

2010

Iota LLC, a Utah Limited Liability company, and  
California Benefit, Inc., A California corporation v.  
Davco Management Company L.C., a Utah  
Limited liability company : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS FOR THE STATE OF UTAH**

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IOTA LLC, a Utah limited liability  
company, and CALIFORNIA  
BENEFIT, INC., a California  
corporation

Plaintiff/Appellee

vs.

DAVCO MANAGEMENT  
COMPANY L.C., a Utah limited  
liability company,

Defendant/Appellant

Utah Court of Appeals No.  
20100855-CA

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**REPLY BRIEF OF APPELLANT**

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Appeal from the Fifth District Court of Washington County, State of Utah  
The Honorable James L. Shumate

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## TABLE OF CONTENTS

ARGUMENT .....	1
I. THE TRIAL COURT IMPROPERLY DENIED DAVCO'S RULE 67 MOTION .....	1
A. The Trial Court Was Not Justified in Issuing the Ex Parte Order Requiring Davco and Mr. Fisher to Deposit Rents With the Court. ....	1
B. Davco and Mr. Fisher Did Not Lose Their Ability to Argue the Invalidity of the Trial Court's Ex Parte Order. ....	3
II. THE TRIAL COURT INCORRECTLY DETERMINED THAT IT HAD JURISDICTION TO HOLD A CONTEMPT PROCEEDING AND THAT DAVCO AND MR. FISHER WERE GIVEN DUE PROCESS .....	6
A. Mr. Fisher Did Not Receive the Due Process to Which he was Entitled. ....	6
B. Mr. Fisher's Deposition Testimony Did Not Satisfy the Requirement for an Affidavit to Confer Jurisdiction of the Contempt Proceeding Onto the Trial Court. ....	8
III. THE TRIAL COURT'S FINDINGS THAT MR. MURSET PROVIDED THE FINANCIAL INFORMATION FOR 2005 AND 2006 TO MR. FISHER AND THE MORTGAGE BROKER ARE CLEARLY ERRONEOUS .....	10
A. The evidence is legally insufficient to support the trial court's finding of fact. ....	10
IV. MURSET'S ORAL AGREEMENT TO PROVIDE FINANCIAL STATEMENTS IS ENFORCEABLE. ....	13
A. Murset's Oral Agreement is Not Barred by the Statute of Frauds. ....	13
B. Davco Could Not Obtain Financing Without Mr. Murset Providing Accurate Financial Statements for 2005 and 2006. ....	15

C.	The Trial Court's Judgment is not Sustainable on the Affirmative Defense of Lack of Consideration. ....	16
V.	MURSET'S ORAL AGREEMENT TO EXTEND THE MATURITY DATES OF THE PROMISSORY NOTES IS ENFORCEABLE. ....	17
A.	The Trial Court's Finding That the Parties Did Not Orally Modify the Promissory Notes is Clearly Erroneous ....	17
B.	The Oral Agreement is Not Barred by the Statute of Frauds. ....	19
C.	The Oral Agreement Does Not Lack Consideration. ....	19
VI.	IOTA AND CALIFORNIA BENEFIT WAIVED THEIR RIGHT TO ENFORCE THE PROMISSORY NOTES. ....	19
VII.	IOTA'S AND CALIFORNIA BENEFIT'S CLAIMS ARE BARRED BY EQUITABLE ESTOPPEL. ....	20
VIII.	THE TRIAL COURT INCORRECTLY CONCLUDED THAT DAVCO BREACHED THE IOTA DEED OF TRUST ....	23
	CONCLUSION .....	23

## TABLE OF AUTHORITIES

### Statutes

<i>Utah Code Ann.</i> § 78B-6-303 .....	8
---	---

### Rules

<i>Utah Rules of Civil Procedure</i> , Rule 67 .....	1, 2, 3, 5
<i>Utah Rules of Civil Procedure</i> , Rule 12(h) .....	17, 19, 21

### Utah Cases

<i>ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.</i> , 245 P.3d 184 (Utah, 2010) .....	20
<i>Allen v. Rose Park Pharmacy</i> , 237 P.2d 823, 825 (Utah, 1951) .....	15
<i>Bailey v. Bayles</i> , 52 P.3d 1158 (Utah, 2002) .....	16
<i>Calhoun v. Universal Credit Co.</i> , 146 P.2d 284, 287 (Utah, 1944) .....	21
<i>Chen v. Stewart</i> , 123 P.3d 416 (Utah, 2005) .....	6
<i>Covey v. Covey</i> , 80 P.3d 553 (Utah, 2003) .....	5
<i>Crank v. Utah Judicial Council</i> , 20 P.3d 307 (Utah, 2001) .....	9

