IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

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

Petitioner/Plaintiff/Appellee,

vs.

COA No. 29, 243
Judge Edmund Kase III

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

Respondents/Defendants/Appellants.

RESPONSE BRIEF OF APPELLEE, RON MILLER CPA, A NEW MEXICO PROFESSIONAL CORPORATION, AND JD BEHLES AND ASSOCIATES P.C., A NEW MEXICO PROFESSIONAL CORPORATION,

APPEAL FROM A SEVENTH JUDICIAL COURT ORDER OF THE HONORABLE KEVIN SWEAZEA (NOW RECUSED) SIERRA COUNTY

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STATEMENT REGARDING TAPE RECORDED TRANSCRIPT

LNB's statement is adopted with the exception of the fact that Appellee, Miller et al., has either cited from the tape log or Transcript page as it filed a Motion to file a Supplemental Transcripts the parties had available to them as a certified court reporter's transcript of the July 30, 2008 and November 20, 2008 hearings . The transcripts are ready to be filed and useful considering the issues here.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA, I certify that the foregoing Brief comprised of the applicable type-volume limitations, that the body of the Brief contains, 26 pages.

Respectfully Submitted:

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SUMMARY OF PROCEEDINGS

I. Nature of the Proceedings

O'Brien and Associates Inc., (OBA) Plaintiff, brought suit originally against CKC Limited, (CKC) a New Mexico Limited Liability Company. (R.P. 1-10) Neither Miller and Associates CPA, JD Behles and Associates, P.C. (Miller et al.) Lubbock National Bank, (LNB) nor Stephanie O'Brien (SB) were parties to the original action. (R.P.406-432). OBA claimed that it held title to the real property in question and contested the validity, priority, and extent of the labor and materialman's claim of CKC. At some point during the litigation, OBA determined it wished to sell the property. It was unable to sell the property in question because the title company involved refused to close the sale without dealing with or removing claims to the property which included the mortgages to LNB and SB (R.P. 104-110, 165-169 and 203-207) (OBA had not joined them as parties in the initial action) or the liens of Miller et al. A stipulation was entered into between OBA, CKC, and the parties added as Defendants, to accommodate the sale of the property with the liens and claims attaching to the proceeds (which were placed in the court registry) with the same validity, priority, and to the same extent as they attached to the real property. The additional Defendants were required to voluntarily join in the pending action which had been progressing for approximately a year at that time and the Plaintiff's Complaint was amended to have the claims determined. The court approved the stipulation. Miller et al., filed a Motion for Partial Summary Judgment against LNB contending first that it was required to marshal the collateral that it held for the loan. LNB made O'Brien a loan which was secured by a lien upon substantial blue chip stocks of O'Brien, and later by a third party pledge or mortgage upon the real estate owned by OBA which was subject to the agreed sale. For

some period of time, pursuant to a private agreement between O'Brien, OBA, and LNB, blue chip stock had been placed in some sort of trust account and was being liquidated by a Trustee, in order to provide funds to make monthly payments of approximately $5,000 to LNB. (R.P. Document 1060-1143 R.P. 1065). Until the market slide at the end of the year 2008, the blue chip stock handily secured the debt of the Plaintiff. (R.P.1428-1436). By December of 2008, there was a deficit of approximately $80,000 in debt/collateral coverage due to attorneys fees. LNB's note provided for the Plaintiff to pay interest and attorney's fees incurred in the collection of the note. (R.P. 876-941 pg. 4-6 ¶19-21, 26 and 30).

Secondly, Miller et al., sought the determination of the court, that the LNB's mortgage was either void because it failed to contain a mortgage cap, or that any amount of debt secured by the mortgage, was limited to the original obligation amount (R.P.876-941, 1060-1143 and 1144-1157). The testimony developed indicated that there had been substantial advances made after the initial advance on the note. (See R.P 876-941 pg. 4-6 ¶19-21, 26 and 30).

Finally Miller et al., contended that the mortgage that LNB got from OBA was void for lack of consideration.

The court held a hearing on the Summary Judgment Motion in July of 2008. (R.P. 1210-1215 2:05:00 pm- 3:34:11 pm; July 30, 2008 Transcript 8:14- 67:20). It announced an oral ruling against LNB which required marshalling, did not specifically deal with the cap issue, except to indicate that the lack of a cap might not void the mortgage, but that any mortgage would be limited to the initial advance, and took under advisement whether or not the mortgage was void for lack of consideration.. An Order was prepared and circulated on the marshalling ruling, but LNB and the OBA refused to sign off on that Order. No formal written Order was ever entered on the court's marshalling ruling until March 23, 2009. The court ruled then entered the order on the cap rulings,

denied all parties motions on standing and found Green liable on the August 2002 contract of sale based on a transcript of the prior hearing. (See R.P.1511-1514).

Nevertheless, LNB, immediately after the July oral ruling, filed a Motion to Reconsider as to the issue of marshalling, and a Response was filed. (See R.P .1331-1342 and 1381-1401). Miller et al., had been unable to get a handle on the balance owed LNB in the discovery, and the value of the blue chip stock collateral, so Miller et al., filed a Motion to require accountings after marshalling and to determine that LNB had no further standing in the case, and should be dismissed from the action on the basis that if it marshaled, or had properly marshaled the debt would have been paid in full (See R.P1292-1301). The court then set a hearing in November of 2008, to rule on the issue that it had taken under advisement as to the validity of the mortgage, and to deal with the Motion for Reconsideration on the marshalling issue (See R.P.1286-1287, R.P. 1292-1301 and R.P. 1308-1310) At that hearing, the court announced its decision that the mortgage of LNB was void for lack of consideration and specifically held that the marshalling issue had now become moot which mooted the reconsideration motion and the accounting motion. (See R.P.1469-1472 pg. 1 ; 1:24:50 pm November 20, 2008 Transcript 2:16-10:17 and R.P. 1511-1514 Order of court entered December 10, 2008). The court directed Miller et al., to prepare and circulate an Order, and though the formal Order had been agreed to, it was not entered until sometime later, at or about a time shortly before the recusal of Judge Sweazea in this matter which occurred at a view of the property on December 12, 2008. Judge Sweazea had entered the Order on December 10, 2008 (See R.P.1519-1520) and an identical duplicate of that Order was later signed by Judge Kase and entered in the matter which can now be viewed as excess.

