Bank. However, the claims of Behles and Miller arise from a debt incurred by non-parties, Ron Green or Riverside Properties, not from any debt of O'Brien to Behles and Miller. O'Brien is not and has never been a debtor of Behles and Miller.

O'Brien is a debtor of Lubbock National Bank, but not a debtor of Behles and Miller. Therefore, there is no common debtor involved as to the claims of Behles and Miller. The District Court erred in requiring marshaling of assets in these circumstances.

In addition, although O'Brien arguably could be considered to be a common debtor as between Lubbock National Bank and Carl Kelley Construction, the doctrine of marshaling similarly should not be applied. In order for the doctrine of marshaling of assets to apply, there must be two funds that belong to the common debtor, with the senior lien holder having claim to both and the junior lien holder having a claim to one. *In re Harold's*

*Hatchery*, 17 B.R. 712, 716 (M.D. Ga. 1982); *In re Francis Construction Co., Inc.*, 54 B.R. 13 (D.S.C. 1985).

In this case, both funds at issue are not owned by the same debtor and are not in the hands of the debtor or superior creditor. The stock securing the indebtedness to Lubbock National Bank is held personally by Michael O'Brien. The second source of funding—the proceeds from sale of the property—is held by the District Court and is, in part, claimed by O'Brien and Associates.

Last, there are issues as to the validity and priority of the claims asserted by both Behles and Miller and by Carl Kelley Construction. Until Behles, Miller, and Carl Kelley Construction prove up their claims, they cannot be considered to be competing creditors of Lubbock National Bank. Therefore, even if the Court were to ultimately hold that the marshalling doctrine

### **CONCLUSION**


The District Court erred in holding that Lubbock National Bank's mortgage is void and, therefore, that Lubbock National Bank has no standing to assert claims against the funds held in the Court Registry. The mortgage was properly given by O'Brien and Associates as security for the pre-existing debt owed to the Bank by its corporate shareholder, Michael

O'Brien. Further, the multiple extensions of the loan given by the Bank constitute sufficient consideration to support the mortgage. Therefore, there is no failure of consideration and the mortgage is not void. The District Court erred in granting summary judgment based on the existence of genuine issues of material fact and because summary judgment was not proper as a matter of law.

Further, the Court erred in applying the equitable doctrine of marshalling of assets to Lubbock National Bank. Application of the doctrine will work inequitable prejudice to the debtor, Michael O'Brien. Further, O'Brien is not a common debtor as between Lubbock National Bank and Behles and Miller. Last, there aren't two funds owned by the debtor or in the hands of a superior creditor for purposes of the claims of Carl Kelley Construction.

Therefore, the Appellant, Lubbock National Bank, would respectfully request the Court reverse the Orders of the District Court (1) granting summary judgment and dismissing the claims of Lubbock National Bank for lack of standing and (2) requiring Lubbock National Bank to marshal assets, and remand the case for adjudication of the validity and priority of all claims to the funds in the Court Registry.

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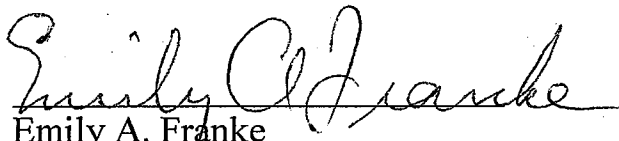
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