<i>Espinal v. Salt Lake City Bd. of Educ.</i> , 797 P.2d 412, 413 (Utah, 1990) .....	18, 21
<i>Francis v. State, Utah Div. of Wildlife Resources</i> , 248 P.3d 44 (Utah, 2010) .....	17
<i>Globe Leasing Corp. v. Bank of Salt Lake</i> , 547 P.2d 197, 199 (Utah, 1976) .....	1, 2, 6
<i>Kimball v. Kimball</i> , 217 P.3d 733 (Ut. Ct. App., 2009) .....	15
<i>Larson v. Wycoff Co.</i> , 624 P.2d 1151, 1155 (Utah, 1981) .....	22
<i>Orlob v. Wasatch Medical Management</i> , 124 P.3d 269 (Ut. Ct. App., 2005) .....	10
<i>Robinson v. City Court for City of Ogden, Weber County</i> , 185 P.2d 256, 258 (Utah, 1947) .....	9
<i>Von Hake v. Thomas</i> , 759 P.2d 1162, 1170 (Utah, 1988) .....	7

## **Federal Cases**

<i>U.S. v. Rainwater</i> , 283 F.2d 386, 389 (C.A.8, 1960) .....	10, 16, 18
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## ARGUMENT

### I. THE TRIAL COURT IMPROPERLY DENIED DAVCO'S RULE 67 MOTION

#### A. The Trial Court Was Not Justified in Issuing the Ex Parte Order Requiring Davco and Mr. Fisher to Deposit Rents With the Court.

To have been justified in issuing the ex parte order, the trial court must have before it either pleadings submitted by Davco and/or David Fisher or an examination of one of them that admitted that they had in their possession or under their control money which belongs or is due to Iota or California Benefit.

When it is admitted by the pleadings, or shown upon the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party upon such conditions as may be just, subject to the further direction of the court; provided that if money is paid into court under this rule it shall be deposited and withdrawn in accordance with Utah Code Section 78B-5-804 or any like statute. (U.R.P.C. 67). (*See also Globe Leasing Corp. v. Bank of Salt Lake*, 547 P.2d 197, 199 (Utah, 1976) ("It is to be noted further that Globe has not admitted in its pleadings that it has in its possession or under its control the funds; nor has it been shown by any examination of Globe that it now has the funds or did so at the time the order was made."))

First, contrary to Iota's and California Benefit's position, the trial court was not justified in ordering Davco and David Fisher to deposit rents in the court based on Mr. Murset's declaration. The affidavit of Mr. Murset is not a pleading filed by nor an examination of Davco or Mr. Fisher. Thus, the requirements of Rule 67 were not met by Iota or California Benefit and the trial court was not justified in issuing the ex parte



order. (*Globe Leasing Corp. v. Bank of Salt Lake*, at p. 199).

Second, contrary to Iota's and California Benefit's position, the trial court was not justified in ordering Davco and David Fisher to deposit rents in the court based on David Fisher's testimony in deposition that Davco did retain rents after the ex parte order was issued on November 4, 2008. To have been justified in issuing the ex parte order, the trial court must have had before it an admission from Davco and/or Mr. Fisher in a pleading or in an examination that the funds were in existence and under their control. (*Globe Leasing Corp. v. Bank of Salt Lake*, at 199 ; Rule 67, U.R.C.P.). Mr. Fisher's testimony given in deposition on June 15, 2009, was not before the court on November 4, 2008, when the trial court signed the ex parte order, as required by Rule 67.

Even if the trial court had Mr. Fisher's deposition testimony before it on November 4, 2008, Mr. Fisher does not testify that he or Davco had funds belonging to Iota and California Benefit on November 4, 2008 when the ex parte order was issued. (R. 409-410). The fact that he admits that Davco did keep rents after the issuance of the ex parte order does not prove that on November 4, 2008 he or Davco had funds in their possession or under their control that belonged to Iota or California Benefit. Thus, the trial court was not justified in issuing the ex parte order. (*Globe Leasing Corp. v. Bank of Salt Lake*, at p. 199).

Third, contrary to Iota's and California Benefit's position, the trial court was not justified in ordering Davco and David Fisher to deposit rents in the court based on Mr.

Fisher being a party to the lawsuit on the date he was served with the ex parte order.

Again, the trial court is only justified in issuing the ex parte order if it has before it pleadings or an examination of Davco and/or Mr. Fisher in which it is admitted that they have in their possession monies owed to Iota and/or California Benefit. (Rule 67, U.R.C.P.). The service of the ex parte order on Mr. Fisher does not satisfy those requirements. Thus, the trial court was not justified in issuing the ex parte order.

**B. Davco and Mr. Fisher Did Not Lose Their Ability to Argue the Invalidity of the Trial Court's Ex Parte Order.**

Iota and California Benefit also contend that Davco and Mr. Fisher lost their ability to argue the invalidity of the court's Ex Parte Order because: (1) they failed to object to the ex parte order and attorney Fisher stipulated to the Order Regarding Payment of Rents to the Court; and (2) the trial court's error in issuing the Ex Parte Order was harmless because Mr. Fisher later admitted in his deposition and at trial that Davco was retaining the rents (Brief of Appellee, p. 44).

First. Iota and California Benefit mistakenly represent that Attorney Darwin Fisher stipulated to the Ex Parte Order dated November 4, 2008 when the truth is that attorney Darwin Fisher stipulated to the Order Regarding Payment of Rents to the Court dated March 5, 2009.