In short, LNB is appealing the entry of the Order which avoids this mortgage given by OBA for lack of consideration and also on appealing the ruling of the court which was never reduced to

an Order because it was mooted by a previous Order. (See R.P.1511-1514). The Order, appealed from as it relates to the voiding of the LNB mortgage is the final appealable Order subject to an appeal. Any ruling of the court on marshalling was not entered pre-appeal, is not subject to appeal, and even if an Order had heretofore been entered, it became moot, and this would also constitute an appeal from an interlocutory ruling when there is no Order for an appeal as required by the law and rules specifically allowing for an interlocutory appeal.

II. Course of Proceedings and Disposition in the Court Below

The description of this case by counsel for the Bank, is at best incomplete and to some extent misleading. Unfortunately, the Bank counsel writing the brief was not counsel in the trial court so a recitation of these proceedings is more difficult. In fact, the proceedings are as follows:

The case was originally instituted on March 16, 2006 by the Plaintiff, OBA to void the labor and materialman's lien of CKC and for slander of title against CKC (R.P. 1-10). Approximately one year later, the Plaintiff determined that it wanted to sell the property (See R.P. 104-110, 165-169 and 203-207). Its petition (R.P. 1-10), alleged that it had title to the real property in question, however it was unable to sell because there were claims against the property in favor of LNB, Miller et al., and SB. LNB held a unsolicited, consensual mortgage on the property which had been executed by OBA to secure the debt of O'Brien, to Plaintiff. This debt had been incurred by O'Brien individually some years before the mortgage had been executed. It was secured by blue chip stock owned by O'Brien which initially had a value substantially in excess of the debt. After the initial loan but before the mortgage was executed, additional advances were made to O'Brien pursuant to the note and amendments thereto. At the time the mortgage was executed, there was no demand by LNB, no default, no extension, modification of, in advance on the note (See R.P. 876-941 pg. 1-7, 1060-1059 pg. 2-6 and 1144-1157 pg. 1-4).

Nearly a year later, a stipulation was entered between the Plaintiffs, Defendant, CKC, L NB, Miller et al., and SB, which provided for the sale of the property, escrowing of the sale proceeds, with the liens and claims of the parties attaching to the monies, with the same validity and to the same priority and extent as they attached to the, "real property." This particular stipulation provided the parties would litigate those issues before the court in an amended Complaint, by stipulation approved by the Order. This stipulation also provided for the voluntary entry into the lawsuit of LNB, Miller et al., and SB, who were not heretofore parties to the action. (See R.P.104-110, 165-169 and 203-207).

One of the additional parties joined, SB was the daughter of the principal of OBA and was later dismissed out of the suit with prejudice (See R.P. 1788-1789). The sale was closed pursuant to an Order which allowed for closing the said sale, and an amended Order. The funds were deposited in the court registry. (See R.P. 165-169 and 203-207).

On July 30, 2008 the court set a hearing on various motions filed by the parties. They were: Default Judgment as to Defendant Del Rio Corp. (R.P. 840-842) and Motion for Summary Judgment (R.P. 876-941). At the hearing, Judge Sweazea propounded an oral ruling requiring LNB to marshal, then took under advisement issues as to the validity or avoidance of the LNB's mortgage. Miller et al., prepared an Order and attempted to circulate it, but the Plaintiff and LNB refused to sign off on it. LNB filed a Motion for Reconsideration on September 2, 2008 (See R.P. 1331-1347). A Response to that Motion was filed by Miller et al., (See R.P. 1381-1401) and Kelley (See R.P. 1367-1374) as well as Miller et al., having filed a Motion on August 15, 2008 to require accounting after marshalling and determine that LNB had no further standing in the case, on the basis that its debt would be paid through marshalling Responses were filed (See R.P. 1324-1325 and R.P. 1343-1347).

A further hearing was set by the court on November 20, 2008 for the purposes of ruling on

the pending Motions, and on matters which the court had taken under advisement which were those claims in the previously pending Motion heretofore set for hearing on July 30, 2008 relating to the validity or the voidability of the LNB mortgage. (R.P. 1331-1342, R.P. 1292-1301 and R.P. 1308-1310). At the hearing on November 20, 2008 Judge Sweazea immediately ruled on the matter under consideration, and voided the mortgage of LNB on the basis there was no consideration for the mortgage (See R.P. 1511-1514 and Tape Log 1469- 1472 1:24:50 pm November 20, 2008 Transcript 2:16-23). The loan in question was made by LNB initially in 1999 to Michael O'Brien individually and was secured by blue chip stock owned by him. At a later date, but long before the execution of the mortgage by O'Brien and Associates, additional personal advances were made under that loan. The mortgage did not contain a cap provision in accord with New Mexico law, but it was recorded. The court then addressed the other pending matters, including the Motion for Reconsideration, the Motion to Require Accounting, and the other issues which had been under advisement, and found that they had all been rendered moot and so ruled from the bench. An Order was prepared by Miller et al., and circulated which was later approved by all parties. It was entered by Judge Sweazea on December 10, 2008. (See R.P. 1511-1514). An identical duplicate of that agreed Order was later entered by Judge Kase as after the recusal of Judge Sweazea (See R.P.1562-1565). The recusal was done on December 12, 2008 as a result of comments made by CKC, despite court instructions at a view. (See R.P.1520). There was never, at that time, an Order entered which properly recorded the court's ruling on the marshalling issue until March 23, 2009 after the appeal was filed. (See R.P. 2613-2615).