Contrary to Iota's and California's position, the failure to object to the ex parte order and stipulating to the Stipulated Order Regarding Payment of Rents to the Court does not waive Davco's and Mr. Fisher's right to argue the validity of the Ex Parte

Order. The Stipulated Order Regarding Payment of Rents does not constitute an agreement of the parties that all the facts necessary to support the Ex Parte Order would be sustained by the available evidence. But it does constitute an agreement that Iota and California Benefit, as owners of the apartment complexes after the trustee's sale, are entitled to the rents being paid by the tenants.

The Stipulated Order Regarding Payment of Rents to the Court concerned the continued payment of the rent by the tenants to the clerk of the trial court after Iota and California Benefit had foreclosed on the apartment complexes and became the record owners. (R. 119-120). By stipulating to the order, Davco stipulated to the following facts: (1) that a trustee's sale was held for the apartment complexes; (2) that Iota and California Benefit purchased the apartment complexes at the trustee's sale; (3) that Iota and California were now the record title owners of the apartment complexes; and (4) that Iota and California Benefit were entitled to the rents being paid by the tenants after the trustee's sale. (R. 119-120).

The Stipulated Order Regarding Payment of Rents was not concerned with whether the trial court had jurisdiction of the alleged contempt charge or that Iota and California Benefit filed a proper affidavit, or that the trial court had before it pleadings and/or an examination of Davco and/or Mr. Fisher admitting that they had in their possession funds belonging to Iota and California Benefit on November 4, 2008.

The Stipulated Order clearly states its purpose that "[t]he properties are now owned by Plaintiffs. Accordingly, there is no longer a need for rents to be paid directly to

the Court during the pendency of this action.” (R. 120). Its purpose was not to adjudicate whether the trial court had jurisdiction, etc. The Stipulated Order simply recognized that Iota and California Benefit were the owners of the apartment complexes after the trustee’s sale and nothing more.

Second. “‘Harmless error is defined ... as an error that is sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.’ (quotations and citations omitted). ‘Put in other words, an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict.’ (quotations and citations omitted). (*Covey v. Covey*, 80 P.3d 553 (Utah, 2003) at ¶21).

Rule 67 specifically requires that an order requiring the deposit of funds in the trial court must be based on evidence admitted in the pleadings, or shown upon the examination of the party to be bound that “he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party . . .” (U.R.C.P., Rule 67).

The trial court erred by issuing the Ex Parte Order without requiring evidence showing that Davco and/or Mr. Fisher admitted having possession of funds belonging to Iota and California Benefit. The trial court error affected the outcome of the contempt proceeding since the ex parte order constitutes the basis for the contempt charge against Davco and Mr. Fisher. Thus, the trial court’s error was not harmless.

Third. Iota's and California's contention that the trial court's error was corrected by Mr. Fisher's deposition and trial testimony fails because that testimony was not available on November 4, 2008 when the trial court issued the ex parte order and could not have been considered by the trial court. (*Id.*; *Globe Leasing Corp. v. Bank of Salt Lake*, at p. 199).

**II. THE TRIAL COURT INCORRECTLY DETERMINED THAT IT HAD JURISDICTION TO HOLD A CONTEMPT PROCEEDING AND THAT DAVCO AND MR. FISHER WERE GIVEN DUE PROCESS**

**A. Mr. Fisher Did Not Receive the Due Process to Which He Was Entitled.**

"A court's authority to 'hold any person in contempt, whether a party to a case before that court or a non-party, is subject to constitutional and statutory restraints regarding the process due to any person so accused.' (Citation Omitted)" (*Chen v. Stewart*, 123 P.3d 416 (Utah, 2005) at ¶ 36).

Iota and California Benefit contend that Mr. Fisher received "all the due process to which he was entitled because: (1) Mr. Fisher was a party to the lawsuit at the time the ex parte order was issued; (2) Mr. Fisher was served with the ex parte order; (3) Mr. Fisher knew from November 4, 2008 forward that he was subject to the ex parte order; (4) Mr. Fisher received notice that Iota and California Benefit were seeking to have him held in contempt in Iota's and California Benefit's October 14, 2009 Motion for Release of Rents Deposited with the Court, in the December 18, 2009 Pretrial Order, and in Iota's and California Benefit's April 16, 2010 Trial Brief; and (5) Davco addressed the

contempt in its April 21, 2010 Trial Brief, in its June 9, 2010 Written Closing Argument, and its proposed findings of fact and conclusions of law.

“The due process provision of the federal constitution requires that in a prosecution for a contempt not committed in the presence of the court, ‘the person charged be advised of the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf.’ (Citations omitted)” (*Von Hake v. Thomas*, 759 P.2d 1162, 1170 (Utah, 1988)).

Contrary to Iota’s and California Benefit’s contentions, Mr. Fisher did not receive due process because: (1) he was never advised by the trial court of the nature of the action against him; (2) he was never informed by the trial court that a contempt proceeding would be held with the trial; (3) he was never informed by the trial court that he could seek assistance of counsel; (4) he did not have the opportunity to hire counsel and/or consult with counsel on the charge of contempt of court; and (5) he was never informed that he had the right to confront witnesses, have the right to offer testimony on his behalf, and he did not have the opportunity to conduct discovery or prepare testimony to be offered on his behalf at trial.

Iota’s and California Benefit’s grounds for claiming that Mr. Fisher received all the due process to which he was entitled are not relevant to whether he was advised by the trial court of the nature of the action against him, or to whether he was informed by

the trial court that a contempt proceeding would be held with the trial, or to whether he was informed by the trial court that he could seek assistance of counsel, or to whether he had the opportunity to hire counsel and/or consult with counsel on the charge of contempt of court, or to whether he was informed that he had the right to confront witnesses, or to whether he had the right to prepare and offer testimony on his behalf at trial.

In addition, Mr. Fisher was entitled to notice from the trial court that the contempt proceeding would be combined with the trial. The trial court erred by failing to inform Mr. Fisher that a contempt proceeding against him would be held with the trial and as a result, Mr. Fisher did not know until he was testifying in trial that a contempt proceeding was being conducted by the trial court and he did not have the opportunity to retain counsel or to prepare his case against the charge of contempt. Without being notified of the date of the contempt hearing by the trial court, Mr. Fisher was prevented from preparing his case opposing the contempt charge.

**B. Mr. Fisher's Deposition Testimony Did Not Satisfy the Requirement for an Affidavit to Confer Jurisdiction of the Contempt Proceeding Onto the Trial Court.**

“For the Court to have jurisdiction, an affidavit of the facts constituting the contempt must be given to the Court. (See UCA §78B-6-303) (“When the contempt is not committed in the immediate view and presence of the court or judge, an affidavit setting forth a statement of the facts by a judicial officer shall be presented to the court or

judge of the facts constituting the contempt.”); (see also *Crank v. Utah Judicial Council*, 20 P.3d 307 (Utah,2001) at ¶28) (“Thus, in Utah, the statutory requirement of an affidavit is a procedural prerequisite to the imposition of any sanctions for indirect contempt.”) (See *Robinson v. City Court for City of Ogden, Weber County*, 185 P.2d 256, 258 (Utah 1947)) (“A contempt proceeding is separate from the principal action, and in order for the court to acquire jurisdiction of the offense when committed, an affidavit or initiating pleading must be filed, and unless that is done, subsequent proceedings are void.”).

Contrary to Iota’s and California Benefit’s contention, Mr. Fisher’s sworn deposition testimony cited in their trial brief does not constitute a proper affidavit. (Brief of Appellee, pp. 47-48). They contend that an affidavit is “[a] voluntary declaration of facts written down and sworn to by the declarant . . .” (Brief of Appellee, at p. 47). However, Mr. Fisher’s deposition testimony is not a voluntary declaration of facts and thus, is not an affidavit.

Iota and California Benefit also argue that even if Mr. Fisher’s testimony does not qualify as an affidavit, their argument in the trial brief should qualify as an affidavit because it sets forth the acts done that form the factual basis for the contempt charge. (Brief of Appellee, at p. 48). This argument also fails because their argument is not sworn to by anyone on behalf of Iota or California Benefit and thus, is not an affidavit.



**III. THE TRIAL COURT'S FINDINGS THAT MR. MURSET PROVIDED THE FINANCIAL INFORMATION FOR 2005 AND 2006 TO MR. FISHER AND THE MORTGAGE BROKER ARE CLEARLY ERRONEOUS**

**A. The Evidence is Legally Insufficient to Support the Trial Court's Finding of Fact.**

Iota and California Benefit contend that Davco has failed to marshal the evidence “to overcome” the district court’s findings” that: (1) Mr. Murset provided Davco with the information Davco requested before the apartments were purchased in 2006; (2) Davco decided to proceed with the deal with the information he had available at the time; and (3) Mr. Murset provided the remaining information in early 2007. (Brief of Appellee, p. 26).

First. Davco fulfills its burden to marshal the evidence by presenting the evidence supporting the trial court’s findings of fact then demonstrating that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below. (*Orlob v. Wasatch Medical Management*, 124 P.3d 269 (Ut. Ct. App., 2005) at ¶19). Davco does not fulfill its burden to marshal the evidence by presenting the evidence that “overcomes” the trial court’s findings. (*Id.*).

Second. Mr. Murset’s testimony that he gave Mr. Fisher a financial statement in February 2007 was contradicted by his deposition testimony that he gave Mr. Fisher all of the financial statements in 2006 which are contained in Exhibit 3(a). (R. 1125, 178:1-26; 187:12-20). And, Mr. Murset’s contradictory testimony is not legally sufficient to support the trial court’s finding of fact. (See *U.S. v. Rainwater*, 283 F.2d 386, 389 (C.A8,

1960)).

Third. Iota and California Benefit contend that the following evidence is legally sufficient to support the trial court's findings of fact: 1) the information regarding other income and expenses contained in the financial statements does not make them inaccurate but only overinclusive; and 2) Mr. Fisher chose to purchase the apartment complexes even though he had not received accurate financial statements. (Brief of Appellee, p.26).