Judge Kase, at a presentment, and relying upon the court reporter's transcript of the July 30, 2008 hearing, and after having hearing argument of parties remaining in the case, entered an Order (R.P. 2613 - 26) which addressed the marshalling (para. 2, page 2613) "The court finds further that

there are no material facts in dispute that any claim Lubbock National Bank has against the collateral realized from the sale to secure the Sierra County Property based on the mortgage and corporate guarantee of O'Brien and Associates Inc., cannot be reached until the Bank applies the amount due on the loan through marshalling of assets pledged by T. Michael O'Brien to secure the original debt." It noted in paragraph 4, page 2614 that it had taken under advisement the issue and the voidability of the mortgage, and denied the motions directed at the validity of Miller at al., and CKC's liens and conclude don paragraph 5, "To the extent the Bank has a claim against the proceeds of the sale of the Sierra County real estate, it must fully satisfy its debt out of securities pledged by Michael O'Brien in his individual capacity before proceeding against assets of the corporation. At a minimum, the bank mortgage is capped at its original advance." Furthermore, it memorialized, at page 2614 that Ron Green assumed authority for the to be formed Del Rio Corporation by executing the real estate contract as its manager, and that O'Brien and Associates was the vendor of a real estate contract for the subject land and concluded that Ron Green was jointly and severally liable on the real estate contract, and that O'Brien and Associates was the vendor of the real estate contract.

At no time did LNB in its original briefing on these issues, and argument (See R. P. 736-755, R.P. 853-854 and R.P. 857-873) which was complete around the time of the July 30, 2008 hearing, address the issues in the same way which it sought to address them in the Motion for Reconsideration which it filed, (R.P. 1331-1347) and on which it seeks to appeal (See R.P. 1573-1583). Those issues included that marshalling was improper due to tax prejudice to Mr. O'Brien individually. The Bank argued that if O'Brien had to liquidate the stock (he apparently had a low basis in the stock) the sale price would be higher than the basis. The difference between the two (2) would constitute a capital gain taxable to him. Precisely the same thing is true as to OBA and the real property sold as it was as a developer. As a matter of fact, there has been a taxable event here

if in fact the Plaintiff is the titled owner. OBA, either acting as a developer, has to pay income tax on the entire gain as ordinary income here, or alternately, if it is held for investment, it is going to have a taxable gain between its basis and the sale price. Taxes are a normal consequence of living. It is not something that can be avoided or that should be avoided, nor was this argument ever made prior to the court's ruling on marshalling.

Furthermore, the Bank had already required O'Brien to liquidate a lot of the stock (See R.P. Document 1144-1157 R.P. 1149 ¶ 23). It was liquidated and held in an impound account (See Brief pg. 10 supra). These funds were already being used to pay the Bank.

Finally, the Common Debtor Doctrine, though inapplicable, was argued like this for the first time in the Bank's Motion for Reconsideration and is now argued on this Appeal. (Tape Log R.P. 1210-1215 pg. 2 ; 2:23:23 pm July 30, 2008 Transcript 16:19- 17:22 R.P. 1331-1342). It was not argued in the original briefing prior to the July hearing (See R.P. 1367-1374 and R.P. 1381-1401). The fraudulent conveyance/ standing arguments were also not made until that same time.

III. Statement of Facts

The Statement of Facts as propounded by LNB is, for the same reason as is the Statement of Proceedings, incorrect, or at least, incomplete. There was no finding of the court, and it would be difficult for there to be such a finding, that the funds borrowed by O'Brien from LNB on June 15, 1999 were used to develop the Phase II property, and then subsequently pledged nearly two (2) years later by the Plaintiff to the Bank. The facts of the matter are that no development started on this Phase II property until at least February 2000. (See R.P. 40).

Furthermore, there was no material fact that Mr. O'Brien's illness had anything to do with the execution of the mortgage by the Plaintiff to LNB, nor was there any finding that LNB was no longer adequately secured on October 2001 when it acquired this mortgage. In fact, this quite to the

contrary. LNB did not become undersecured until the market crashed in the late fall of 2008 (See R.P. 2507-2513 and 1428-1436). This mortgage was simply provided as an additional collateral at a time when the loan by the Bank to O'Brien was current and fully collateralized. LNB Bank apparently relies upon one (1) quotation from Bank loan memorandum while ignoring the statements of material facts of the parties made on the Summary Judgment Motion. The material facts were not disputed.

On or about February 7, 2002 the Plaintiff, entered into an agreement with Ron Green relating to subject property.

Miller et al., obtained a security agreement on such contract. (See R.P. 877- 941) In August of 2002 the Plaintiff entered into a second contract with Ron Green acting as manager of Del Rio Corp., for the purchase of the property and received a $100,000 down payment as initial consideration (See R.P. 878) Miller et al., obtained a Security Agreement from Riverside Properties (See R.P. 877) as set forth in the Summary Judgment Motion Statement of Material Facts. Del Rio Corporation was at the time a corporation to be formed which was subsequently not formed. Green then formed a corporation named Riverside Properties for the purposes of holding this contract. Later, in 2004, Miller et al., sued Green and Riverside, obtained a transcript of money judgment against Green and foreclosure of the Green and Riverside security interests.