Iota's and California Benefit's argument fails because: (1) Mr. Murset testified at trial that the 2005 and 2006 Iota P&Ls for Casa Sonoma are inaccurate because they contain income and expenses for properties other than Casa Sonoma and he would have to correct them (R. 1125, 195:16 to 196:-11; 200:20-26); (2) the trial court found that David Fisher had discussions with Murset regarding the inaccurate financial information contained in the financial statements and that Mr. Murset orally provided additional information to David Fisher (R. 778, ¶11; Defendant's Exs. 3 through 6); (3) accurate financial statements were not introduced into evidence at trial nor was there any testimony that accurate financial statements were provided by Mr. Murset.

Fourth. Iota and California Benefit also claim that the trial court's finding is supported because Davco chose to purchase the apartment complexes on the financial information it had even though the 2006 statements were not available.

Iota's and California Benefit's contention fails because: (1) accurate written

financials statements were needed to obtain financing by Davco, not for Davco's decision to purchase the apartment complexes (Id.; R. 1127, 476:26 to 477:12); (2) Davco's purchase of the apartment complexes is not evidence that Mr. Murset fulfilled his oral agreement to provide accurate written financials, but is only evidence that Davco was satisfied by the financial information given orally by Mr. Murset to proceed with the purchase and wait for the accurate written financial statements to give to a lender to obtain financing. (R. 1127, 471:16 to 480:10; Brief of Appellee, p. 9 ¶6).

Fifth. Iota and California Benefit contend that evidence which does not support the trial court's findings still constitutes legally sufficient evidence. The statement referred to is found on p. 30 of Davco's opening brief in the section discussing trial exhibit 18(a) and refers to the fact that the evidence contained in exhibit 18(a) does not prove that Mr. Murset provided accurate financial statements to Davco because: (1) in the e-mail Mr. Murset is asked by Mr. Fisher "How are those (the 2005 and 2006 year to date operating statements) coming?" (Exhibit 18(a)); (2) the e-mail does not contain any evidence that Mr. Murset had provided the financial statements to the Davco's broker; (3) Mr. Feltwell never testified that he received financial statements from Mr. Murset, but did testify that he received financial statements from Mr. Fisher for a part of 2006 and for 2007 (R. 1126, 292:16-25); and (4) it is clear from the e-mail that accurate 2005 and 2006 financial statements had not been provided by Mr. Murset prior to March 26, 2008.

Exhibit 18(a) is legally insufficient to support the trial court's finding because it does not prove that Mr. Murset had provided accurate financial statements, but that he had not provided accurate financial statements. Thus, Iota and California Benefit have failed to fulfill their burden to prove by a preponderance of the evidence that Mr. Murset had provided accurate financial statements.

**IV. MURSET'S ORAL AGREEMENT TO PROVIDE FINANCIAL STATEMENTS IS ENFORCEABLE.**

**A. Murset's Oral Agreement is Not Barred by the Statute of Frauds.**

Iota and California Benefit contend that the oral agreement is barred by the statute of frauds because the 2006 REPC's, the promissory notes, and trust deeds did not include Iota and California Benefit's alleged agreement to provide financial statements for their apartment complexes, and since those documents were fully integrated agreements, parol evidence about the oral agreement is inadmissible. (Brief of Appellee, p. 28).

Their contention fails because: (1) they fail to demonstrate that the documents are integrated agreements; (2) the trial court did not make any findings or conclusions of law regarding the parol evidence rule; (3) Iota and California Benefit did not object to the introduction of evidence regarding the oral agreement at trial; (4) Iota and California Benefit did not raise the issue of parol evidence at trial; and (5) the trial court did not exclude evidence of the oral agreement at trial.

Iota and California Benefit also contend that the oral agreement is barred because it is not in writing and the part performance exception to the statute of frauds does not

apply because the terms of the oral contract are not clear and definite. (Brief of Appellee, p. 29). They argue that the terms of the oral agreement are not clear and definite because it is “not clear what Davco’s obligations were under the new oral agreement.” (*Id.*).

Iota’s and California Benefit’s argument fails because the terms of the oral contract are made clear and definite by: (1) Mr. Murset’s testimony that he knew that Davco would need financials to refinance (R. 1125, 176:6-10); (2) Mr. Murset’s testimony that he was being asked to provide the financial statements to the mortgage company so that it would be known that the financial statements came from him (R. 1125, 82:12-21); (3) Mr. Murset’s testimony that he provided financial statements for 2005 and for 2006 which are contained in Exhibit 3(a) and later gave 2006 financials statements to Mr. Fisher in February 2007 (R. 1125, 176:11-12; 217:15-21; 218:10-18); (4) Mr. Murset’s testimony that his failure to provide the financial statements was contrary to what he wanted which was Davco refinancing the apartment complexes and paying him (R. 1125, 224:4-10); (5) Mr. Fisher’s testimony that he requested financials from Mr. Murset (R. 1127, 468:26 to 469:2); (6) Mr. Fisher’s testimony that he received written financial statements from Mr. Murset (R. 1127, 469:3-14); (7) Mr. Fisher’s testimony that he told Mr. Murset that he needed the financial statements to obtain financing (R. 1127, 493:3-15); and (8) Mr. Fisher asking Mr. Murset if he had provided the financial statements to Davco’s broker (Exhibit 18(a)).

Iota’s and California Benefit’s contention that the terms of the oral contract are

not clear and definite because Davco's obligations are not clear and definite fails because: (1) Davco's obligation to obtain financing is clear and definite (R. 1125, 176:6-10; 82:12-21; Exhibit 18(a)); and (2) if this is a unilateral contract, there are no mutual promises and Davco does not need any obligations for the oral contract to be enforceable against Iota and California Benefit. (*Allen v. Rose Park Pharmacy*, 237 P.2d 823, 825 (Utah, 1951)).

**B. Davco Could Not Obtain Financing Without Mr. Murset Providing Accurate Financial Statements for 2005 and 2006.**

Iota and California Benefit contend that the evidence is legally sufficient to support the trial court's finding that their breach of contract did not cause the failure of Davco to refinance the promissory notes because Mr. Feltwell testified that the prior owner's financial statements for 2005 and 2006 were not required by the lenders and under the guidelines were not needed to obtain a loan for the apartment complexes. (Brief of Appellee, pp. 29-30).

Contrary to Iota's and California Benefit's contention, Mr. Feltwell's testimony is not legally sufficient to support the trial court's finding of fact because: (1) the trial court ruled that Mr. Feltwell's testimony was excluded because it is hearsay and therefore, cannot support the trial court's finding of fact (*Kimball v. Kimball*, 217 P.3d 733 (Ut. Ct. App., 2009) at ¶20 n.5); (2) Mr. Feltwell contradicted his testimony by also testifying that he did not know whether the prior owner's financial statements could be used to obtain a commercial loan and therefore, his testimony cannot support the trial court's

finding of fact (R. 1126, 312:24-4; (R. 1125, 224:4-10; *U.S. v. Rainwater*, at 389); and (3) the evidence cited by Iota and California Benefit concerned Mr. Fisher , not Davco. Davco still had time to refinance the apartment complexes during the one-year extension and there is no evidence that if Davco had created two full years of financial statements under its ownership of the apartment complexes that it would not have been successful in refinancing the apartment complexes.

Iota and California Benefit have failed to prove that Mr. Feltwell's testimony was included by the trial court, that Mr. Feltwell did not give contradictory testimony, and that Davco could not have obtained financing within the extra year. Thus, the evidence does not support the trial court's finding of fact.

**C. The Trial Court's Judgment is not Sustainable on the Affirmative Defense of Lack of Consideration.**

It is well settled that an appellate court may affirm the judgment appealed from

“if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.” *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225 (quoting *Limb v. Federated Milk Producers Ass'n*, 23 Utah 2d 222, 225-26 n. 2, 461 P.2d 290, 293 n. 2 (1969) (citation and emphasis omitted)); see also *Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998) (applying *Limb* ); 5 C.J.S. Appeal & Error § 714 (1993) (“Generally, the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court.”). Moreover, “[a] party to an appeal does not have a constitutional right to have a cause of action decided on a particular ground.” *DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995). (*Bailey v. Bayles*, 52 P.3d 1158 (Utah, 2002) at ¶10).

To be apparent on the record requires more than mere assumption or absence of evidence contrary to the alternate ground or theory. The record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.

(*Francis v. State, Utah Div. of Wildlife Resources*, 248 P.3d 44 (Utah, 2010) at ¶19).

And, it is Iota's and California Benefit's burden to explain why it is eligible to have the alternative arguments considered. (*Francis v. State, Utah Div. of Wildlife Resources*, at ¶21).

The trial court's judgment cannot be sustained on the affirmative defense of lack of consideration because: 1) Iota and California Benefit have failed to show that the record contains sufficient and uncontroverted evidence supporting an affirmative defense of lack of consideration to place a person of ordinary intelligence on notice that they may rely thereon on appeal; and 2) Iota and California Benefit waived the affirmative defense of failure of consideration by failing to plead it (U.R.C.P., Rule 12(h)).

**V. MURSET'S ORAL AGREEMENT TO EXTEND THE MATURITY DATES OF THE PROMISSORY NOTES IS ENFORCEABLE.**

**A. The Trial Court's Finding That the Parties Did Not Orally Modify the Promissory Notes is Clearly Erroneous**

Iota and California Benefit argue that Davco has failed to establish a fatal flaw in the marshaled evidence because Mr. Thompson's testimony that Mr. Murset told him that he had granted Davco a one year extension is not definitive enough to create a fatal flaw.



At trial, Mr. Thompson clearly testified that he was told by Mr. Murset that he had given Davco another year to pay the promissory notes. Mr. Thompson initially testified that he “vaguely” remembered Mr. Murset telling him that he had given Davco an additional year to finance the apartments. His deposition testimony was read into the record which establishes that he was told by Mr. Murset that he had given Davco an additional year to pay the promissory notes “. . . probably the only real thing briefly was said was the reason he had taken it (apartment complex) is because Mr. Fisher wasn’t able to get financing for them, he had given them, I think it was another year and then there was no payment received by Mr. Murset from Mr. Fisher.”(R. 1126, 274:2-9). Additional deposition testimony of Mr. Thompson was read into the record in which he guesses from what he was told by Mr. Murset that Mr. Murset and Davco “. . . had worked out something for seller financing for another year, . . .” Mr. Thompson’s testimony clearly contradicts Mr. Murset’s testimony and creates a fatal flaw which makes Mr. Murset’s testimony legally insufficient to support the trial court’s finding. (*U.S. v. Rainwater*, at 386, 389).