Hence, the claims of Miller et al., were based on security agreements to secure the debt of Green and Riverside against property purchased by Green, as manager for a corporation to be formed, Riverside, and there was a Transcript of Judgment against Green. The court had ruled on July 30, 2008 (See R.P. 2613-2615 Order of court entered on March 23, 2009) that the August 2002 contract did exist between the Plaintiff and Green, that it was not terminated, and that CKC was a third party beneficiary due to provisions in that Agreement which provided for payment of its debt.

This ruling of the court was based on the fact that the Plaintiff had not taken appropriate action pursuant to the terminate the August 2002 Agreement and re-take title to the property. (See Statement of Material Facts (See R.P. 877) No.11 referencing the court Order and in February 01, 2008

The Plaintiff entered into a contract to sell the real property on December 31, 2005. (See R.P. 878). Statement of Material Facts No. 12) and because it could not close the sale due to the liens of the LNB/Stephanie O'Brien and Miller et al., a stipulation, agreed to by all the parties, and an amended Order approving that stipulation which provided that parties, not original parties to the action, LNB, Stephanie O'Brien, and Miller et al., would voluntarily join in the suit, and that their liens attached to the funds in the court registry, derived from the sale, with the same validity, priority, and extent to the liens attached to the real property and those issues would be litigated there. (See R.P. 878 - Statement of Material Facts No. 14)

This stipulation, and the Order approving it, specifically provided standing for determination of Miller et al's interest in the property. (See R.P. 878 - Statement of Material Facts No. 15, 16, and 17) The Statement of Material Facts and the Summary Judgment Motion makes it very clear that this was a personal loan to Michael O'Brien made on June 15, 1999, collateralized by a pledge of his stock. (See R.P. 879 - Statement of Material Facts No. 19)

According to the Bank, at the time the Motion was filed for Summary Judgment, the amount owed to the Bank was $314,715.73 in principal, $2,348.61 in interest until cleared, $317,064.34 as of December 5, 2007, with interest accruing at $78.67 per day until paid, plus attorneys fees and costs in the amount of $400,709.90. (See R.P. 879 Statement of Material Facts No. 21)

The loan has always been in the name of O'Brien individually and it started out at $525,410.66, with payments and disbursements as shown on Exhibit A of the Motion (See R.P.

880) Statement of Material Facts No. 26) Attached as Exhibit A in the Statement of Material Facts No. 30, was the loan history which showed the payments made from the collateral. In the renewed or re-stated Motion (See R.P. 879 - Statement of Material Facts No. 23) Miller et al., pointed out that this stock was being held and liquidated on a monthly basis and payments were being made to the Bank out of the stock, and that O'Brien had personally been collecting the dividends as the Bank was not applying the dividends to the loan. In this re-stated Motion Statement of Material Facts No. 24, R.P. 1060-1143 pg. 6, the statement of O'Brien was that it was his intention to use the proceeds of the real estate contract to pay the Bank in order to retake his individual stock investment which he wished to retain. These facts were not really contested. LNB, OBA's Response to these - Counter Statement of Material Facts.

At times there has been some attempt on the part of LNB to say that since some of the documents in the bank file, would refer to the individual Debtor, O'Brien, as doing business as O'Brien and Associates, that somehow, this was a corporate debt. This is simply nonsense. There is no factual dispute, and as a matter of law the loan was made to O'Brien is in his individual capacity.

The designation, "dba," or, "doing business as," is commonly recognized as a fictitious business name. NMSA 55-9-102 (1978) Section 11 provides, "A corporation is a registered corporation and it is to be defined as such as a public record for purposes of notice whereas, there is no requirement to register a dba."

LNB makes a factually inadequate and legally insignificant argument that the Bank intended for the 1999 loan to cover the corporation. Their intention is really not relevant, nor is it the issue.

The security agreement collateralized stock personally owned by O'Brien and there is no collateral pledge on corporate property. As a matter of law, the execution of the mortgage by

Michael T. O'Brien dba O'Brien and Associates, and could not bind the Plaintiff in this case, and so LNB's self serving argument that the Plaintiff was always indebted to it as borrower is really irrelevant and legally untrue. There is no dispute that the original note and security agreement were executed by O'Brien individually. The mortgage in question was executed by the Plaintiff much later.

LNB further admits that there was no additional advance, there was no extension, change, or modification in the terms of the loan at the time that the mortgage was executed. The note was not in default, no parties were released, no collateral was released, and in short, the mortgage was a gift from the corporate Plaintiff. (See also R.P. 1026-1035).

IV. Argument Summary

It is the position of Miller et al., that the Summary Judgment of a court is supported and not subject to being overturned because there are no genuine issues of material fact as to whether or not the Bank's loan was personal to O'Brien, and that furthermore, even as a personal loan to OBA as a matter of law, there was no consideration to support the mortgage. Therefore the court did not err in granting Summary Judgment on either grounds.

Furthermore, it is the position of Miller et al., that there was no Order ever entered on the court's marshalling ruling. It is therefore not subject to being appealed and that furthermore, even had an Order been entered, it would have been moot once the court made the ruling voiding the mortgage. Also, this issue would be interlocutory and not subject to being appealed at this time. There are no grounds stated by LNB on which this court can review the marshalling ruling, however, it is the position of the Miller et al., that if it could do so, this ruling is not properly reversed.

The arguments that LNB relies upon to reverse this marshalling ruling, i.e., that there was no common fund, and secondly, the prejudice to O'Brien, due to his potential payment of tax was not

considered, were never raised in the court below, and cannot be raised for a first time on a Motion for Reconsideration, and certainly for the first time on appeal of a nonexistent Order. Furthermore, neither of these arguments is correct as a matter of law.