Iota and California Benefit also argue for the first time that the parties did not reach a meeting of the minds with respect to a one-year extension. (Brief of Appellee, p. 32-33). Their argument fails because: (1) appellate courts decline to consider issues not raised in the trial court except for a few limited exceptions, and they have failed to demonstrate that this Court should apply any exception (*Espinal v. Salt Lake City Bd. of*

*Educ.*, 797 P.2d 412, 413 (Utah, 1990)); and (2) failure to reach a meeting of the minds is an affirmative defense which they waived by failing to plead it in the trial court. (U.R.C.P., Rule 12(h)).

**B. The Oral Agreement is Not Barred by the Statute of Frauds.**

Iota and California Benefit contend that Davco has failed to overcome the trial court's legal conclusion that the oral agreement is barred by the statute of frauds. However, they do not address Davco's argument that the statute does not apply because there was partial performance of the oral agreement. As such, they failed to demonstrate how the evidence supports the trial court's conclusion.

**C. The Oral Agreement Does Not Lack Consideration.**

Iota's and California Benefit's argument fails because: (1) they have failed to show that the record contains sufficient and uncontroverted evidence supporting an affirmative defense of lack of consideration to place a person of ordinary intelligence on notice that they may rely thereon on appeal; and (2) they waived the affirmative defense of failure of consideration by failing to plead it (U.R.C.P., Rule 12(h)).

**VI. IOTA AND CALIFORNIA BENEFIT WAIVED THEIR RIGHT TO ENFORCE THE PROMISSORY NOTES.**

Iota and California Benefit contend that they did not waive their right to enforce the promissory notes because Mr. Murset's "efforts to choose the most cost-effective way to recover his money should not in any way amount to a waiver . . ."

Their contention fails because: (1) at trial it was shown that they did have an

existing right to foreclose on the promissory notes (Exhibits 1 and 13), and that they knew they had a right to foreclose (R. 1125, 25:13-20), and that they intended to relinquish their right to foreclose until they had delivered financial statements that could be used by Davco to refinance the apartment complexes or until Davco had another year to create two full years of financial statements under its ownership of the apartment complexes (*Id.*) (*ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 245 P.3d 184 (Utah, 2010) at ¶38); and (2) they failed to demonstrate at trial and on appeal that their actions constituted the most cost-effective way to recover their money.

**VII. IOTA'S AND CALIFORNIA BENEFIT'S CLAIMS ARE BARRED BY EQUITABLE ESTOPPEL.**

Iota and California Benefit argue that their claims are not barred by equitable estoppel because Davco cannot point to a statement, admission, act, or failure to act by them that is inconsistent with their later claims for foreclosure, for deficiency judgments, and for recovery of rents.

Their argument fails because they made statements and performed acts and failed to perform acts that are inconsistent with their later claims for foreclosure, deficiency judgment, and for recovery of rents: (1) they agreed to provide financial statements (R. 1125, 82:12-21; 176:11-12; 217:15-19); (2) they gave Mr. Fisher financial statements (Exhibit 3(a)); (3) they told Davco that they would not provide the financial statements but that Davco could have one-year to create two full years of financial statements under its ownership of the apartment complexes (R. 1127, 481:14-23; 496:23 to 497:19);

(4) They did not send Davco notices of default for more than 8 months after the maturity dates ( R. 1125, 152:23-26); and (5) they accepted payments on the promissory notes for 9 months after the maturity dates (R. 1125, 65;23 to 66:6). An extension of time by itself constitutes a waiver. (*Calhoun v. Universal Credit Co.*, 146 P.2d 284, 287 (Utah, 1944)) (“In *Commercial Credit Co. v. Macht*, it was held that by giving an extension of time for payment of an amount then due, the seller waived his right to a forfeiture. In other words, the extension is in effect a waiver.”).

Iota and California Benefit argue that Davco has failed to prove equitable estoppel because Davco has failed to prove that its reliance on Mr. Murset’s statements and acts was reasonable under the circumstances. (Brief of Appellee, p. 36-37). However, Iota and California Benefit do not demonstrate that Davco’s reliance on Mr. Murset’s statements and acts was not reasonable under the circumstances. They seem to be admitting that Mr. Murset’s statements and acts were meant to mislead Davco, and Davco should have known that, and therefore, Davco’s reliance was not reasonable.

Since the lack of reliance is an affirmative defense and they did not raise it in their pleadings or at trial, they waived it. (U.R.C.P, Rule 12(h); *Espinal v. Salt Lake City Bd. of Educ.*, at p. 413).

“A party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation. (Citations Omitted).

Furthermore, a determination of the issue of estoppel is not dependent on the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, i.e., what would a reasonable person conclude under the circumstances. (Citations Omitted).” (*Larson v. Wycoff Co.*, 624 P.2d 1151, 1155 (Utah, 1981)).