V. Standard of Review - Appellants Statement is Correct

Summary judgment is appropriate where there is "no genuine issue as to any material fact" and where "the moving party is entitled to a judgment as a matter of law." N.M.R. Civ. P. 1-056. The moving party is required to make a prima facie showing of entitlement to summary judgment. *Roth v. Thompson*, 113 N.M. 331, 335, 825 P.2d 1241, 1245 (1992). Once a prima facie showing is made, the burden shifts to the party opposing the motion to show that a genuine issue for trial exists. Id. The party opposing the motion may not rest on mere allegations, but must set forth specific facts showing there is a genuine issue for trial. *Peck v. Title USA Ins. Corp*, 108 N.M. 30, 32, 766 P.2d 290, 292 (1998).

Summary Judgment serves as a means of avoiding trial where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1358 (9th Circuit 1986). To defeat such a motion, the nonmoving must come forward with "specific facts showing that there is a genuine issue for trial" with respect to a material fact. *Matsushita Elec. Inc. Co., LTD v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). The non-movant cannot rest on allegations in its pleadings, but must set forth specific material facts via affidavit or otherwise to defeat the motion. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983).

On appeal then, the standard for review on a Summary Judgment Proceeding is De Novo in that the court on an appeal is in as good a position to find, review, and/or determine the law as applicable to the undisputed facts as was the trial court. *Willams v. Herrera*, 83 N.M. 680, 496 P.2d

740 (Ct. App. 1972); *Montgomery v. Lomos Altos Inc.*, 2007 NM S Ct. 2P 16, 141 N.M. 21, 150 P.3d 971.

Furthermore in reviewing the Statement of Material Facts in the Summary Judgment Motion and the Renewed Summary Judgment Motion, together with LNB's Response thereto and the Reply, (See R.P. 876-941, 1060-1143, and 1163-1171) the Bank does not really dispute these core issues of undisputed facts necessary to support the court's ruling, that O'Brien was the Debtor on the note, that the mortgage which was later executed was executed by the corporate Plaintiff in this case, and at the time it was executed no additional advance was made, no extension or modification was made, no default was cured, etc. The issues set forth in by the Bank in its Docketing Statement do no include that there was a material issue of fact. (See R.P.1804-1814).

VI. Argument

The district court did not err in holding LNB's mortgage void for lack of consideration.

a. Consideration - LNB argues that Miller et al., cannot raise lack of consideration unless they allege and prove a fraudulent conveyance under the Uniform Fraudulent Transfer Act. There is no authority cited for this proposition. This argument was not made in the original brief, was not made at the hearing on July 30, 2008, and no legal support is given for this argument - none exits.

LNB now raises a new fact issue that there was consideration given to this corporation which was not argued in the Summary Judgment Brief and was only touched upon in the Motion for Reconsideration. The problem with this argument is it is inappropriate to be making said argument in the context of a summary judgment when it is raised for the first time in oral argument on the Motion, and certainly it is inappropriate when it is only raised in citing additional authority. What is most inappropriate about it, however, is that there are no facts which support that there was any

consideration given to this corporation. In the case cited by the Bank, *Continental Bank of Pennsylvania v. Barker Riding Academy,* 93 N.J. 153, 459 P.2d 1163, the Court says consideration is required. It simply says that there is a possibility of consideration in two ways. The first is the creditor's forbearance in suing on an over due debt; and number two, the renewal or extension on a debtor's original note. Neither of these things occurred here in conjunction with the mortgage. Absolutely nothing happened in conjunction with the mortgage, except that LNB got additional collateral from a third party. The Bank's counsel now seems to argue "the loan was extended numerous times after the date of the mortgage. Indeed it was extended numerous times after the date of the mortgage. Extensions after the date of the mortgage are gratuitous and do not raise consideration before the mortgage, nor is there any factual basis to in any way to attach the extension to the mortgage. The court *In re Janis*, 151 B.R. 936 cited by the Bank, does not hold differently. It too requires that there be consideration to support a third party debt. The question is what was the consideration here. The answer is "Nothing." Furthermore there has been no evidence submitted to support that there is consideration. It has been argued on many occasions during this briefing, you cannot avoid the summary judgment by simply stating a proposition without supporting, underlying facts. That is precisely what LNB seems to do here.

Quite frankly, had Mr. O'Brien been asked to execute a mortgage of property that he owned, it is debatable as to whether or not there would have been any consideration for the execution of that mortgage because there is no evidence that he received any consideration at the time either, i.e., no new money was advanced to him at the time of the mortgage, no extension of the debt, modification the loan, cure of default, etc. Mr. O'Brien is not in a position to contend that the mortgage was given by the Plaintiff as consideration to save him from having his note called by LNB and his stock foreclosed because there is simply no evidence that the note was ever accelerated and called. In fact

it wasn't and it has not been to this day. LNB could have at any time liquidated its blue chip stock collateral and at some point it began to do so to the tune of $5,000 a month to apply that to the debt.

Pre-existing debt is sufficient consideration to support a mortgage, so long as it is a pre-existing debt of the party who executes the mortgage. The problem in this case is that the pre-existing debt in this matter is the debt owed by O'Brien to the LNB. Nearly two (2) years after that debt was incurred, and all the funds on that note were advanced, when that note was not in default, nor any extension required to be made, a mortgage was executed by OBA on property it owned as additional collateral for the loan. There is no case law that supports the fact that a pre-existing debt of another may provide consideration for the execution of a mortgage by a third party.