The following circumstances prove that Davco’s reliance was reasonable: (1) Mr. Murset promising to provide accurate financial statements to Davco even after the maturity dates of the promissory notes (R. 1125, 82:12-21; 176:11-12; 217:15-19; 1127, 481:14-23); (2) Mr. Murset promising Davco a one-year extension to create its own financial statements (R. 1126, 272:6-10; 274:2-9; 276:8-11); (3) Mr. Murset not sending default notices to Davco until Davco discontinued making payments (R. 1125, 152:23-26; R. 1127, 494:25 to 495:1; 496:9-13); and (4) Mr. Murset continuing to accept payments during those 9 months (R. 1125, 152:23-26).

Iota and California Benefit also contend that Davco cannot show an injury because their actions did not prevent Davco from obtaining a loan. As explained above, Davco could not obtain a loan without two years of financial statements which Mr. Murset agreed to provide but did not, and Davco was not given sufficient time to create two years of financial statements under its ownership of the apartment complexes. Mr. Murset testified that he knew that Davco needed financial statements to obtain a loan. (R. 1125, 176:6-10). By preventing Davco from obtaining a loan, Mr. Murset received the apartment complexes back with the net income having been increased and more than

\$128,000 in renovations performed and paid for by Davco.

**VIII. THE TRIAL COURT INCORRECTLY CONCLUDED THAT DAVCO BREACHED THE IOTA DEED OF TRUST.**

Iota's and California Benefit's argument that the trial court correctly concluded that Davco breached the Iota Deed of Trust fails because: (1) Davco did not encumber the Casa Sonoma apartments with a trust deed (Exhibit 7; R. 516:11-13); (2) Iota did not give notice of default to Davco; (3) Iota did not give notice to Davco giving it a reasonable time in which to cure the default; and (4) Iota did not attempt at trial to fulfill its burden to prove that the trust deed to Fab 5 Management LLC ("Fab 5") was a material breach.<sup>1</sup>

**CONCLUSION**

For the foregoing reasons, Davco respectfully requests the Appellate Court to:

1) reverse the trial court's ruling that the statute of frauds bars Davco's affirmative defense of breach of contract, and rule that Iota and California Benefit

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<sup>1</sup>Appellees' attorneys for the first time raise the claim that attorney Darwin Fisher violated Utah Rule of Professional Conduct 3.7 by acting as both advocate and witness. However, Appellees' attorneys mistakenly or intentionally misrepresent that attorney Darwin Fisher acted as both witness and attorney. Appellees' attorneys did not designate attorney Darwin Fisher as a witness to testify at trial and Davco did not designate him as a witness. Attorney Darwin Fisher never testified at trial, nor was his deposition taken. If Appellees' attorneys honestly believed that attorney Darwin Fisher violated Rule 3.7, why didn't they move the trial court for an order removing attorney Darwin Fisher as attorney for Davco or even discuss it with attorney Darwin Fisher? Appellees' attorneys never raised a violation of Rule 3.7 at any time during this lawsuit until now. Why then has Appellees' attorneys chosen to misrepresent the facts to the Court and try to discredit attorney Darwin Fisher on appeal?

breached the REPCs and promissory notes, and/or remand to the trial court Davco's affirmative defense of breach of the covenant of good faith and fair dealing for findings of fact and conclusions of law;

2) reverse the trial court and rule that Iota's and California Benefit's claims are barred by the doctrine of equitable estoppel;

3) reverse the trial court and rule that Iota and California Benefit waived their claims against Davco;

4) reverse the trial court's ruling that Iota's and California Benefit's breach of contract did not cause the failure of Davco to refinance the promissory notes;

5) reverse the trial court's ruling that Iota and California Benefit did not breach the covenant of good faith and fair dealing;


6) rule that the trial court did not have jurisdiction to combine a contempt proceeding with the trial, and that Davco and Mr. Fisher were denied due process;

7) reverse the trial court's ruling denying Davco's Rule 67 motion and rule that the Ex Parte Order be set aside; and

8) reverse the trial court's ruling that Davco breached the Iota Deed of Trust.

DATED this 8<sup>th</sup> day of November, 2011.

DARWIN C. FISHER P.C.

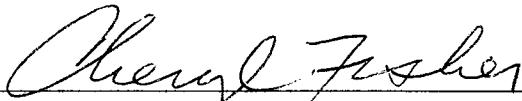
A handwritten signature in black ink, appearing to read 'Darwin C. Fisher', with a stylized flourish at the end.

Darwin C. Fisher  
*Attorney for Defendant/Appellant Davco  
Management Company LC*

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 9<sup>th</sup> day of November, 2011, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **REPLY BRIEF OF APPELLANT** to the following:

<u>      </u>	VIA FACSIMILE	Paul D. Veasy, Esq.
<u>      </u>	VIA HAND DELIVERY	David R. Hall, Esq.
<u>  X  </u>	VIA U.S. MAIL	Parsons, Behle & Latimer 201 South Main Street, Ste 1800 Salt Lake City, UT 84111

  
An Employee of Darwin C. Fisher P.C. Law Office