There must be consideration for execution of a mortgage. See *CJS Mortgages 87.* Even existing debt is sufficient so long as it is debt of the entity executing the mortgage. *McAllister's v. Farmer's Dev. Co.,* 55 P.2d 657, 40 N.M. 101. The argument has always been whether or not some consideration, past, present, or future existed for the execution of the mortgage and precisely what that mortgage secured. In other words, whether or not the mortgage would secure a prior advance as well as the present advance being made concurrently with the mortgage or a future advance. All of this construction depend upon the exact wording of the document. As would be the case here though, it is much more simple because of the fact that we know neither O'Brien individually, or OBA, the entity executing the mortgage and the owner of the real estate got consideration. Essentially speaking, based on the case law, it is clear that this mortgage does not secure Mr. O'Brien's debts for the lack of consideration. LNB cited *Clovis National Bank v. Harmmond*, 692 P.2d 1315, 102 N.M. 106. *Harmmond* executed a mortgage securing their existing and future indebtedness. Three years later they gave the bank another mortgage to secure, past, present, and future debts. This case makes no point other than that if the language of the other mortgage provides

for pre-existing, or future debt, to be collateralized by a mortgage, then it can be. This is not an issue in this case, nor has, Miller et al., ever disputed it. In fact, Miller et al., has not disputed that pre-existing debt, it could be consideration for the execution of a mortgage under certain circumstances. The *Harmmond* case is really not applicable because here there was pre-existing debt owed by O'Brien which was current and well collateralized at a time when the Bank was given gratuously, a mortgage by a third party corporation as additional collateral for that debt, without any new advances, without any extension or modification of the loan, and without the loan having been in default. That is not the situation in *Harmmond.* Likewise the Bank cites *Royal Indemnity Co., v. McClendon* which suffers a familiar infirmity. This was a suit for money judgment to set aside to conveyance as consolidated with a suit to foreclose on the basis that there was a fraudulent conveyance. This case makes the point that a pre-existing debt can be valid consideration, which indeed it can, and which indeed Miller et al., does not contest. It furthermore makes the point, however, that in certain instances the subject the conveyance runs a foul of the Fraudulent Conveyance Act, and the debt may be subject to being set aside anyway. That is not the issue in this case.

Miller et al., has not contended at any time that the execution of the mortgage by OBA was a fraudulent conveyance, nor does it have to be such. This case makes an interesting point as it relates to the argument being made by Miller et al., which points out how inadequate the pre-existing debt was for consideration here because there was already substantial collateral to secure the debt. The consideration in Royal was really inadequate for the value of the asset transferred and so it was considered to be a fraudulent conveyance. This is not a fraudulent conveyance case, however what this matter does point out is that where you have excess equity conveyed, the court may very well look at the issue of adequacy or inadequacy of consideration. As the court said, "this transfer

constituted a conveyance upon a glaring and inadequacy of consideration and the lower court so found." That is really the situation here. The commonwealth case cited *supra* and makes it clear that there has to be some consideration, albeit however small, and if not the conveyance is void. There is a good reason for that, and that is the reason suggested in *Royal Indemnity.* that the lack of consideration can be fraud.

The problem here is that OBA got nothing for the execution of this mortgage. In fact, O'Brien individually, got nothing in exchange for the execution of this mortgage - no additional money, no modification of the loan, no forgiveness of the default, nothing. All that has been done is violate the doctrine set forth in *Commonwealth. Supra* pg. 24 which both LNB and Miller et al., say is law applicable to the case.

b. Mootness - The rule is that generally an appellate court does not decide moot cases. *Gunagi v. Mesillas*, 2001-NMSC-028, para. 9, 130 N.M. 734, 31 P3d 1008 (2001). A case is moot when no actual controversy exists, and the court cannot grant actual relief *Mower v. Rest*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980). The exception to the mootness doctrine allows for review if and only if the issue involves "substantial public interest". *Id*

There is no contention here that this matter fits within this exception to the Mootness Doctrine. Here, LNB even refuses to confront this issue let alone pretend that it fits an exception. It simply says that it would be, " handy," from its point of view if it did not have to appeal this matter twice. If the courts did this, then the parties would have to deal with the marshalling issue and the cap issue that the court ruled on. These would have been interlocutory orders, they would not have been subject to interlocutory appeal, no one requested such a finding, and so these matters would remain until the end of the case.

It was the position of Miller et al., and CKC that marshalling should have occurred, and that LNB should be required to account as if they had marshaled. LNB was in a position in this case to

clear its own debt and for whatever reason, LNB did not liquidate its collateral and save itself. In other words, LNB could have mitigated any damage or loss that was incurred here but it did not do so. Instead, it asked this court to put back in place a second and duplicative source of recovery while it has failed to save itself by selling the stock and paying its debt. LNB now asks that the court make it easier to try to deal with the issue of whether or not they were required to marshal the collateral against its debt if this Court reversed the mortgage avoidance issue. Only LNB, not Miller it al., nor CKC, have any recourse to two (2) separate funds as collateral. The benefit of these two (2) funds is great. It is great to the Bank, which has back up security, but it is even greater to the Plaintiff or its individual shareholder, who is able to keep all of his assets in an attempt to use this Court to eradicate claims of those who have valid liens on assets which would be eradicated as a practical matter if LNB were allowed to pay itself out of the sale proceeds of the mortgaged property and return the blue chip stock to this Debtor.

c. Standing - It is the position of LNB that Miller et al., and CKC were not parties to the loan agreement or note between O'Brien and LNB so that they have no standing to attempt to void that mortgage. As a matter of law, this is simply incorrect. In this case, LNB stipulated to the standing of those parties to contest the validity, priority, and extent of the lien based on the stipulation when they all entered into the case as parties, agreed to the sale and the attachments of their liens to the proceeds in the court registry.

LNB makes some factually legally unsubstantiated claim that the junior lien holders have to prove their claims before the doctrine of lack of consideration a marshalling deal can be invoked.

Furthermore, it has been established that the Court had already entered an order finding that there was a contract between Green, as manager for Del Rio, a non-existent corporation, and OBA. This ruling was first made well before the hearings on this Summary Judgment Motion so it was

clearly established that Green had an interest, and the interest of Miller et al., was derivative of that interest (See R.P. 756-757). Ron Green gained interest as early as February of 2002, however, under the August 22, 2002 agreement, he clearly obtained an interest as Purchaser. When an individual purchases property as an agent for a corporation to be formed, which has not been formed, that corporate promoter, Green in this case, is personally bound by the contract. By Green being personally bound on the contract, it is obvious that he had an interest which was subject to prior attachment. See Solomon et al., Corporations Law and Policy 4th Ed., 69 West Group 1998 (1982), stating as a general rule that when a promoter contracts for the benefit of a corporation which is contemplated but has not been organized, the promoter is personally bound.

Miller et als., Judgment Lien was properly filed and is enforceable. In New Mexico, "the judgment lien on real estate is a right created by statute." *Bank of Santa Fe v. Garcia*, 102 N.M. 588, 590, 698 P.2d 458 (Ct. App. 1985). The statute governing a judgment lien states that "the judgment shall be a lien on the real estate of the judgment debtor from the date of the filing of the transcript of the judgment in the office of the county clerk of the county in which the real estate is situate." *NMSA 1978*, §39-1-6. It is clear from this statute that "under New Mexico law, a money judgment becomes a lien on the judgment debtor's realty when the transcript of the judgment docket is filed and recorded with the county clerk of the county in which the realty is situated." *Ranchers State Bank of Belen v. Vega*, 99 N.M. 42, 44, 653 P.2d 873 (1982); see also *Pugh v. Heating & Plumbing Finance Corp.*, 49 N.M. 234, 161 P.2d 714 (1945). Additionally, pursuant to *NMSA 1978*, §39-4-13, once the property is sold, Miller et al., is entitled to recover from the sale proceeds that Plaintiff obtained as a result of the sale. See *NMSA* §39-4-13.

Miller et al's, Judgment Lien on the subject property was appropriately filed against named owners of the subject property pursuant to the requirements of *NMSA* § 39-1-6. The Judgment Lien

was successfully obtained against the named debtors on the Security Interest, Ron Green (Individually), Riverside Properties Corp., and Western Archaeological Serv. All of these named debtors had a proper interest in the subject property at the time of filing. It has been ruled by the court that Ron Green did have an interest in the subject property.

The Judgment Lien was also appropriate pursuant to *NMSA* § 39-1-6 because it took into effect on September 28, 2004, which is the same day that the transcript of judgment was filed with the Sierra County Clerk. Accordingly, because Defendant's Judgment Lien was property filed and recorded, the money judgment became a lien on the realty and is enforceable against the proceeds that Plaintiff received from selling the subject property. This all occurred before any termination of the contract by the Plaintiff or attempt to do so. This did not occur until the beginning of 2009.

Because Miller et al., properly filed the Judgment Lien against the subject property, they are entitled to recover from the sale proceeds of the subject property.

"A judgment is not a specific lien upon any particular real estate but rather a general lien upon all of the judgment debtor's real property." *Springer Group, Inc. v. Wittelsohn*, 128 N.M. 36, 40, 988 P.2d 1260 (Ct. App. 1999). Furthermore, "once the statutory terms have been complied with, i.e., the transcript of the judgment is recorded, a transferee of the debtor takes the property with constructive notice of the amount of the judgment and the life of the lien." *Bank of Santa Fe*, 102 N.M. at 590.

Additionally, it is clear that Plaintiff was informed of Defendants Lien by Gretchen Campbell. This actual and constructive notice is sufficient to put the Plaintiff on alert of not only Defendant's Security Agreements and Judgment Liens, but also any other lien or security interest that is on the property. In fact, the Order obtained from the Court has acknowledged that other parties, including

Defendant's, have an interest in the property by allowing the proceeds from the sale of the property to be put in a trust until this matter is resolved.

Because Miller et al., properly obtained the Judgment Lien against the subject property and filed security interests, and because Plaintiff either never terminated or attempted to terminate Green's interest in the subject property until 2009. Miller et al., had standing, however Miller et al., had standing based on the court approved stipulation. Debtor brought this into the court.

d. Common Debtor Doctrine - The Common Debtor Doctrine was not argued in the original briefing, and incorrectly applied here. At the end of the hearing in July, Mr. Morel made some comment to the Court that he did not believe that there was a common debtor or debt in this matter, and the Court, in fact, said that there was (R.P.1210-1215). It is not clear by any means that had any great effect one way or another on the ruling in this matter as this wasn't briefed. This is particularly true since OBA's Motion to Reconsider was premature and no order has been entered and the point was not argued.

We do have a common debtor here. Green/Riverside owed O'Brien. Green/Riverside owes Miller, et al. What the Bank and O'Brien seem to try to cover up by confusing this Court is that no only does Miller, et al., have a perfected security interest as against Green in the real estate contract, which is the subject of this action, they have a perfected interest against Riverside which is filed in the appropriate county and state records; and furthermore, they have a transcript of judgment which is transcribed and recorded against Riverside and Green. The Court clearly found that Green was a party to the contract, and that Riverside, later, had an interest, and no doubt that Riverside was the "corporation to be formed referred to by O'Brien in informing the Bank of the transfer of interest in the Contract from Green to a corporate entity, which in fact by everyone's admission (particularly

O'Brien's to the Bank), turned out to be Riverside. The argument of the Bank simply misconstrues and confuses the Common Debt or Doctrine. O'Brien is not and does not have to be a debtor of Miller, et al., that is not the issue.

e. Marshalling - Generally the doctrine of marshalling is invoked by a junior encumbrancer to require a senior encumbrancer to exhaust his remedy against property other than that covered by the junior encumbrancer. The New Mexico Supreme Court in the case of *Seasons Inc., v. Atwell,* 86 N.M. ,751, 527, P.2d, 792 (Oct. 18, 1974), noted that the State of New Mexico recognized the Doctrine of Marshalling, so long as the appropriate facts existed to make this equitable doctrine applicable. The court said "marshalling is an equitable principal under which the assets of a debtor are arranged to protect the rights of two or more competing creditors. It is also referred to as the two funds doctrine, as often 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 the two funds being required to look first, to the funds to which he has exclusive right. Its purpose is to protect the junior lien holder." *American National Insurance v. Vine-Wood Realty Co.,* 414 Pa.., 263, 199 A.2d, 449, 1964; *Bank of Bentonville v. Swift & Co.*, 233 ARK. 808, 348, S.W.2d, 881 (1961). This doctrine was recognized in *Springer v. Kirkeby-Natus*, 80 N.M. 206, 453 P.2d, 376, 1969, when the court said that *Springer's*, real relief lay in invoking the Doctrine of Marshalling, by which a 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. The facts have to apply exactly. There has to be two funds and there has to be competing creditors. In fact that is the case here. There is the bank on the one-hand, a law firm and accounting firm, on the another hand and Carl Kelley Construction on the third. There are in fact two funds of assets. The stock and the mortgaged

property. The equities literally scream out for this result in this case. This was a loan to O'Brien, individually, this property is not owned by O'Brien, individually. O'Brien's individual collateral, the stock, is pledged to secure the loan. It should first be liquidated to apply to the loan, before the bank has any right against the mortgaged property of a non-debtor. This is particularly true, when there was no advance made to OBA. Already, over $100,000 of funds, from the sale of this property to Green/Riverside/Del Rio was paid to this bank. In effect it allows OBA, to use this bank as a shield to fend off claimants against the property in order not to pay this debt, but to pay the debts of Mr. O'Brien, individually. This is a highly inequitable situation. OBA, was a real estate development company. It participated in the development of its property through sales to others. These assets were used and relied upon by third parties, either extending credit to purchasers or performing work on the property. It is incredibly unfair, that OBA, should be able to use the bank as a shield to protect assets and O'Brien, to be able to keep his individual stock. To the extent that there is any validity to the bank lien, because of the poor drafting of the mortgage without a cap and because there was no consideration for the execution of the mortgage of OBA, this mortgage should be avoided and set aside against this property. At the least, the bank should be required to marshal and liquidate all of the stock, apply it to the indebtedness and be entitled to payment of only much of the balance as remains, out of the mortgaged real property. As a matter of fact it is incredibly unfair at this point, that the bank is continuing to run interest and attorney's fees, fighting over this matter, for the benefit of Mr. O'Brien, rather than simply liquidating the stock and paying the debt and saving everybody some money.

f. Appeal from Final Orders -With rare exceptions relating to specifically conforming reviews of interlocutory orders, only final orders can be appealed. The foundation for appellate jurisdiction is

in the constitution which grant's an aggrieved party only one (1) appeal. In the statute, NMSA-3-2 provides that:

> Within thirty (3) days from the interim of any final judgment or decision, any interlocutory order or decision which practically disposes as the merits of the action, or any final order after entry of judgment which affects substantial rights. In any civil action in the district court, any party aggrieved may appeal therefrom."

Clearly, an oral ruling from the bench does not constitute a final order. *Westbrook v. Lea General Hospital*, 85 N.M. 191, 510 P.2d 515 (Ct. App. 1973).

In the context of multiple party cases on appeal, Rule 54 provides:

> "When a judgment is entered adjudicating all issues as to one or more, but fewer than all of the parties involved in the judgment is final unless the court expressly states otherwise in the order aside for appeal that runs from the date of the entry of the order."

This is precisely what occurred here with the Order of the court which voided the mortgage of LNB.

Another avenue for an appellate review is that interlocutory appeal, but that is difficult to obtain. Interlocutory appeals are to clarify the law. NMSA 39-3-4 reads:

> "In a civil action a special proceeding in the district court with a judge makes an interlocutory order a decision which does not practically dispose of the merits of the action, but he believes the order a decision involves a controlling question of law as to which there is substantial grounds for difference of opinion, and that an immediate appeal from the order a decision may materially advance the termination of litigation he shall state in writing an order or decision and in that case the party aggrieved my file with the court an application for an order to allow the appeal as interlocutory and in that it must either be acted upon within the fixed

time period, or it is deemed denied."

There was no final Order on any issue here, other than the fact that the mortgage was void, and this mooted the Motion for Reconsideration or any other pleadings relating to these issues. The Doctrine of Mootness renders the marshalling ruling as well as any ruling of the court on the cap's effect on the mortgage moot because in effect, there is no longer any mortgage. The issue has become moot, i.e., it is unnecessary to decide those issues, or deal with those issues, any longer because the mortgage no longer exists - it is void.

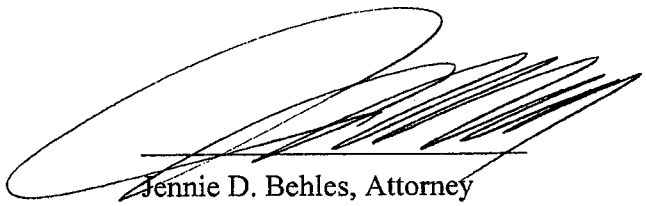
LNB does not suggest any reason why it should be allowed to continue to make these arguments before the court in a matter where there is no Order, the issues are moot, and furthermore, they were not argued at the original hearing. These points were not raised until the Motion for Reconsideration and could not have even properly been heard on a Motion for Reconsideration. They certainly cannot now be heard for the first time on appeal.

Conclusion

The ruling of December 10, 2008 should be upheld. No other issues are ripe for appeal.

Respectfully submitted,

THE BEHLES LAW FIRM, P.C.



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